



Republic v Communications Authority of Kenya; Information Communication Technology Association of Kenya (ICTAK) (Ex parte) (Judicial Review Application 21 of 2020) [2021] KEELRC 7 (KLR) (9 April 2021) (Judgment)

Republic v Communications Authority of Kenya Ex parte Information Communication Technology Association of Kenya (ICTAK) [2021] eKLR

Neutral citation: [2021] KEELRC 7 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

JUDICIAL REVIEW APPLICATION 21 OF 2020

MA ONYANGO, J

APRIL 9, 2021

IN THE MATTER OF: ARTICLES 2(1), 3(1), 10, 19, 20, 21, 22, 27, 28, 35, 41, 43, 47, 48, 50, 94(5), 159(1), 162(2)(A), 232 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE PUBLIC SERVICE COMMISSION ACT

AND

IN THE MATTER OF MWONGOZO, THE CODE OF GOVERNANCE FOR STATE CORPORATIONS

AND

IN THE MATTER OF THE DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION, 1958

AND

IN THE MATTER OF THE LEGAL AND CONSTITUTIONAL VALIDITY OF THE PURPORTED RECRUITMENT OF DIRECTOR GENERAL, COMMUNICATIONS AUTHORITY OF KENYA

BETWEEN

REPUBLIC APPLICANT

AND

COMMUNICATIONS AUTHORITY OF KENYA RESPONDENT

AND



A State corporation had no power to alter the statutory minimum requirements for the appointment of a State officer.

Reported by Chelimo Eunice

Statutes – interpretation of statutory provisions – interpretation of the State Corporations Act, the Mwongozo, Code of Governance for State Corporations - specifications for appointment of chief executive officers (CEOs) of State corporations - Public Service Human Resource and Policies Manual on the minimum number of days required before closing of an advert for a vacant position – claim that a State corporation enhanced the requirements for the position of a director general – whether a State corporation had powers to alter the statutory minimum requirements for the appointment of State officers - what was the minimum number of days required before closing an advert for the position of a director general of a State corporation – whether the Public Service Human Resource and Policies Manual could supersede the provisions of the Mwongozo, Code of Governance for State Corporations - Constitution of Kenya, 2010, articles 10(2)(b) and 73; State Corporations Act, 1986, sections 7 and 30.

Judicial Review – application for judicial review – purpose of judicial review – what were the grounds for grant of judicial review remedies.

Brief facts

Following the lapse of the contract for the immediate previous director general of the respondent, the Communications Authority of Kenya Board (the Board) advertised for the position in the local daily newspapers on May 22, 2020 specifying the qualifications, duties and conditions applicable for the position. The *ex-parte* applicant was unhappy with the advertisement as in its view, the advert introduced qualifications that were not contained in the law, which alteration locked out its members and other members of the public who would otherwise be qualified to apply for the position and was, thus, discriminatory. The *ex-parte* applicant further complained that time frame for closing of the advertisement was less than the 21 days provided by the law. The *ex-parte* applicant, through its advocates, wrote a letter to the respondent demanding the immediate revocation, cancellation and withdrawal of the vacancy notice.

In its response, the respondent contended that the Mwongozo Code of Governance for State Corporations (the *Mwongozo*) only prescribed the minimum requirements for the appointment of a Chief Executive Officer (CEO) and that Boards of State corporations had the latitude to make additional requirements for the appointment of a CEO. It, however, agreed to modify the advertisement to indicate that the affiliation to a professional body be provided where applicable while providing a similar timeframe as provided in the earlier advertisement of any new applications. It subsequently re-advertised for the position. The *ex-parte* applicant was offended by the re-advertisement, hence the instant application.

Issues

- i. What were the grounds for the grant of judicial review remedies?
- ii. What was the purpose of judicial review applications?
- iii. What were the specifications for the appointment of Chief Executive Officers of State corporations?
- iv. Whether a State corporation had powers to alter the statutory minimum requirements for the appointment of a State officer.
- v. What was the minimum number of days required before closing an advert for the position of Director General of a state corporation?
- vi. Whether the Public Service Human Resource and Policies Manual could supersede the provisions of the Mwongozo Code of Governance for State Corporations.



Held

1. The purpose of judicial review was to ensure that public bodies executed their mandates within their statutory remit while at the same time ensuring fairness by complying with the rules of natural justice. There was also the need to ensure that those decisions were rational.
2. Judicial review had developed to a stage where one could classify the grounds upon which administrative action was subject to control by judicial review under three heads. The three grounds being illegality, irrationality and procedural impropriety.
3. The grounds upon which judicial review could be granted were not limited. Judicial review was an important tool that courts used to ensure that the officers and bodies vested with constitutional and statutory authority exercised their powers in the best interests of society. Some of the grounds for the grant of judicial review orders were: -
 1. where there was an abuse of discretion;
 2. where the decision maker exercised discretion for an improper purpose;
 3. where the decision maker was in breach of the duty to act fairly;
 4. where the decision maker had failed to exercise statutory discretion reasonably;
 5. where the decision maker acted in a manner that frustrated the purpose of the Act donating power;
 6. where the decision maker failed to exercise discretion;
 7. where the decision maker fettered the discretion given; and
 8. where the decision was irrational and unreasonable.
4. Sections 7 and 30 of the State Corporations Act gave power to the President to give directions of a general or specific nature with regard to the better exercise and performance of the functions of State corporations. Section 30 of the State Corporations Act on the other hand gave power to the President to make regulations for the better carrying into effect of the provisions of the Act. Under those powers, the President promulgated the *Mwongozo*, Code of Governance for State Corporations (the *Mwongozo*). Attachment 1 of the *Mwongozo* set out the specifications for the appointment of Chief Executive Officers (CEOs) of State corporations: -
 1. held a degree in the relevant field from a university recognized in Kenya;
 2. had at least ten years of knowledge and experience in the relevant field;
 3. met the requirements of Chapter Six of the Constitution;
 4. had served in a position of senior management for a period of at least five years; and
 5. had met the requirements of the fit and proper test.
5. Section 11 of the Kenya Information and Communications Act provided that the Director General was the Chief Executive Officer of the respondent and was, subject to the directions of the respondent responsible for the day-to-day management of the respondent. The Director General was an *ex-officio* member of the Board but had no right to vote at any meeting of the Board.
6. The original advertisement and the re-advertisement were the same, word for word. Since the Kenya Information and Communications Act did not set out the qualifications for the Director General of the respondent, the qualifications set out in the *Mwongozo* applied. The *Mwongozo* was issued jointly by the Public Service Commission (PSC) and State Corporations Advisory Committee (SCAC) under the President's Executive Order pursuant to sections 7 and 30 of the State Corporations Act.
7. An advisory from SCAC and the respondent's Human Resource Policy Manual could not supersede the provisions of the *Mwongozo* which had a statutory underpinning. The averments about a policy of comply or explain was not anchored on any law or regulation and could not supersede the explicit provisions of the *Mwongozo*.
8. The respondent enhanced the requirements for the position of director general thus locking out persons, including the *ex-parte* applicant's members who were qualified under the statutory requirements. The respondent had no power to alter the minimum requirements for appointment.



- Enhanced qualifications could only be an added advantage to be considered during an interview, among other unique qualifications of each of the candidates. It could not be used as a criterion to lock out persons who were otherwise qualified for the position from applying or from being shortlisted and given an opportunity to compete for the advertised position. The respondent, therefore, acted without authority in enhancing the minimum qualifications set out in the *Mwongozo*, hence it acted *ultra vires*.
9. By altering the requirements for the position of the Director General, the respondent also violated the provisions of article 10(2)(b) of the Constitution of Kenya, 2010 (Constitution) which provided for observance of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. Persons who were qualified under the *Mwongozo* were discriminated against by the enhancement of the minimum requirements which locked them out. The Board further violated article 73 of the Constitution on the guiding principles of leadership and the Leadership and Integrity Act.
 10. The respondent was bound by the provisions of the Public Service Human Resource and Policies Manual in the absence of any other similar provisions in its own Act or regulations and was bound to give a minimum of 21 days before closing the advert for interested persons to apply for the vacant position.
 11. The respondent's assertion that it published the advertisement on May 22, 2020 and re-advertised on June 17, 2020 with a closing date of June 23, 2020, thus exceeding the 21 days' requirement was not the correct position. The initial advertisement was on May 22, 2020 and closed on June 9, 2020. The re-advertisement was on June 17, 2020, long after the lapse of the original advertisement and could not be deemed to be a continuation or extension of the same. A person who only saw the re-advertisement and not the original one was entitled to the full 21 days before the closure of the advertisement. Both the original advertisement and the re-advertisement failed to meet the minimum requirements under the Public Service Commission Human Resource and Policies Procedures Manual of a minimum of 21 days.
 12. The Kenya Information and Communications Act further provided that the Board was to determine the terms and conditions of service of the Director General in consultation with the PSC. The respondent could not, thus, detach itself from or avoid compliance with the Human Resources Process and Procedures Manual for the Public Service. It was, thus, clear that the advertisement for the position of Director General by the respondent failed to meet the minimum statutory requirements in terms of both the qualifications of the position and the process of advertisement. There was both procedural impropriety as well as illegality in the advertisement of the position of Director General of the respondent.

Application dated July 3, 2020 allowed with costs.

Orders

An order of certiorari granted to remove into the court and quash the vacancy notice for the position of Director General/Chief Executive Officer of the Communications Authority of Kenya, referenced as CA.DG/HCA2020.

Citations

Cases

Kenya

1. *Masinde, Joy Brenda v Law Society of Kenya & another* Petition 54 of 2015; [2015] KEHC 507 (KLR) - (Explained)
2. *Muigai & another v Law Society of Kenya & another* Petition 286 of 2014; [2015] KEHC 6973 (KLR) - (Explained)
3. *Okoiti, Okiya Omtatah v Ethics and Anti-Corruption Commission & another* Cause E040 of 2020; [2021] KEELRC 2302 (KLR) - (Explained)



4. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR); [2014] 2 KLR 253 - (Explained)
5. *Republic v County Government of Mombasa Ex-parte Outdoor Advertising Association of Kenya* Judicial Review 63 of 2013; [2014] KEHC 5564 (KLR) - (Explained)
6. *Republic v Vice Chancellor, Jomo Kenyatta University of Agriculture and Technology ex-parte Cecilia Mwachhi & another* Miscellaneous Civil Application 30 of 2007; [2008] KEHC 2252 (KLR) - (Explained)
7. *Resley, Jacqueline v City Council of Nairobi* Miscellaneous Civil Application 1654 of 2004; [2005] KEHC 2342 (KLR) - (Explained)
8. *Wambua Maithya v Pharmacy and Poisons Board; Pharmaceutical Society of Kenya & another (Interested Parties)* Constitutional Petition 2 of 2019; [2019] KEHC 8474 (KLR) - (Explained)

Uganda

Francis Babikirwe Muntu and others v Kyambogo Miscellaneous Application 643 of 2005 - (Mentioned)

United Kingdom

1. *Al-Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876; [1989] 3 All ER 843; 1990 Imm AR 140 - (Explained)
2. *Associated Provincial Picture Houses Ltd, v Wednesbury Corporation* [1948] 1 KB 223 - (Mentioned)
3. *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; [1984] 3 All ER 935; [1984] UKHL 9 - (Followed)
4. *Council of Civil Unions v Minister for the Civil Service* [1985] AC 2 - (Mentioned)

Regional Court

1. *In Re an Application by Bukoba Gymkhana Club* [1963] EA 479 - (Explained)
2. *Pastoli v Kabale District Local Government Council and others* [2008] 2 EA 300 - (Explained)

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 1B - (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 21 rule 1 - (Interpreted)
3. Constitution of Kenya articles 1, 2, 3, 10(2)(b); 27; 32; 47(1); 48; 59; 94(5); 159(2)(d); 259(2)(d) - (Interpreted)
4. Fair Administrative Action Act (cap 7L) section 5 - (Interpreted)
5. Kenya Defence Forces Act (cap 199) section 28 - (Interpreted)
6. Kenya Information and Communications Act (cap 411A) section 11 - (Interpreted)
7. Leadership and Integrity Act (cap 185C) In general - (Cited)
8. Public Service Commission Act (cap 185) sections 3, 35, 36(1)(b)(3)(a)(e); 37(1)(2)(3)(4)(e) - (Interpreted)
9. Societies Act (cap 108) In general - (Cited)
10. State Corporations Act (cap 446) section 7, 30 - (Interpreted)

Instruments

Discrimination (Employment and Occupation) Convention, 1958

Advocates

None mentioned

JUDGMENT

1. The applicant, the Information Communication Technology Association of Kenya (ICTAK) is a professional association registered under the [Societies Act](#) (cap 108) of the Laws of Kenya.



Its objectives *inter alia* include liaising with government and public bodies in deliberation and formulation of policies in regard to information communication technology related issues; promotion of professionalism and protection of public interest in all matters relating to ICT in Kenya.

2. The respondent is a state corporation incorporated in 1999 under the [Kenya Information and Communications Act](#), 1998. The Communications Authority of Kenya is responsible for facilitating the development of the information and communications sectors including broadcasting, cybersecurity, multimedia, telecommunications, electronic commerce, postal and courier services.
3. Following the lapse of the contract for the immediate past Director General of the respondent, the Board of the respondent advertised for the position in the local daily newspapers on May 22, 2020 specifying the qualifications, duties and conditions applicable for the position. The applicant was unhappy with the advertisement as in its view, the advert introduced qualifications that are not contained in the law and “Mwongozo” Code of Governance for State Corporations promulgated by His Excellency, The President under Executive Order No 7 of 2015. By letter dated June 2, 2020, the applicant through its advocates wrote to the respondent demanding the immediate revocation/ cancellation/ withdrawal of the vacancy notice.
4. By letter dated June 3, 2020, the respondent acknowledged receipt of the letter and informed the applicant that it was consulting with the relevant government agencies on the issues raised in the applicant’s letter and would respond substantively within 7 days. By letter dated June 3, 2020, the respondent wrote to the State Corporations Advisory Committee (SCAC) seeking guidance as follows:
-
 - a. Whether the requirements as contained in the Authority’s advertisement are suitable;
 - b. Whether the requirements of an institution for a suitable candidate to the position of Chief Executive Officer can exceed those set in Mwongozo; and
 - c. How best to proceed with the recruitment process in light of the letter dated June 2, 2020 from Ms Adrian Kamotho Njenga & Company Advocates including how best to respond to the said letter.
5. Upon receipt of the response from SCAC, the respondent wrote to the Applicant by letter dated June 8, 2020, which is reproduced below: -

“Our Ref: CA/LS/MISC/000/2020 (036)

Your Ref: AKN/V 1/147

June 8, 2020

Adrian Kamotho Njenga & Co Advocates

Hazina Towers, 9th Floor, PSC Wing

Box 17429 – 00100

Nairobi

“Advance Copy by Email to: kamothonjenga@gmail.com”

“Without Prejudice”

Dear Sirs,

RE: Recruitment of the Director General of Communications Authority of Kenya



We refer to the above matter.

We confirm that we have concluded the consultations in respect to this matter as advised in our letter dated June 3, 2020. The Authority wishes to advise that the outcome of the said consultations is that Mwongozo Code of Governance only prescribes the minimum requirements for appointment of a Chief Executive Officer (CEO). Boards of State Corporations have latitude to make additional requirements for the appointment of a CEO.

The Board of the Authority considered the requirements for the position of Director General and availed itself the latitude to make additional requirements in addition to the minimum requirements provided under Mwongozo. This was informed by the fact that the position of the Director General of the Authority requires certain technical competencies, experience and knowledge in addition to the basic requirements provided under Mwongozo.

Nevertheless, the Authority has reconsidered the additional requirement that the applicants should be affiliated to a professional body and acknowledges that the said requirement may disadvantage candidates whose careers do not have a legally recognised professional association. The Authority will therefore modify the advertisement to indicate that the affiliation to a professional body be provided “where applicable”, while providing a similar timeframe as provided in the earlier advertisement of any new applications.

Candidates who have already applied will not be required to re-apply. The Authority therefore wishes to advise that a re-advertisement will be published in this regard on or about June 9, 2020.

The Authority confirms that it is available to provide any further clarification or information that you may require relating to this matter. Please note that the contents of this letter are strictly on a without prejudice basis and that the intended modification should not be construed to mean that the Authority admits liability in any manner whatsoever.

Yours Faithfully,

Signed

Edward Rikanya, For Director General”

6. The respondent subsequently re-advertised for the position. In the re-advertisement, the qualifications of the candidate are set out as follows: -

“The successful applicant should possess extensive leadership and managerial experience of at least 15 years, 10 of which must be at a senior managerial level. He/she must also possess a postgraduate degree in a relevant discipline and must be affiliated to a professional body. The ideal candidate should also demonstrate in-depth knowledge and experience preferably in a regulatory environment.

Appointment to the position will be on contract for a term of four (4) years, renewable once, subject to satisfactory performance.

If you fulfil the aforementioned requirements and would like to take up the challenge, you are invited to apply not later than June 18, 2019 at 5.00 pm.

Applications for the position must be accompanied by the following documents: a detailed CV, certificated copies of National ID or passport, academic certificates, proof of current



membership to professional bodies and any other relevant credentials. Shortlisted candidate will be required to present the following documents during the interviews:

- a. Tax Compliance Certificate from the Kenya Revenue Authority (KRA)
- b. Certificate of Clearance from the Higher Education Loans Board (HELB)
- c. Certificate of Good Conduct from Directorate of Criminal Investigations (DCI) and
- d. Duly filed and stamped Clearance Form by the Ethics and Anti-corruption Commission (EACC).

Please note that the Self –Declaration Form from Ethics and Anti-corruption Commission (EACC) should indicate the Authority as the State Office for which declaration is being submitted.”

7. Offended by the re-advertisement, the applicant filed Chamber Summons dated June 22, 2020 under certificate of urgency seeking the following orders:-

1. Spent.
2. That the applicant herein be and is hereby granted leave to apply for an order of *certiorari* to remove into this court and quash the vacancy notice for the position of Director General/Chief Executive Officer of Communications Authority of Kenya, referenced as CA DG/HCA2020.
3. That pending the hearing and determination of this matter, the leave so granted under prayer (2) above do operate as a stay of the vacancy notice for the position of Director General/Chief Executive Officer of Communications Authority of Kenya, referenced as CA DG/HCA2020.
4. That costs of and incidental to this application be provided for.
5. That such further and other relief that the court may deem just and expedient to grant.

8. Upon considering the application, the court granted orders as follows:-

1. Spent.
2. That leave be and is hereby granted leave to apply for an order of *certiorari* to remove into this court and quash the vacancy notice for the position of Director General/Chief Executive Officer of Communications Authority of Kenya, referenced as CA DG/HCA2020.
3. That application to be filed and served upon the respondent within 14 days.
4. That leave will serve as a stay of the said vacancy notice.
5. That mention on a date to be set by the Deputy Registrar but not alter than 14 days after the filing and service of the application.

9. In the substantive motion dated July 3, 2020, the applicant seeks the following orders: -

1. That an order of *certiorari* be and is hereby granted to remove into this court and quash the vacancy notice for the position of Director General/Chief Executive Officer of Communications Authority of Kenya, referenced as CA DG/HCA2020.
2. That costs of and incidental to this application be provided for.
3. That such further and other relief that the court may deem just and expedient to grant.



10. The grounds upon which the motion is made as set out in the statutory statement and replying affidavits of Dr Salesio Kiura and Joel Itube are that: -
- a. The decision and recruitment notice by the respondent is by all means *ultra vires* the lawful powers bestowed upon the respondent.
 - b. The vacancy notice by the respondent arbitrarily excludes eligible members of the applicant and the wider public, and is manifestly irrational to warrant its quashing by this court.
 - c. The decision by the respondent to eliminate them from competing for the position of Director General/Chief Executive Officer of the respondent is so outrageous and amounts to abuse of office by the respondent.
 - d. The recruitment notice by the respondent is unlawful, unreasonable, procedurally unfair and contrary to the dictates of articles 27 and 47(1) of the Constitution.
 - e. No known constitutional provision, statute or legal instrument whatsoever confers authority upon the Respondent to manipulate the qualifications for the position of Director General/Chief Executive Officer as established under Mwongozo, the Code of Governance for State Corporations (Executive Order No 7 of 2015).
 - f. Attachment 1 to Mwongozo, categorically sets out the following person specifications for appointment as Chief Executive Officer/Director General of a State Corporation:
 - i. Holds a degree in the relevant field from a university recognized in Kenya;
 - ii. Has at least ten years knowledge and experience in the relevant field;
 - iii. Meets the requirements of chapter six of the Constitution;
 - iv. Has served in a position of senior management for a period of at least five years;
 - v. Meets the requirements of the fit and proper test.
 - g. On its part the vacancy notice by the respondent sets out the following person specification:

“The successful candidate should possess leadership and managerial experience of at least 15 years, 10 of which should be at a senior managerial level. He/she must possess a postgraduate degree in a relevant discipline and be associated with a professional body. The ideal candidate should also demonstrate in-depth knowledge and experience preferably in a regulatory environment.”
 - h. Under article 94(5) of the Constitution, no person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation. Clearly, the respondent has no authority, power or capacity in law to substitute the straightforward provisions of Mwongozo with its own ideas to achieve nefarious objectives.
 - i. The said recruitment notice contravenes articles 1, 2 and 3 of the Discrimination (Employment and Occupation) Convention, 1958 which forbids any distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.



- j. The decision by the respondent discloses an ulterior motive and purpose calculated to influence the recruitment outcome in favour of a particular candidate while prejudicing the legal rights of the applicant's membership and that of the public.
- k. The administrative action taken by the respondent which excludes statutorily qualified citizens from competing for the public office herein adversely affects their legally embedded rights and interests and runs counter to section 5 of the *Fair Administrative Action Act*, 2015.
- l. Paradoxically, the last paragraph of the respondent's vacancy notice is couched in the following terms:

“CA is an equal opportunity employer and all qualified candidates are encouraged to apply. Only shortlisted candidates will be contacted.”
- m. Thus, should the respondent's vacancy notice be allowed to stand, the actual applicants for the position or even the applicable shortlisting criteria will never be known to the public.
- n. The vacancy notice is riddled with ambiguity and runs counter to the express values and principles underpinned by article 232 of the *Constitution* including involvement of the people; accountability for administrative acts; transparency and affording of equal opportunities to all persons.
- o. The vacancy notice resoundingly offends the following provisions of the *Public Service Commission Act*, 2017:
 - i. Section 36(1)(b) for failing to adhere to prescribed qualifications for holding the office;
 - ii. Section 36(3)(a) & (e) by countenancing discrimination and subverting access of opportunities by youthful members of society;
 - iii. Section 37(1), (2) & (3) for denying an equal opportunity to disadvantaged persons; and
 - iv. Section 37(4)(e) for failing to disclose the applicable remuneration including salary, allowances and other benefits as mandatorily required.
- p. The vacancy notice glaringly contravenes section B 4(1) of the Human Resource Policies and Procedures Manual for the Public Service May, 2016 which requires Ministries/State Departments to advertise all vacant posts in a manner that reaches the widest pool of potential applicants and allow for at least twenty one (21) days before closing the advert. Further the advert should detail the person specification and the proposed remuneration. The respondent's Vacancy Notice falls short of these specific requirements.
- q. The vacancy notice published by the respondent is tainted with bias, against sections of the applicant's membership.
- r. The recruitment conditions imposed by the respondent are extremely in bad faith and grossly violate the legitimate expectations of the applicant's membership and that of the public.
- s. The respondent is a statutory creature hence the need for strict adherence to the law in the filling of any legally prescribed position.
- t. The applicant's justice, reprieve and relief lies in this court, which the applicant has hereby approached without delay.



- u. The respondent herein is subject to the supervisory jurisdiction of this court.
11. The respondent opposes the application and filed the replying affidavit of Ngene Gituku, the Chairman of the Board of Communications Authority of Kenya in which he states that no evidence has been adduced by the applicant to prove that the advertisement was done in excess of jurisdiction. Further that; -
- i. The [Kenya Information and Communication Act](#), under section 11(3) gives power to the Board, to recruit and appoint the Director General through a competitive process. b) The respondent's Human Resource Policy Manual provides as follows: Clause 2.1: The Board has power to appoint persons to hold office.
- ii. Clause 2.2: The Board may modify or add to any regulations or procedures relating to appointment.
12. The affiant avers that the applicant moved to court without disclosing the contents of the response from SCAC and is therefore guilty of material nondisclosure and not deserving of the orders sought.
13. It is the averment of the affiant that Mwongozo only provides for minimum requirements for the position of Director General and that the advertisement meets the minimum conditions.
14. It is further the averment of the affiant that the respondent's Human Resource Manual and the advisory from SCAC gave discretion to the respondent to include particular qualifications above the minimum requirements.
15. It is further the affiant's position that the requirement of at least 21 days' notice in the Human Resource Policies and Procedure Manual for the Public Service Commission (May 2016) does not apply to the respondent as it is not a Ministry or Government Department. The affiant further states that in any event, the advertisement exceeded the requirement for 21 days. The affiant denies that the actions of the respondent were unlawful, unreasonable, unfair or contrary to articles 27 and 47(i) of the [Constitution](#) as alleged by the applicant.

Evidence

16. By consent of the parties, the motion herein was disposed of by way of pleadings and written submissions.
17. It is the submission of the ex parte applicant that article 35(3) of the [Constitution](#) confers the right to access to information and the respondent was under a duty to publicise the list of applicants and shortlisted candidates under the principle of accountability and transparency as enshrined in article 10 of the [Constitution](#). The ex parte applicant submits that by stating that only shortlisted candidates will be contacted the respondent contravened articles 35(3) and article 10 of the [Constitution](#).
18. On the qualifications of the Director General, the ex parte applicant submits that the respondent did not comply with statutory guidelines and Mwongozo. That although the respondent was expected to select the candidate with the highest qualifications there was no justification in altering or manipulating the basic qualifications in a manner that narrows the pool by edging out persons who are qualified under the law. That statutory guidelines are to be strictly observed and failure to do so would lead to an



illegality. For emphasis, the *ex parte* applicant cited the case of *Githu Muigai & another v Law Society of Kenya & another* (2015) eKLR where it was held :-

“In our view, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority ...”

19. The applicant submits that the advertisement does not comply with section 35 of the *Public Service Commission Act*, as it does not state the remuneration including salary, allowances and other benefits. It is the submission of the applicant that the respondent's averment that it relied on its Human Resource Policy Manual is a vain attempt to “read out” express provisions of Mwongozo and the *Public Service Commission Act*. The *ex parte* applicant submits that section 3 of the *Public Service Commission Act*, 2017 provides that subject to articles 155(3)(a), 158(3), 234(2)(a), 234(3) and 252(1) of the *Constitution* and section 28 of the *Kenya Defence Forces Act*, the Act shall apply to all public bodies and persons holding office in the public service.
20. It is submitted that Mwongozo is anchored on sections 7 and 30 of the *State Corporations Act* and the respondent's averment at paragraph 10 of the replying affidavit that Mwongozo is premised on a “comply and explain basis” is an admission of non-compliance.
21. The applicant relies on *Republic v County Government of Mombasa ex parte Outdoor Advertising Association of Kenya and Wambua Maithya v Pharmacy and Poisons Board; Pharmaceutical Society of Kenya & 2 others (Interested Parties)* [2019] eKLR.
22. It prays that the orders sought be granted with costs relying on the Supreme Court decision in *Jasbir Singh Rai & 4 others* [2014] eKLR.

Respondent's Submissions

23. It is submitted for the respondent that the applicant has failed to meet any of the standards for grant of judicial review orders as set out in Petition No 54 of 2015 *Joy Brenda Masinde v Law Society of Kenya* where reference was made to *Pastoli v Kabale District Local Government Council and others* (2008) 2 EA 300 which cited *Council of Civil Unions v Minister for the Civil Service* [1985] AC 2 and an application by *Bukoba Gymkhana Club* [1963] EA at 479.
24. It is submitted that the applicant has failed to demonstrate that the advertisement was tainted with illegality, irrationality and procedural impropriety or was contrary to dictates of article 27 and 47(1) of the *Constitution* as the power of the respondent is donated by statute, the minimum qualifications in Mwongozo have been met, the additional qualifications have not been made mandatory and the re-advertisement of June 17, 2020 was aimed at ensuring that there was no procedural impropriety.
25. On whether the advertisement offends the provisions of the Human Resources Policies and Procedures for falling short of 21 days, the respondent submits that the advertisement was on May 22, 2020 with a closing date of June 23, 2020, which exceeds 21 days, relying on Petition 40 of 2020, *Okiya Omtata Okoti v Ethics and Anti-Corruption Commission & another* [2021] eKLR.

Analysis and Determination

26. Having considered the pleadings and submissions together with cited authorities, the issues for determination are whether the impugned advertisement was ultra vires, arbitrary, unlawful, unreasonable and procedurally unfair contrary to articles 27 and 47(1) of the *Constitution* and Mwongozo. The second issue is whether the *ex parte* applicant is entitled to the orders sought.



27. The purpose of judicial review is to ensure that public bodies execute their mandates within their statutory remit while at the same time ensuring fairness by complying with the rules of natural justice. There is also the need to ensure that those decisions are rational. The boundaries of judicial review were demarcated by Lord Diplock in the famous case of *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 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 KB 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.”

28. Kasule J of Uganda explained the meaning of illegality, irrationality and procedural impropriety in the case of *Pastoli v Kabale District Local Government Council & others* [2008] 2 EA 300 when he stated that:

“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 Babikirwe 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.”

29. The grounds upon which judicial review can be granted are not limited. Judicial review is an important tool which the courts use to ensure that the officers and bodies vested with constitutional and statutory authority exercise their powers in the best interests of the society. Nyamu, J (as he then was) enumerated some of the grounds for grant of judicial review orders in *Republic v Vice Chancellor, Jomo Kenyatta University of Agriculture and Technology Ex-parte Cecilia Mwathi and another* [2008] eKLR as follows:
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.”
30. In the instant case, the *ex parte* applicant alleges that the respondent altered the qualifications for Director General in contravention of the qualifications set out in Mwongozo without power to do so and the same is therefore ultra vires. It is further the contention of the *ex parte* applicant that the alteration locked out its members and other member of the public who would otherwise be qualified to apply for the position and thus discriminated against them contrary to articles 27 and 47(1) of the *Constitution*.
31. Section 7 of the *State Corporations Act* gives power to the President to give directions of a general or specific nature with regard to the better exercise and performance of the functions of State Corporations. Section 30 of the Act gives power to the President to make Regulations for the better carrying into effect of the provisions of the Act.
32. Under these powers, The President promulgated Mwongozo, Code of Governance for State Corporations. Attachment 1 of Mwongozo sets out the specifications for appointment of Chief Executive Officers of State Corporations as follows: -
- i. Holds a degree in the relevant field from a university recognized in Kenya;
 - ii. Has at least ten years knowledge and experience in the relevant field;



- iii. Meets the requirements of chapter six of the Constitution;
 - iv. Has served in a position of senior management for a period of at least five years;
 - v. Meets the requirements of the fit and proper test.
33. Section 11 of the Kenya Information and Communications Act provides for Director General as follows: -
- 11. The Director General
 - 1. The Director-General shall be the chief executive of the Commission and shall, subject to the directions of the Commission, be responsible for the day to day management of the Commission.
 - 2. The Director-General shall be an *ex-officio* member of the Board but shall have no right to vote at any meeting of the Board.
34. In the first advertisement for the position of Director General, the qualifications were set out as follows

“The successful applicant should possess extensive leadership and managerial experience of at least 15 years, 10 of which must be at a senior managerial level. He/she must also possess a postgraduate degree in a relevant discipline and must be affiliated to a professional body. The ideal candidate should also demonstrate in-depth knowledge and experience preferably in a regulatory environment.

Appointment to the position will be on contract for a term of four (4) years, renewable once, subject to satisfactory performance.

Applications for the position must be accompanied by the following documents: a detailed CV, certificated copies of National ID or passport, academic certificates, proof of current membership to professional bodies and any other relevant credentials. Shortlisted candidate will be required to present the following documents during the interviews:

- a. Tax Compliance Certificate from the Kenya Revenue Authority (KRA)
- b. Certificate of Clearance from the Higher Education Loans Board (HELB)
- c. Certificate of Good Conduct from Directorate of Criminal Investigations (DCI) and
- d. Duly filed and stamped Clearance Form by the Ethics and Anti-corruption Commission (EACC).”

35. This is what the *ex parte* applicant contested by its letter to the respondent dated June 2, 2020. Thereafter the respondent re-advertised the position on June 17, 2020 where the qualifications for the position are set out as follows

“The successful applicant should possess extensive leadership and managerial experience of at least 15 years, 10 of which must be at a senior managerial level. He/she must also possess a postgraduate degree in a relevant discipline and must be affiliated to a professional body. The ideal candidate should also demonstrate in-depth knowledge and experience preferably in a regulatory environment.



Appointment to the position will be on contract for a term of four (4) years, renewable once, subject to satisfactory performance.

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- c. Certificate of Good Conduct from Directorate of Criminal Investigations (DCI) and
- d. Duly filed and stamped Clearance Form by the Ethics and Anti-corruption Commission (EACC).”

36. It is evident from above that the two advertisements were the same word for word. Since the Information and Communications Act does not set the qualifications for Director General of the Respondent, it is the qualifications set out in Mwongozoto apply. Mwongozoto issued jointly by the Public Service Commission and State Corporations Advisory Committee (SCAC) under the President’s Executive Order pursuant to sections 7 and 30 of the *State Corporations Act*.

37. An advisory from SCAC and the respondent’s Human Resource Policy Manual cannot supersede the provisions of Mwongozo which has statutory underpinning. The averments by the Respondent about a policy of comply or explain is not anchored on any law or regulation and cannot supersede the explicit provisions of Mwongozo.

38. In the case of *Resley v the City Council of Nairobi* [2006] EA, the court held that: -

“In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid... The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent.”

39. Further, in *Gitbu Muigai & another v Law Society of Kenya & another*, the court held that:-

“In our view, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority...”

40. In the instant case, the respondent enhanced the requirements for the position of Director General thus locking out persons, including the ex parte applicant’s members who are qualified under the statutory requirements. The respondent had no powers to alter the minimum requirements for appointment. Enhanced qualifications can only be an added advantage to be considered during interview, among other unique qualifications of each of the candidates. It cannot be used as a criteria to lock out persons who are otherwise qualified for the position from applying or from being shortlisted and given an opportunity to compete for the advertised position.



41. I therefore find that the respondent acted without authority in enhancing the minimum qualifications set out in Mwongozo, hence it acted *ultra vires*.
42. By altering the requirements for the position, the respondent also violated the provisions of article 10(2)(b) which provides for observance of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. Persons who are qualified under Mwongozo were discriminated by the enhancement of the minimum requirements which locked them out. The Board further violated article 73 on the Guiding Principles of Leadership and the [*Leadership and Integrity Act*](#).
43. It is further the contention of the applicant that the timeframe for closing of the advertisement did not conform with the Human Resource Policies and Procedures Manual for the Public Service which provides at section B 4(1) that vacancies be open for at least 21 days before closing. The original advert was published on May 22, 2020 and was to close on June 9, 2020 a duration of 18 days. The re-advertisement was on 17th and 19th June to close on June 23, 2020, thus giving potential candidates a mere 5 days to apply. It is noted that in the replying affidavit, the Respondent states the re-advertisement was on June 9, 2020 but in the submissions it is stated that the re-advertisement was on June 17, 2020.
44. The Public Service Human Resource and Policies Procedure Manual defines Public Service under definition of terms as follows: -
45. Public Service: It incorporates the Civil Service, National Police Service, Teaching Service, Judiciary, Kenya Defence Forces, County Governments, Public Universities, Parliamentary Service, State Corporations and Statutory Bodies.
46. The second last paragraph of the preamble thereto further provides that the policies will apply to the National Government and other Government Agencies.
47. The respondent is thus bound by the provisions of the Public Service Human Resource and Policies Manual in the absence of any other similar provisions in its own Act or regulations and was bound to give a minimum of 21 days before closing the advert for interested persons to apply for the vacant position.
48. The respondent submitted that it published the advertisement on the May 22, 2020 and re-advertised on June 17, 2020, with a closing date of June 23, 2020, thus it exceeded the 21 days requirement. This is not the correct position. The initial advertisement was on May 22, 2020 and closed on May 9, 2020. The re-advertisement was on June 17, 2020, long after the elapse of the original advertisement and could not be deemed to be a continuation or extension of the same. A person who only saw the re-advertisement and not the original one was entitled to the full 21 days before closure of the advertisement.
49. From the foregoing, both the original advertisement and the re-advertisement failed to meet the minimum requirements under the Public Service Commission Human Resource and Policies Procedures Manual of a minimum of 21 days.

Section B4 of the Manual provides as follows

B.4 Advertisement of Vacant Posts

1. Ministries/State Departments will advertise all vacant posts in a manner that reaches the widest pool of potential applicants and allow for at least twenty one (21) days before closing the advert. The advert shall have the following details:



the title of the post, number of vacancies, job description, person specification and the proposed remuneration.

2. The advert shall be delivered in soft copy to the Public Service Commission to be posted in its website.

50. The [Kenya Information and Communications Act](#) further provides that the Board shall determine the terms and conditions of service of the Director General in consultation with the Public Service Commission.

51. The respondent cannot thus detach itself from or avoid compliance with the Human Resources Process and Procedures Manual for the Public Service.

Conclusion

52. From the foregoing, it is clear that the advertisement for the position of the Director General by the respondent failed to meet the minimum statutory requirements in terms of both the qualifications of the position and the process of advertisement. There was thus both procedural impropriety as well as illegality in the advertisement of the position of Director General of the respondent.

53. For the foregoing reasons I find merit in the notice of motion dated July 3, 2020 and make the following orders: -

1. An order of certiorari be and is hereby granted to remove into this court and quash the vacancy notice for the position of Director General/Chief Executive Officer of Communications Authority of Kenya, referenced as CA DG/HCA2020.
2. That respondent shall pay the applicant's costs of this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF APRIL 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on March 15, 2020 and subsequent directions of April 21, 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with order 21 rule 1 of the [Civil Procedure Rules](#) which requires that all judgments and rulings be pronounced in open court. In permitting this course, this+ court has been guided by article 159(2)(d) of the [Constitution](#) which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under article 48 of the [Constitution](#) and the provisions of section 1B of the [Civil Procedure Act](#) (chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE

