IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, WARSAME & G.B.M. KARIUKI, JJ.A)

CIVIL APPEAL NO. 114 OF 2013

BETWEEN

REPUBLIC……………………..………………...……………..….APPELLANT

AND

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

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

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

EX-PARTE – AMICA BUSINESS SOLUTIONS LIMITED

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Korir J.) dated 8th March 2013

in

HC JR Case No. 246 of 2012)

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JUDGMENT OF THE COURT

By a notice of motion application dated 12th June 2012, Amica Business Solutions Limited (hereinafter referred to as "the applicant"), brought judicial review proceedings namely **JR No. 246 of 2012** aggrieved by the respective decisions by Kenya National Highways Authority (hereinafter "the 1st respondent") and City Council of Nairobi (hereinafter "the 2nd respondent") pursuant to which Ikon Prints Media Company Limited (hereinafter referred to as " the 3rd respondent") sought to erect and maintain billboards and gantries on road reserves on various roads in the city of Nairobi. Specifically, the applicant sought:-

> *a) an order of certiorari removing into the High Court and quashing the entire decision of the 1st respondent contained in its letter dated 10th November 2011 to the 3rd respondent authorizing the latter to erect and maintain billboards and gantries on road reserves on various roads in the city of Nairobi city of Nairobi;*

b) an order of certiorari removing into the High Court and quashing the entire decision of the 2ndrespondent contained in its letters dated 23rd April 2012 and 2nd May 2012 to the 3rd respondent authorizing the latter to erect and maintain billboards and gantries on road reserves on various roads in the city of Nairobi;

c) an order of mandamus compelling and directing the 2nd respondent to remove and / or direct the removal of all billboards and gantries erected and maintained by the 3rd respondent pursuant to the authorization and approval through letters dated 23rd April 2012 and 2nd May 2012 from the 2nd respondent to the 3rd respondent.

Leave to commence the judicial review proceedings was granted on 12th June 2012. The Judicial Review application was premised on the grounds on its face and was supported by the statutory statement and a verifying affidavit sworn by the applicant's director, Joseph Ndichu. The crux of the applicant's case is that any lawful authorization that could have been given to the 3rd respondent had to comply with the constitution of Kenya 2010, the Kenya Roads Act No. 2 of 2007, the Local Government Act Cap. 265, and the Public Procurement and Disposal Act No.3 of 2005, all of which mandate the 1st and 2nd respondents to procure the use of their services and facilities in a fair, equitable, transparent, competitive and cost effective manner. The authorization given to the 3rd respondent was to be subject to tendering and the taking into account that the powers of licensing and control of outdoor advertising and physical planning are powers exercisable by the 2nd respondent only as a county government and not the 1st respondent. The applicant's case is also that the 1st and 2nd respondents have subverted and frustrated the legitimate expectation by the public in failing to procure the use of their facilities and services in a fair, equitable and transparent, competitive and cost effective manner and have aided the 3rd respondent in defrauding the public. Further, that the respondent is mandated and obliged by the Physical Planning Act Cap. 286 of the laws of Kenya to remove the offending billboards and gantries but had failed to do so.

The application was opposed by the 1st respondent through an affidavit sworn on 12th September 2012, by Joseph Simiyu Khisa, a manager at the planning section of the 1st respondent. The 1st respondent asserted that it has powers under the Kenya Roads Act to grant approval to any person or body to lay structures or carry out any kinds of works on, over or below the roads and road reserves under its territorial jurisdiction. The 1st respondent thus exercised this authority in favour of the 3rd respondent. Its practice is neither monopolistic nor single sourcing to qualify as a 'procurement' or 'disposal' as defined in the Public Procurement and Disposal Act, 2005. The 1st respondent argued that it is not expected to know which sections of its road suit various parties and it is for the interested party upon identifying a suitable section to apply and this process is not time bound. The 1st respondent denied backdating the letter dated 10th November 2011 approving the 3rd respondent's application. In reference to the letter dated 29th May 2012 in which the 1st respondent indicated to the 2nd respondent that advertisement on Nairobi

– Thika road would be subjected to competitive bidding, the 1st respondent submitted that the bidding was specific to that road which is a new super highway and its design included the installation of advertisement billboards. The 1st respondent denied usurping the powers of the 2nd respondent to approve placement of advertisements on billboards and gantries. The 1st respondent attacked the applicant's locus on the ground that the applicant had not established sufficient interest in the matter or presented an application for use of the road reserves. The 1st respondent also argued that the application is statute barred since its prayer for certiorari was brought over six months after the alleged decision was made.

The 2nd respondent opposed the application through an affidavit sworn by Mr. A. J. Owuor, its director of legal affairs. The main ground of objection is premised on the provisions of **Order 53 rule 2** of the Civil Procedures Rules 2010 and section **9(2)** and 3 of the Law Reform Act (Cap. 26 Laws of Kenya). In the alternative, the 2nd respondent reiterated the mandate of the 1st respondent under the Kenya Roads Act to include regulation of advertisement rights on national roads and road reserves. The 2nd respondent

submitted that it was aware of the letter dated 10th November 2011 granting advertisement rights to the 3rd respondent which rights the 2nd respondent did not object to in terms of its letters dated 23rd April 2012 and 2nd May 2012. The 2nd respondent indicated that it had informed the Outdoor Advertising Association of Kenya through a letter dated 30th July 2012 that the issue of construction of advertisement structures was vested in the 1st respondent. The 2nd respondent also argued that the grant of advertisement rights by the 1st respondent is not an act of procurement capable of breaching as purported in the application.

A further affidavit on behalf of the 2nd respondent was sworn by Karisa Iha, the acting legal affairs director. This affidavit made reference to the 2nd respondent's regulations and policy guidelines regarding advertisements on road reserves, pointing out tha***t*** approval and constructions of gantries and bill boards is the exclusive mandate of the 1st respondent. The 2nd respondent thus argued that the actions complained of did not contravene any of the 2nd respondent's policies or regulations. To the extent that the 2nd respondent neither approved nor constructed any gantries and bill boards nor approved any display of advertisement messages on road reserves, the 2nd respondent was non suited and should be struck out as a party to this application and any claim against it dismissed *in limine.*

The 3rd respondent opposed the application by way of replying affidavit dated 18th December 2012, sworn by Chukwuma Nduche. The 3rd respondent assailed the application for being statute barred, indicating that it had actually been discharged from **JR No. 202 of 2012** on the same ground. The 3rd respondent stated that the 1st respondent acted within the law in approving the 3rd respondent's application to construct gantries and billboards on road reserves. The deponent further stated that the 2nd respondent had been improperly suited as the role of the 2nd respondent was limited to advertising and not erection of billboards and gantries. The 3rd respondent attacked the applicant for being a busy body with no sufficient interest in the matter and for being driven by malice against the 3rd respondent. The 3rd respondent also stated that the procedure it had used to obtain the permission of the 1st respondent for use of road reserves is the same procedure used by other players in the industry.

By a consent entered by the parties before the High Court on 10th October 2012, the above proceedings were consolidated with two other proceedings brought in respect of a similar matter. These were **JR No. 202 of 2012** and **Petition No. 245 of 2012.** The parties to **JR No. 202 of 2012** were Real Deals Limited (the *ex parte* applicant), Kenya National Highways Authority (respondent and the 1st respondent herein), Alliance Media Kenya Limited (1st interested party), Magnate Ventures Limited (2nd interested party) and Ikon Prints Media Limited (3rd interested party and the 3rd respondent herein) while **Petition No. 245 of 2012** was between Look Media Limited, Standard Group Limited, Widereach Limited, Supreme Outdoors Limited, Live Ad Limited, Krenim Investment Limited, Consumerlink Communications Limited and Adsite Limited being the 1st to 8th petitioners against Kenya National Highway Authority and the Attorney General as respondents with the City Council of Nairobi, Ikon Prints Media Limited and Alliance Media Kenya Limited being the 1st to 3rd interested parties respectively.

The application for consideration in **JR No. 202 of 2012** related to seeking orders of *certiorari* to quash the decisions of the respondents contained in letters dated 19th March 2012 and 4th May 2012 from the respondent to the 1st and 2nd interested parties awarding the said interested parties contracts for the erection and maintenance of billboards and gantries on road reserves. The application was premised *inter alia* on the ground that the 1st respondent contravened the provisions of the Constitution, the Kenya Roads Act and the Public Procurement and Disposal Act in allowing the rights to the interested parties therein to erect billboards and gantries without tendering. Further, that the 1st respondent's action was *ultra vires* since the award of rights contravenes the **Fourth schedule Part 3** of the Constitution which vests the power of control of outdoor advertising upon the counties. The application invoked the provisions of **sections 22(2) (d) and 40(1) of the Kenya Roads Act** that required approval by Minister, and gazettement of fees and charges. The applicant therein also relied on **Article 227** of the

Constitution in that the 1st respondent's actions amounted to single sourcing and preferential treatment. The application met strong opposition and resistance from the respondent and interested parties therein.

The **Petition No. 245 of 2012** on the other hand sought similar order of certiorari to quash the 1st respondent's decision authorizing the putting up of billboards and placing of advertisements on gantries erected on road reserves. The petitioners further sought a declaration that the 1st respondent's decision to authorize the erection of gantries and other advertising signs on the road reserves contravenes the Petitioners' rights protected under **Articles 10, 27, 35(3), 40, 46, 47** and **227 of the Constitution of Kenya 2010**. The petitioners also sought an order restraining the respondents from permitting a few advertisers to put up gantries and other advertising materials on the road reserves and a declaration that the 1st respondent's decision to authorize the placing of advertisement on the gantries constructed on the road reserves as *ultra vires* its mandate set out in the Kenya Roads Act. The petition also arose out of the 1st respondent's letter dated 19th March 2012 allowing a select group of advertisers to erect gantries for purposes of displaying advertising signs on road reserves. The Petition was opposed by the 1st respondent herein and the Attorney General all of whom reiterated that the 1st respondent acted in line with the legitimate obligations. The 2nd and 3rd respondents herein also opposed the petition.

Largely, the three proceedings involved a similar dispute and the respective parties herein adopted the same position across the cases. In the end and the issues in the three proceedings as consolidated having been argued out by the respective parties, the trial judge summarized the issues for determination as follows:-

> *1. whether the 1st respondent has authority to give approvals for the use of road reserves;*
>
> *2. whether the approvals given to the interested parties ought to have been subjected to the procurement process provided by the Public Procurement and Disposal Act;*
>
> *3. whether there is breach of any of **Articles 10, 27, 35(3), 40, 46, 47 and 227** of the Constitution;*
>
> *4. whether the applicants and the petitioners have locus standi;*
>
> *5. whether the 1st respondent in issuing the approvals to the interested parties usurped the role of the 2nd respondent; and*
>
> *6. who should meet the costs of the proceedings.*

By a judgment delivered on 8th March 2013, the two judicial review proceedings and the petition were dismissed. The trial judge found that the 1st respondent's system / procedure of award of rights for erection of billboards and gantries for advertisement was in breach of **Articles 10** and **227** of the Constitution and therefore unconstitutional. The court directed the 1st respondent to cease using the said procedure and put in place mechanisms for ensuring compliance with the Constitution. Each party was to bear its own costs. In its decision, the court took into account the competitive nature of advertisement business and required the 1strespondent to at the very least indicate to all and sundry that it intended to grant permission for the use of road reserves in the manner in question. All interested parties would then have had the opportunity of expressing their interest thereby assuring everyone that its operations are transparent and accountable bearing in mind that the 1st respondent is a public entity.

The petition failed in so far as the orders sought were directed at the agreements entered into between the 1st respondent and the interested parties. This was because the respondents and interested parties had shown that the process used by the 1st respondent to grant permission to the interested parties to put up structures on road reserves was a process that has been in place since the 1st respondent came into existence. Some of the applicants and petitioners had used the process in the past as confirmed by the letters dated 10th May 2012 and 29th May 2012. The trial judge also noted that the practice used by the 1st

respondent was applied to all the players in the industry without any discrimination. It would therefore be unjust for the court to terminate the agreements already entered into between the 1st respondent and the interested parties.

Aggrieved by this decision, the applicant in the lead proceedings being **JR No. 246 of 2012** lodged its notice of appeal under **Rule 75** of this Court's rules. The notice is dated 12th March 2013 and was filed on 14th March 2013 before the High Court and on 25th March 2013 before this Court. The record of appeal dated 3rd June 2013 comprising the memorandum of appeal was filed on 5th June 2013 and lists six grounds of appeal thus:-

> ***1. the learned Judge of the High Court erred in law and abused his discretion in refusing to quash the decision of the 1st respondent authorizing the 3rd respondent to erect and maintain billboards and gantries on road reserves in various roads in the city of Nairobi despite his findings, holdings and declaration that the 1st respondent's decision was made in breach of the Constitution and Statutes that govern public procurement and disposal;***
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> ***2. the learned Judge of the High Court erred in law and abused his discretion in refusing to quash the decision of the 2nd respondent authorizing the 3rd respondent to erect and maintain billboards and gantries on road reserves in various roads in the city of Nairobi despite his findings, holdings and declaration that the billboards and gantries were being erected and maintained in contravention of the Constitution and Statutes that govern public procurement and disposal;***
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> ***3. the learned Judge of the High Court erred in law and abused his discretion in refusing to compel the 2nd respondent to remove the billboards and gantries erected and maintained by the 3rd respondent notwithstanding the fact and holding that the same were erected and maintained in contravention of the Constitution and Statutes that govern public procurement and disposal and the express Statutory requirement that any such billboards and gantries be removed;***
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> ***4. the learned Judge of the High Court erred in law in holding that the ex parte applicant's request for certiorari was barred by limitation despite express provisions of the Constitution and Statute to the contrary and the existence of a dispute as to when the decision sought to be quashed was made known to the ex parte applicant;***
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> ***5. the learned Judge of the High Court erred in law in disregarding the ex parte applicant's submissions and refusing to follow binding and persuasive decisions on public procurement and disposal which required that the remedies sought by the ex parte applicant be granted, upon proof that the 1st, 2nd and 3rd respondents had contravened the Constitution and Statute in their use of public assets without resort to a system that is fair, equitable, transparent, competitive and cost effective;***
>
> ***6. the learned Judge of the High Court erred in law in holding that it would be unjust to terminate the agreement entered into between the 1st and 3rd respondents pursuant to the said unconstitutional and illegal decision of the 1st respondent yet that was not a consideration, a contravention of the constitution and statute in the making of the decision and agreement having been proven.***

The applicant, now the appellant seeks orders setting aside the judgment and decree of the High Court made on 8th March 2013 in so far as it relates to the applicant's notice of motion dated 12th June 2012. The appellant prays that the said notice of motion application be allowed.

On this Court's direction, all the parties affected by the High Court decision were incorporated in this appeal and were at liberty to proceed as provided under **rules 92(1), 93 and 94** of the Court of Appeal's rules. When the matter came for hearing and disposal, the Court ordered that all the affected parties

wishing to be brought on board be at liberty to take necessary steps and file a supplementary record. The Court directed that the appeal proceeds by way of written submissions giving the necessary timelines for compliance. The appellant, the 1st and 3rd respondents filed their written submissions while the other parties made oral submissions through their advocates on record.

From its written submissions, the appellant condensed its arguments into two grounds of appeal – abuse of discretion by the learned judge and limitation of time. On the first issue, the appellant faults the judge's conclusion not to terminate the existing agreements having found as a matter of fact and law that the 1st respondent had contravened **Articles 10 and 227** of the Constitution. The appellant argues that the judge's decision amounts to sanctioning an illegality. The appellant referred us to **Heptulla v Noormohamed [1984] KLR 586** where the court held that the court should not allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract which is illegal. The appellant also referred to **Republic v City Council of Nairobi & another ex-parte Monier 200 Limited & 7 others [2005] eKLR** where the court nullified an advertising contract procured in contravention of procurement law, however noble the idea intended in the contract was. Similarly, in **Republic v Municipal Council of Mombasa & another, ex parte Uniken Marketing Services Limited [2007] eKLR**, an order of *certiorari* was granted, the Local authority having been found to have acted *ultra vires* the provisions of the Local Government Act, the contracts made not having been subjected to public tender. It is the appellant's submission that the trial judge, in failing to issue the order of *certiorari*, had engaged in judicial craft as stated by the Supreme Court of Kenya's decision in **Samuel Kamau Macharia& Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**.

As for the second ground on limitation, the appellant submitted that the trial judge's holding that the 6 months limitation period applies to all decisions including administrative decisions subject to the orders of *certiorari* failed to take into account the appellant's case that the authorization letters issued by the 1st respondent had been backdated to support their plea of limitation. The appellant further submitted that the trial judge did not take into account that limitation would only kick in after the date the decision in issue is made known to the aggrieved party despite the judge's own finding while relying on the case of **Nakumatt Holdings Limited v Commissioner of Value Added Tax** in the following terms:-

> ***"My understanding of the decision of the Court of Appeal is that a party who seeks an order of certiorari must bring the application within six months from the date of the decision. I will however add that in some cases one would say that the application should be filed within six months from the date the decisions made known to the claimant."***

According to the appellant, a plain reading of the proviso of **Order 53 rule 3** of the Civil Procedure Rules confines the limitation to judicial decisions and not administrative decisions. The appellant faulted the trial judge's dismissal without reasons of the case of **Republic v Judicial Commission of Inquiry unto the Goldenberg Affair & 3 others ex parte Mwalulu & 8 others [2004] eKLR**. The appellant submitted that the decisions subsequent to Nakumatt Holdings Limited (supra) are in support of the submission that the 6 months limitation applies to judicial decisions only. The appellant referred to **Republic v Principal Registrar of Government Lands & another [2014] eKLR** which held that the 6 months limitation does not apply to administrative decisions. In conclusion, the appellant submitted that the judge abused discretion and this abuse warrants interference as was stated in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR.**

Ms. Ng'ania, learned counsel, appeared on behalf of the appellant at the hearing. She relied on the filed submissions and list of authorities filed. Her submissions reiterated the filed submissions.

The 1st respondent also filed written submissions on 30th January 2015 and list of authorities. On the exercise of discretion, the 1st appellant submitted that the case required exercise of discretion and the superior court considered all the facts and circumstances of the case. Therefore, it properly exercised its discretion in dismissing the appellant's application. The 1st respondent referred to the case of **Salkas Contractors Limited v Kenya Petroleum Refineries Limited [2004]eKLR** where it was held that the appellate court should not interfere with the exercise of a discretion by the superior court unless satisfied

that the superior court was wrong in its decision in exercising its discretion. The 1st respondent further submitted that the superior court considered what was just in the circumstances in line with the principal aim of the overriding objective to create a level playing ground for all the parties coming before the courts. To buttress this position, the appellant referred to the case of **Harit Sheth t/a Harit Sheth Advocate v Shamas Charania [2010] eKLR.**

On the dismissal of the certiorari application, the 1st respondent contended that contrary to the appellant's assertions, the rule that an application for an order of *certiorari* ought to be commenced not later than six months after the date of the decision is absolute and not subject to any liberal interpretation. The 1st respondent relied on the case of **Ako v Special District Commissioner Kisumu & another, Civil Appeal No. 27 of 1989**, where it was *inter alia* held that the prohibition set out in **section 9(3)** of the Law Reform Act is statutory and therefore not challengeable. In the premises, the prohibition is absolute and any contrary interpretation or view would be an affront to the clear statutory provision. The 1st respondent, relying on the case of **Aga Khan Education Service Kenya v Republic ex parte Ali Seif & 3 others [2004] eKLR**, submitted that there was no prospect of success in the Appellant's application for an order of certiorari as it was clear to the court that the same was filed after the lapse of six months from the time the decision was made. The 1st respondent submitted that the trial judge was correct in relying on the court of appeal decision in **Nakumatt Holdings Limited v Commissioner of Value Added Tax [2011] eKLR** in holding that the six months rule applied to the appellant's application and was not restricted to a judgment, order, decree, conviction or other proceedings.

Regarding the appellant's allegation that the authorization letters had been backdated to enable reliance on the plea of limitation, the 1st appellant contended that this was a mere allegation as no proof or evidence was adduced by the appellant before the superior court in this respect. The 1st respondent concluded that the trial judge rightly and properly dismissed the Appellant's application. **Mrs. C. Cheruiyot,** learned counsel appearing for the 1st respondent adopted the written submissions and list of authorities filed on behalf of the 1st respondent. Her oral submission highlighted the written submissions already set out above.

The 2nd respondent did not file written submissions. **Ms. Said,** Advocate, holding brief for **Prof. Ojienda,** senior counsel, was present at the hearing on behalf of the 2nd respondent. In her submissions, learned counsel adopted the submissions of the 1st and 3rd respondent. On the issue of discretion, counsel submitted that a judge is allowed to make obiter remarks. On the six months limitation, counsel submitted that the judges hands were tied as the limitation was statutory and the judge could not extend time. Failure to quash the decision therefore did not amount to discretion rather than upholding the legal position. Moreover, the trial judge had found that the same procedure had been followed in favour of many other parties and did not therefore find it necessary to cancel the contract. Counsel urged the court to dismiss the appeal with costs.

The 3rd respondent filed written submissions on 19th February 2016 opposing the appeal. At a preliminary level the 3rd respondent pointed out that the appellant was a party least interested in the outdoor advertising business and was being used by what it terms as the industry's big wigs as a 'gun for hire'. Accordingly, the suit in the trial court was merely calculated to block other entrants into the outdoor advertising industry which eats into the juicy advertising and marketing pie enjoyed by the cartels.

As to whether the appellant's application is time barred, the 3rdrespondent submits that the decision complained of having been made on 10th November 2011, the appellant ought to have sought to quash it by 9th May 2012. The application by the appellant having been filed on 12th June 2012 was therefore outside the 6 months period allowed by law. The respondent relied on **section 9(3)** of the Law Reform Act and **Order 53 rule 2** of the Civil Procedure Rules**.** The 3rd respondent submitted that the appellant conceded having brought the application outside the 6 months period.

The 3rd respondent further argued that it will not be enough for the appellant to make unsupported

allegations of backdating the approval and expect the court to act on the same. Even if the appellant became aware of the approval of 10th November 2011 on such later date, the judge would not have come to the appellant's aid in the absence of materials being placed before the court. The verifying affidavit of the appellant's director Joseph Ndichu did not state any later date the approval was obtained. The 3rd respondent submitted also that the limitation period at **section 9(3) of the Law Reform Act** is a statutory provision and the Law Reform Act makes no provision for extension of time as to entitle the trial judge to enlarge time for filing an application for certiorari outside the 6 months period. The trial judge was therefore right in dismissing the appellant's notice of motion application and the 3rd respondent implored the court of Appeal to affirm the trial courts position on time bar. The 3rd respondent referred to the case of **Milka Nyambura Wanderi & Another v Principal Magistrate's Court Murang'a & 4 others [2014] eKLR** where the court declined to grant leave as it was time barred, the application for leave having been made more than six months after the decision sought to be quashed.

The 3rd respondent submitted that the other two letters dated 23rd April 2012 and 2nd May 2012 issued to it by the 2nd respondent did not amount to approvals but were merely no objection letters, approvals having already been granted by the 1st respondent; that the letters were written pursuant to the 2nd respondent's mandate under **Article 189** as read with **Part 2(3) of the Fourth Schedule** of the constitution; that this mandate involves control of pollution and other public nuisances and outdoor advertising; that to quash the two letters would be unconstitutional as the 2nd defendant would be stopped from carrying out its mandate.

On the second issue of exercise of discretion by the trial judge, the 3rd respondent submitted that the appellant has not brought itself within the parameters set to warrant the interference with the discretion of the trial judge and that the appellant has not demonstrated that the trial judge exercised his discretion improperly. The 3rdrespondent cited the case of **Milka Nyambura Wanderi (supra)** and **Hezekiah Kamau& Another v Kamau Mukuna [2015] eKLR** both of which cited with approval the well known case of **Mbogo & Another v Shah [1968] EA 93** on the limited role of the appellate court with regard to a trial judge's exercise of discretion.

The 3rd respondent also argued that the judge had correctly balanced the interests of the parties in failing to nullify the approvals it contended that to do so would have resulted in discrimination against the 3rd respondent as other players in the industry had used similar methods to get allocation of sites from the 1st respondent contrary to **Article 27** of the Constitution. The 3rd respondent prayed for dismissal of the appeal as it did not present any grounds upon which to interfere with the trial court's decision.

Mr. Lutta Advocate on behalf of the 3rdrespondent relied on the written submissions dated 18th February 2016 and the list of authorities filed on the same date. Learned counsel associated himself with the position taken by counsel for the 1st and 2nd respondents. His oral submissions took the same path of the written submissions urging this Court to dismiss the appeal with costs.

Mr. Nyaburi O. Hiram, learned counsel appearing on behalf of 10 interested parties, associated himself with the appellant's submissions. He submitted that the judge's hands were not tied on the issue of limitation and that there was no time limitation to grant certiorari under the constitution.

Mr. Michuki, Advocate, appeared on behalf of Alliance Media Kenya Limited, one of the interested parties. He associated himself with submissions of counsel for the 1st and 3rd respondents in opposing the appeal. **Mr. Gitonga,** Advocate for Magnate Ventures Limited, remained neutral on the matter, but added that his client has been operating within the law.

Having set out the case as above, it is now appropriate to deal with the issues on appeal. It is evident that the two issues emerging in the appeal for our determination are: - appeal is founded on the following main grounds:-

a) whether the trial judge exercised his discretion properly in the circumstances;

b) whether the appellant's application for an order of certiorari was time barred.

The Court of Appeal derives its appellate jurisdiction from **Article 164(3)** of the Constitution and **section 3(1)** of the Appellate Jurisdiction Act to hear appeals from the High Court such as the present appeal. The mandate of the Court of Appeal on a first appeal is set out in **Rule 29(1)(a)** of this Court's Rules namely to re-appraise the evidence and to draw inferences of fact. This position has been restated in several Court of Appeal decisions including in the case of **Kenya Anti-Corruption Commission v Republic & 4 others [2013] eKLR.** Where the exercise of judicial discretion is involved, the exercise of which is called to our interrogation, we remain guided by the principles enunciated in **Coffee Board of Kenya v Thika Coffee Mills Limited & 2 others [2014] eKLR,** that we will not interfere unless we are satisfied that the judge misdirected self in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise.

Turning to the first issue on exercise of discretion by the learned judge, it is common ground that the relief sought by the appellant is discretionary in nature. The appellant is adamant that the trial judge abused his discretion while the respondents take the position that the said discretion was exercised appropriately in the circumstances. The extent to which this discretion is cudgeled is in the failure by the trial judge to quash the decision of the 1st respondent made through the letter dated 10th November 2011, even after finding that the respondents had been in breach of **Articles 10 and 227** of the Constitution. On the matter, the court addressed itself thus:-

> ***"I therefore agree with the applicants and the petitioners that KeNHA has in the past acted in breach of the provisions of articles 10 and 227 of the Constitution.***
>
> ***…***
>
> ***In respect of these two applicants (Supreme and Adsite) one can say that they brought their applications in bad faith. It is also noted that the practice used by KeNHA was applied to all the players in the industry without any discrimination. It would therefore be unjust for this court to terminate the agreements already entered into between KeNHA and the interested parties."***

It is apparent that the trial judge tried to balance the interests of the parties in an attempt to be just in the circumstances. There seems to be no doubt that there are players in the industry who had successfully invoked the same procedure as that complained of. This position was not disputed by any of the parties. The trial judge singled out two of the applicants against whom the judge inferred bad faith. It would then beg the question as to why the trial judge would only quash one such procedure in isolation, yet there existed many other incidences, and two of the parties who were now complaining had benefitted from the same process they were now impugning. On the face of it, this is a logical explanation of the judge's exercise of discretion but does it find favour under the existing laws?

Let us first consider the issue of a judge's exercise of discretion and the circumstances under which we can interfere in the judge's exercise of such discretion. Jurisprudence in this area is vast and the principles involved are now well settled. For instance, in the case of **United India Insurance Co. Ltd V.East African Underwriters (Kenya) Ltd [1985] E.A 898,** Madan J.A. (as he then was), aptly pronounced himself as follows, at page 908***:***

> ***"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of***

which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

It is not for the Court of Appeal to substitute the judge's decision merely on the grounds that the judges of the court could have come to a different conclusion in the circumstances. The Court has to consider any or more of the grounds set out by Madan J.A as stated above.

As summarized above, a very strong argument has been made in support of the appeal and backed up by decided cases to the effect that the trial judge ought to have quashed the contract in favour of the 3rd respondent arising out of the disputed letter. Similarly, the respondents and interested parties who oppose the appeal argued that the trial judge acted in line with the overall objective to act justly. Those opposed to the appeal faulted the appellant's appeal on grounds that the appellant had not brought himself within the parameters to warrant the appellate Court's interference with such discretionary power and that in any event the appellate Court's power to interfere with discretion should be exercised sparingly.

In our view, this case transcends the sphere of judicial review as it also incorporates the aspects of constitutionality. The effect of non compliance with statute is more settled in other statutes such as the Elections Act. **Section 83** of the Kenyan **Elections Act**, **2011** states that:

> ***"No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election."***

This means that the judge needs to consider whether the non-compliance affects the result of the elections as was held in **Raila Odinga& 5 others v IEBC & others**, **Supreme Court Petition No. 3 of 2013 (UR)** where it was inter alia held as follows:-

> ***"196..... Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite etsolemniteresseacta: all acts are presumed to have been done rightly and regularly. So the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescription of the law."***

The above decision took into account the long standing common law approach in respect of alleged irregularities in the acts of public bodies that all acts are presumed to have been done rightly and regularly**.** This is the essence of the common law maxim ***Omnia praesumuntur rite etsolemniteresseacta.***

The case involved the application and extent of the provisions of the Constitution. In the matter of **Kenya National Commission on Human Rights, Supreme Court Advisory Opinion Reference No. 1 of [2012] eKLR** para 26 the Supreme Court said: -

> "***But what is meant by a holistic interpretation of a Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision reading it alongside and against other provisions so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of issues in dispute and of the prevailing circumstances."***

Applying the above principle to the present case, it is evident that the prevailing circumstances in the trial judge's view warranted that the existing contracts be allowed to continue and that the 1st respondent do embark on measures to change the situation in future. **Article 25** of the Constitution specifies the constitutional rights and freedoms that may not been limited. These are;

> ***(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;***
>
> ***(b) freedom from slavery or servitude;***
>
> ***(c) right to fair trial; and***
>
> ***(d) right to an order of habeas corpus.***

Though not enshrined under the bill of rights, any rights and freedoms conferred by **Articles 10 and 227** of the Constitution do not cease to be rights and fundamental freedom simply because they are in a part of the Constitution which does not fall under the Bill of Rights. (See **Elias Mwangi Mugwe v Public Procurement Administrative Review Board & 5 Others [2016] eKLR**).

The provisions of **Articles 10 and 227**of the Constitution are not among those non-derogable rights that cannot be limited. It is our view that they can be interpreted in a purposive manner that would take into account the circumstances and the justice of the case, without necessarily adhering to the textual interpretation. This does not mean that they should be disregarded at will. Far from that, all constitutional safeguards are meant to be observed particularly when they are meant to protect citizens from flagrant excesses by the Executive and those other organs that are charged with the responsibility to offer services to the people.

Where these safeguards are ignored, then the courts must step in.

As aptly pronounced in the case of **Republic vs. Returning Officer of Kamukunji Constituency & The Electoral Commission of Kenya, HCMCA No. 13 of 2008,** it is the responsibility of the court to ensure that executive action is properly exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the court, the court is perfectly within its rights to investigate the allegations (See **Republic vs. Returning Officer of Kamukunji Constituency & The Electoral Commission of Kenya (supra))**.

The court was therefore in order to interrogate the procedures applied to issue the licenses in question**.** However**,** courts should be liberal in the manner they go round dispensing justice. (See **Nation Media Group Limited vs. Attorney General [2007] 1 EA 261).**

A court must always be guided by principles of fairness. In the case giving rise to this appeal, the learned judge was properly guided by the said principle. In his judgment, he expressed himself thus;

> ***"This is a court of justice and a court of justice wields the sword of justice in a manner that delivers justice to all parties before it."***

It was with this in mind that the learned judge found that revoking the permission already granted to the respondents and the interested parties, while many others, including the two cited interested parties, had benefitted from the same process would not have served the ends of justice.

In the end and considering that the appellant who is aggrieved did not demonstrate that he had applied to be considered in the same manner as the 3rd respondent, the court cannot be faulted in finding that the appellant failed to discharge the burden that he was in any way prejudiced by the actions of the 1st respondent emanating from the letter dated 10th November 2011. This is so considering that there existed other such arrangements which were not subject to challenge.

Then comes the question; was the learned judge within the law to declare the process complained of

unconstitutional but at the same time decline to quash the authorizations complained of? We hold that the learned judge was indeed within the law. Although the learned judge did not expressly state so, one of the remedies available in law in judicial review is the remedy of declaration of temporary validity. The law gives the court discretionary power to grant an order of temporary validity of otherwise unconstitutional laws or acts in the interests of justice and good government. The court has power to make any orders that are just and equitable, including an order suspending the declaration of invalidity for any period and on any conditions to allow the competent authority to correct the defect.

See **Executive Council, Western Cape Legislature& Others vs President of the Republic of South Africa and Others [1995 (4)] SA 877 (CC).**

This remedy is expressly provided for in the South African Constitution.

Though not expressly provided for in our Constitution; it is our view that it is a progressive concept and such a remedy would promote the constitutional attributes of equality, justice, fairness and non-discrimination as espoused in our constitution. It is a remedy which has also been applied in our Courts **(**See **The Institute of Social Accountability and others vs The national Assembly and others. Petition No. 71 of 2013**), where the High Court declared as unconstitutional and invalid the Constituency Funds Act, 2013, but suspended the order of invalidity for a period of 12 months from the date of judgment, and **Kenya Country Bus Owners' Association & 8 others vs Cabinet Secretary for Transport and Infrastructure and 5 others NRB JR No. 2 of 2014 [2014] Eklr)** on suspension of some Traffic regulations.

The learned judge was therefore within the law when he declared the act unconstitutional but declined to cancel the contracts. He cannot be faulted for that.

Turning to the second limb of the appeal as to the limitation of time, the point of departure by the parties to the dispute is whether the letter by the 1st respondent is subject to the provision of **order 53 rule 2** of the Civil Procedure rules and **s**ection **9(3)** of the Law reform Act in so far as the 6 months limit period is concerned. This issue is two-fold. On the one hand, the argument is whether the limitation applies only to judicial decisions and not administrative actions and on the other hand is whether the six months period applies from the date of the decision or the date when the appellant knew about it. It is common ground that the appellant made the application beyond the six months period. In the absence of proof by the appellant that the 1st respondent backdated the approval, the line of argument is not persuasive. On the former, the trial judge found that the six months period applied to all applications for orders of *certiorari* while on the latter, the learned judge made what appears to have been an *obiter* remark to the effect that in some cases, the six months period would operate from the date the appellant knew about the decision. Interestingly, the learned judge still went on to hold that the appellant's application was time barred.

On the face of it, it is difficult to appreciate the trial judge's finding that the application was statute barred yet the judge acknowledged that the same could be made and considered within 6 months from the date the appellant knew about it. The respondents argued that the trial judge did not have authority to enlarge time and relied on decided cases that strictly uphold the timelines set out in the statute. The appellant on its part did not submit on the enlargement of time but instead relied on the trial judge's indication as stated above. The appellant instead pursued the argument that the provisions of **order 53 rule 2** of the Civil Procedure Rules and **section 9(3)** of the Law Reform Act and cited case law to support this submission. Conversely, the respondents did not rebut the appellant's arguments both in submissions or authorities cited.

The decision complained of is unique in the sense that the decision of the 1st respondent arose out of the request by the 3rd respondent. At no time were there formal proceedings leading to the decision. The decision was in a letter responding to 3rd respondent's request for permission to erect and maintain billboards and gantries. The elephant in the room here is whether that communication qualifies as one of the acts contemplated under section **9 (3)** of the Law Reform Act and Order **53 Rule 2** of the Civil Procedure Rules.

There has been debate as to whether the six months limitation envisaged in order **53 Rule 2** of the Civil Procedure Rules applies strictly to *"any judgment, order, decree, or conviction,or other proceedings''*, or whether this also includes decisions of other kinds, or letters such as the one that is the subject of this case.

In our considered view, **Order 53 Rule (2)** was meant to cover both judicial and quasi-judicial proceedings, where there was a hearing; all affected parties were informed; or were aware of the proceedings and where there was a judgment or decision capable of being disseminated and accessed by all affected parties. This could not in our considered view have been meant to cover letters which were sent to specific persons in response to theirs which were not even copied to other ostensibly interested parties, like in the case here.

We are persuaded in this respect by the High Court decision in **The Goldenberg Affair Ex-parte Hon. Mwalulu and Others, HCMA No. 1279 of 2004 [2004] eKLR,** and **Republic vs The Commissioner of Lands Ex-parte Lake Flowers Limited Nairobi, H.C. Misc. Application No. 1235 of 1998** where the courts held that the six (6) months limitation period set out in **order 53 Rules 2 and 7** only applied to specific formal orders mentioned in **Order 53 Rules 2 and 7** and to nothing else, certainly not to contents of one private letter in response to another.

We are also persuaded by the Tanzania Court of Appeal decision in **Mobrama Gold Corporation Ltd vs Minister for Water, Energy and Minerals and Others, Dar-es-Salaam Civil Appeal No. 31 of 1999 [1995 – 1998] 1 EA 199** in which case the court held that the phrase "*or other proceedings"* has to be construed *ejusdem generis* with '*judgment, order or decree, and conviction*'' as having reference to judicial or quasi-judicial proceedings as distinct from the acts and omissions for which certiorari may be applied for. We hold the view therefore that the six months limitation would not apply to "decisions" made by administrative bodies which fall outside the purview of the definition *"decision, judgment, order, decree or other proceedings"* as contemplated under **Order 53 rule2** of the Civil Procedure Act.

Moreover, the Appellant was not part of the process leading to the impugned letter. He could not therefore have known of the letter with a view to challenging it within the time prescribed under judicial review. It is our view therefore that the Appellant was not statutorily time barred in moving the court for orders of certiorari as he did.

In conclusion therefore, having considered the appeal before us, the very able submissions of all counsel herein, the law, facts and cases cited to us, we come to the inevitable conclusion that save for that small clarification on limitation of time, this appeal must fail. Accordingly, we dismiss it with orders that each party bears its own costs.

Dated and delivered at Nairobi this 4th day of November, 2016.

W. KARANJA

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

G. B. M. KARIUKI

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR