



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 138 OF 2019

-BETWEEN-

OKIYA OMTATAH OKOITI..... PETITIONER

-VERSUS-

**THE CABINET SECRETARY FOR INFORMATION, COMMUNICATIONS
AND TECHNOLOGY.....1ST RESPONDENT
PUBLIC SERVICE COMMISSION.....2ND RESPONDENT
THE HON. ATTORNEY GENERAL.....3RD RESPONDENT**

-AND-

**MAHMOUD MOHAMED NOOR.....1ST INTERESTED PARTY
PAUL MURAGURI MUREITHI.....2ND INTERESTED PARTY
JACKSON KIPROTICH KEMBOI.....3RD INTERESTED PARTY
LAURA CHITE.....4TH INTERESTED PARTY**

THE COMMUNICATIONS

AUTHORITY OF KENYA.....5TH INTERESTED PARTY

ARTICLE 19 EAST AFRICA.....6TH INTERESTED PARTY

KATIBA INSTITUTE (KI).....7TH INTERESTED PARTY

CONSOLIDATED WITH PETITION NO. 155 OF 2019

-BETWEEN-

CONSUMERS FEDERATION OF KENYA..... PETITIONER

-VERSUS-

THE HON. ATTORNEY GENERAL.....RESPONDENT

-AND-

THE COMMUNICATION

AUTHORITY OF KENYA.....1ST INTERESTED PARTY

PUBLIC SERVICE COMMISSION.....2ND INTERESTED PARTY

FRANCIS WAMUKOTA WANGUSI.....3RD INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 15th November, 2019)

JUDGMENT

The petitioner in petition 138 of 2019 filed the petition on 22.07.2019 in person. He prays for:

- a) A declaration that Articles 10, 27, 73, and 232(1) (g) of the Constitution require appointments to public office to be transparent, competitive, merit based, and inclusive and to be subjected to public participation, which includes among others, announcing and holding interviews in the open.
- b) A declaration that Articles 1, 2, 3(1), 10, 129, and 153 (4) (a) of the Constitution bind the 1st respondent to exercise his powers under section 6 (1) (c) of the Kenya Information and Communications Act strictly in accordance with the Constitution and other statutes.
- c) A declaration that section 6 (1) (e) of the Kenya information and communications Act does not empower the 1st respondent to handpick and appoint persons to the CAK Board, without subjecting them to a fair, open, competitive, merit based and inclusive recruitment process and without involving the 2nd respondent.
- d) A declaration that the 1st respondent's appointment of the 1st, 2nd, 3rd, and 4th interested parties was constitutionally invalid and therefore is null and void *ab initio*.
- e) A declaration that the Public Service Commission Act, 2017 if the legislation anticipated under Article 234(2) (a) of the Constitution.
- f) A declaration that pursuant to Article 234 (5) of the Constitution, only the Public Service Commission and not Parliament has the capacity to delegate to any body or authority the functions and powers of the Commission.
- g) An order be issued by the Court quashing Gazette Notice No. 6657 of 18.07.2019 published in Nairobi on 19.07.2019 in the Special Issue of the Kenya Gazette Vol. CXXI – No. 91.
- h) The respondents to pay costs of the petition.
- i) The Honourable Court be pleased to issue any other or further remedy that the Honourable Court shall deem fit to grant.

The petition was supported with the affidavit by the petitioner and the exhibits thereto. The respondents filed on 25.07.2019 the replying affidavit of Juliana Yiapan, the Administration Secretary at the Ministry of Information, Communication, and Technology through the Attorney General. The petitioner responded by filing his supplementary affidavit on 26.07.2019. The further replying affidavit of Juliana Yiapan was filed on 02.08.2019. The 5th respondent filed the replying affidavit of Robin Mayeku Busolo the Acting Manager Regulatory Affairs at the Communication Authority of Kenya (CAK). The further supporting affidavit of Francis Wamukota Wangusi was filed on 02.09.2019. The petitioner filed his 2nd supporting affidavit on 05.08.2019. The petitioner filed an application for contempt on 06.09.2019 for orders:

- a) That the Honourable Court is pleased to certify the application as extremely urgent and hear it ex-parte at the first instance.
- b) That until and unless they purge the contempt, by allowing the outgoing Director General Mr. Francis Wamukota Wangusi to access his office in compliance with the orders of the Court, the Honourable Court be pleased to deny audience to the respondents and the 1st to 5th interested parties.
- c) That the Honourable Court be pleased to cite Ngene B. Gituku, Mercy Wanjau, and J.K. Kandie for contempt of Court and consequently punish them according to the law.
- d) That the costs of the application be provided for.

The application was opposed by the respondents' grounds of opposition filed on 12.09.2019. The 5th interested party filed a notice of preliminary objection on 14.10.2019 through S.M. Kilonzo & Company Advocates to oppose the application. On his part the petitioner opposed the preliminary objection by filing on 23.10.2019 his grounds of opposition. The petitioner also filed his 3rd and 4th supplementary affidavit. The application as well as the petition is subject of the present judgment. The petitioner, respondents and the 5th interested parties have filed their respective submissions on the petition and the application.

The petitioner in petition 155 of 2019 is the Consumers Federation of Kenya (COFEK) suing through its officials Stephen Mutoro, Ephraim Githinji Kanake, and Henry Meshack Ochieng. The petition was filed on 13.08.2019 through Messrs Kurauka & Company Advocates. The petitioner prayed for:

- a) A declaration that the respondent has failed in its duty to uphold the rule of law, the Constitution, and protect public interest.

- b) The declaration that the litigation is a public interest.
- c) An injunction to issue stopping the recruitment of the Director General of the 1st interest party, CAK, and that the status quo be and is hereby maintained for the current Director General to stay in office beyond August 22, 2019 until such a time a legitimate board will be in office to commence and conclude recruitment of his successor and or the board give any other decision in line with applicable law.
- d) That the purported recruitment of the successor of the 3rd interested party as single-handedly conducted by the Chairman of the 1st interested party be and is hereby nullified.
- e) An order that the respondents to ensure that seamless transition in leadership in public agencies be a norm rather than an exception and that the same should form what is envisaged under the rule of law and safeguarding public interest.
- f) Any other or further remedy that the Honourable Court shall deem fit to grant.
- g) An order the respondents do pay the costs of the petition.

The petition was supported by the affidavit of Stephen Mutoro, the petitioner's Secretary-General. The respondent and the 1st interested party, CAK appointed Marende & Nyaundi to act in the matter. The 2nd interested party, Public Service Commission, appointed Oscar Eredi, Deputy Chief State Counsel, for Attorney General to act. The 1st interested party also appointed Igeria & Ngugi to act in the matter. Professor Githu Muigai, SC was the lead counsel for the respondent, the 1st interested party and the 2nd interested party. The 2nd interested party opposed the petition by filing on 28.08.2019 the grounds of opposition dated 26.08.2019. The 1st interested party also filed on 27.08.2019 the replying affidavit of Ngene Gituku, the Chairman of the Board of CAK. The 3rd interested party Francis Wamukota Wangusi filed his replying affidavit on 15.10.2019.

The petitions were consolidated and directions were given that they be heard and determined together with the application for contempt filed by the petitioner in petition 138 of 2019. The Court has considered the material on record. The facts and circumstances leading to the petitions are as follows:

- a) Article 34(5) of the Constitution of Kenya provides that Parliament shall enact legislation that provides for the establishment of a body which shall - (a) be independent of control by the government, political interests or commercial interests; (b) reflect the interests of all sections of the society; and (c) set media standards and regulate and monitor compliance with those standards. Article 34 provides for the freedom of the media so that the body to be established as per Sub-Article 34(5) is to safeguard and assure the full realisation and enjoyment of the freedom of the media.
- b) It is not in dispute that the Communications Authority of Kenya (CAK) is the independent body anticipated and provided for under Article 34(5) of the Constitution. The Supreme Court determined as much in **Communication Commission of Kenya & 5 Others –Versus- Royal Media Services Limited & 5 Others [2014]eKLR** and as followed by the High Court in **Media Owners Association & Another –Versus- Attorney General & 2 Others [2016]eKLR**.
- c) By Gazette Notice No.6657 dated 18.07.2019, Joe Mucheru, the Cabinet Secretary for Information, Communication and Technology appointed Mahamoud Mohamed Noor; Paul Muraguri Mureithi; Jackson Kiptrotich Kemboi; and Laura Chite to be members of the Board of the CAK for a period of 3 years with effect from 18.07.2019. The Gazette Notice stated that the appointments were in exercise of the powers conferred upon the Cabinet Secretary by section 6 (1) (e) of the Kenya Information and Communication Act (KICA). This section replaced section 6B of the KICA which was introduced by section 7 of the Kenya Information and Communications (Amendment) Act, 2013 and which provided detailed procedures for the appointment of the Board by a selection panel. The last proper Board of the CAK and whose some members' tenure lapsed sometimes in April 2019 was appointed through that competitive recruitment process. Thus the introduction of the prevailing section 6(1) (e) is subject of challenge in **Okiya Omtatah Okoiti and 4 Others –Versus- The Hon. Attorney General and 10 Others High Court Petition No. 163 of 2019** and in which the Court delivered a ruling on 12.07.2019 declining to grant an interim order suspending the implementation of the amendments made by the Statute Law (Miscellaneous Amendments) Act 2018 to section 6(1) (a) & (e) and section 6B of the KICA, 1998 (No. 2 of 1998). That petition is pending determination before a bench of three Judges of the High Court.
- d) Section 6(1) (e) of the KICA provides that in appointing members of the Board under subsection (1) (c), the Cabinet Secretary shall ensure – (a) that the appointees to the Board reflect the interests of all sections of society; (b) equal opportunities for persons with disabilities and other marginalised groups; and (c) that not more than two-thirds of the members are of the same gender.
- e) The petitioner's case is that the appointments by the Cabinet Secretary under the prevailing section 6(1) (e) and as done by Gazette Notice No.6657 dated 18.07.2019 does not meet the tests in Articles 10, 27, 73, and 232(1) (g) of the Constitution. Thus the appointments as conveyed in the Gazette Notice should be quashed.
- f) The respondents' case is that the petitioner has not demonstrated that the decision to appoint as per Gazette Notice No.6657 dated 18.07.2019 was unreasonable, irrational or illegal and neither has the petitioner demonstrated that the appointed candidates are lacking in skill, values, competency and qualifications. Further, the orders sought are against public interest and public policy and if granted, will occasion grave hardship to the respondents and affect the constitutionally granted mandate of the respondents.
- g) In the meantime, on 16.08.2019 the Court (Onyango P.J) gave interim orders suspending Gazette Notice No. 6657 of 18.07.2019 and the appointments therein. The Court further gave the order of a temporary injunction prohibiting the respondents and their agents and any person howsoever from acting to give effect to the notice.

h) Francis Wamukota Wangusi served as the Director General of the CAK and his contract of service lapsed on 21.08.2019. Clause 6 of his contract of service stated that the contract would not be renewed because he was serving his second and final term. Further in **Francis W. Wangusi –Versus- Communications Authority of Kenya & Others, ELRC Petition No. 7 of 2018** at Nairobi, by consent of the parties the petition was marked settled with orders, amongst others, that the parties shall abide by the terms of the contract of employment dated 23.06.2015 between the Petitioners and the 1st respondent therein.

i) Thus the contract of service of Francis Wamukota Wangusi as the Director General of the CAK having lapsed on 21.08.2019, by reason of the Court orders in Petition 138 of 2019 herein given on 16.08.2019 there was no proper Board of CAK in place on 21.08.2019. Prior to that order, recruitment of the CAK's Director General had been initiated by the CAK's Board Chairman through publication of a vacancy notice dated 28.05.2019 said to be in line with the provisions of the Human Resource Policy Manual and section 11(3) of the KICA as amended and which provides that the Director General is to be interviewed and recruited by the Board of the Authority through a competitive process. The Board resolution declaring the vacancy in the office of the Director General and initiating the recruitment process by way of the advertisement, if any, has not been exhibited. The applications to the advertisement of the vacancy closed on 18.06.2019 at 5.00pm. On that date, there was no properly constituted CAK's Board.

j) By the letter dated 16.08.2019 from the State Corporations Advisory Committee, an advisory was given to the Chairman of CAK's Board and pursuant to his request and provisions of section 27(2) (c) of the State Corporations Act, Cap. 446. The request for the advisory has not been exhibited. The advisory letter by the Committee stated that the considered parameters included consultations within Government; the core business of CAK under the enabling law; professional qualifications and ethics of the eligible candidates for acting appointment, and required business stability and dynamics. The advisory letter further considered that the Board of CAK was lacked quorum and the advisory was thus, **"All the above parameters having been considered, it is hereby advised that you offer an Acting appointment for the post of Director General to Ms. Mercy Wanjau, the current Director of Legal Services. The appointment should be for a period not exceeding one year or until the post is substantively filled, whichever is the earlier."**

k) The petitioner in petition 155 of 2019 urges that the appointment of the acting Director General and continued recruitment of the substantive Director General as per the advertisement which closed on 18.06.2019 will violate consumers' rights as protected under Article 46 of the Constitution because the CAK will be exposed to render services contrary to the standards of independence envisaged in Article 34 (5) of the Constitution. In particular, there is no legitimate and proper Board of CAK to undertake the acting and substantive appointments. Further, Francis Wamukota Wangusi as the outgoing Director General should be allowed to handover to the proper and legitimate Board once it is properly constituted. Thus the doctrine of necessity favours the recall and continued service of Francis Wamukota Wangusi so that there is a smooth transition at CAK.

l) The respondent's case is that Francis Wamukota Wangusi's term of service lapsed on 21.08.2019 and he cannot be allowed and recalled to come back into office. Further, as per the advisory by the State Corporations Advisory Committee, an acting appointment is appropriate on the basis of the doctrine of necessity.

m) The petitioners urge that the CAK Board with a proper quorum lapsed on 28.04.2019 and the advertisement for the Director General's position was made on 28.05.2019 without a Board resolution but, by the Board Chairman's unilateral decision. The Chairman was not an executive chairman and no Board resolution sanctioned the advertisement and the recruitment, selection and appointment procedure for filling a vacancy in the office of the Director General is already flawed.

The Court has considered the material on record and makes findings on the matters in dispute as follows.

The **1st issue** is whether the Court has jurisdiction to determine the petitions. The respondents urged that the petitions were *res judicata* or *sub judice* in view of the pending **Okiya Omtatah Okoiti and 4 Others –Versus- The Hon. Attorney General and 10 Others High Court Petition No. 163 of 2019**. It was further urged for the respondents that the Court lacked jurisdiction because board members of a board of a state corporation like CAK were not employees. The Court returns that the jurisdictional issues were already determined by the ruling of the Court delivered on 16.08.2019 by Onyango P.J. It is also obvious that the cause of action in the present petitions was new and distinct from the one in **Okiya Omtatah Okoiti and 4 Others –Versus- The Hon. Attorney General and 10 Others High Court Petition No. 163 of 2019**. For avoidance of doubt, this Court has time and again found and held that board members in state corporations are indeed public officers and therefore servants of the people. The Court upholds its opinion in the judgment in **Okiya Omtatah Okoiti –Versus- Attorney General & 2 Others and Francis K. Muthaura & 5 Others [2019]eKLR**, thus, **"The Court has held that public officers are servants of the people and are engaged or employed within a framework of constitutional and statutory provisions as well as lawful policies and practices. The Court finds that the dispute relates to employment of public officers as defined in the Constitution and further relates to applicable constitutional and statutory provisions or lawful policies and practices in that regard and the dispute is clearly within the Court's jurisdiction."** And further, **"The Court finds that the dispute is about employment in the public service. The Court finds that the chairperson and the members of the Board of the KRA (just like the chairpersons and members of other state corporations or boards of other public bodies) are public officers bound by applicable constitutional and statutory provisions and lawful policies and practices that govern public employment. The Court holds that in the constitutional framework under the Constitution of Kenya 2010, the public officers despite their designation or position held in the service, they are all in public or state service and governed by specific applicable constitutional and statutory provisions and lawful policies and practices – so that the variance in positions held or designation does not render any of the public or state officers to escape their being servants of the people, employed by the people, within such applicable constitutional and statutory provisions, and, lawful policies and practices. Thus the provisions of Article 73 as read with Article 80 (c), and, Article 232 apply accordingly. In view of that finding, the dispute in the present petition is about employment within the complex framework of public service or public sector employment. The substantive law applicable to such employment ranging from declaration of vacancy, recruitment and selection procedures, appointment procedure, and termination procedure would be the applicable public service constitutional and statutory provisions and such other lawful policies and practices to the extent that they prescribe minimum or better terms and conditions of service than those envisaged in the Employment Act, 2007."**

Again the Court follows the opinion in its ruling delivered on 12.04.2019 in Okiya Omtatah Okoiti –Versus- The National Executive of the Republic and 6 Others [2019]eKLR, thus,

“The Court has also held that in the public service under the Constitution of Kenya 2010, there are no masters and servants so that in public service in the new Republic, the test of master – servant does not obtain towards establishing existence of employment. In Paul Nyadewo Onyango –Versus- Parliamentary Service Commission and Another [2018]eKLR the Court stated, “In the present case, the Court will not therefore place emphasis on the relationships between individual public or state officers. None was a servant or master of the other. What is paramount, in the opinion of the Court, is that the officers interrelate and work together within the lawful prescription of the standards of a good public service delivery. They have no private treaties binding one officer to the other but only the constitutional, statutory and lawful policies or practices that are applicable to the public service and incorporated in the individual officer’s contract of service.”

The jurisdictional objection is accordingly determined and the Court returns that it enjoys the necessary jurisdiction in that regard.

The **2nd issue** for determination is whether the appointment of the 4 board members by Gazette Notice No.6657 dated 18.07.2019 was lawful and constitutional. There is no dispute that the CAK is a state corporation. Of appointment of members of state corporations, the Court has time and again stated that the constitutional parameters and the general statutory provisions in public service apply. The Court upholds its opinion in the judgment in Okiya Omtatah Okoiti –Versus- Attorney General & 2 Others and Francis K. Muthaura & 5 Others [2019]eKLR thus, **“To answer the 3rd issue for determination, the Court considers that until Parliament enacts specific recruitment and appointment procedure, the provisions of the Public Service Commission Act, 2017 on criteria for appointments and advertisement of vacancies shall apply to normal appointments made under section 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act (Cap.469) – because except for the urgent remedial appointments pursuant to section 7(3) of the State Corporations Act, the Court returns that normal appointments under section 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act (Cap.469) must comply with the criteria for appointment as prescribed in Articles 232, 73, and 10 of the Constitution. The Court further considers that for temporary and remedial appointments by the President, like in the instant case, as made under sections 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act (Cap.469) and pursuant to section 7(3) of the State Corporations Act, they are not unconstitutional for want of competitive recruitment and selection as such appointments are clearly vested in the President’s discretion by the statute and in the specific statutory circumstance.”**

The Court finds accordingly and returns that the appointments by Gazette Notice No.6657 dated 18.07.2019 did not comply with the constitutional procedures and provisions in the Public Service Commission Act, 2017 on advertisement and competitive recruitment procedures such as open interviews and vetting, objective selection criteria based on qualifications, and then the appointment of the most suitable candidates in the circumstances of the case. It was unconstitutional to that extent. It is said for the respondents that the persons appointed had good resume, nice qualifications, represented required diversity, and that 3 more members of the Board will subsequently be appointed to make the 7 members prescribed by statute. It is true that the appointed persons may be suited for the membership on the Board. However, the Court returns that their identification must fit the constitutional and statutory transparent and accountable procedures; and affording all men, women, persons with disability, marginalised groups, communities, and other diversities an equal opportunity.

Thus the Court follows the opinion in the ruling of 26.07.2019 in Chama Cha Mawakili (CCM) –Versus- The Chairperson Independent Electoral and Boundaries Commission and 2 Others [2019]eKLR thus, **“...The Court holds that an objective and predetermined score sheet taking into account the qualifications in section 10(2) of the IEBC Act was crucial and mandatory. Similarly the Court holds that it was mandatory to have an objective and predetermined score sheet for the interview process or other method invoked to recruit and select the most suitable candidate on headings contemplated in Articles 232(1) (g), (h) and (i) and Article 73(2) (a) of the Constitution and section 10(2) of the IEBC Act so as to demonstrate fairness and transparency and other values and principles in Articles 10, 232, and 73 of the Constitution. The score sheet must be completed for the candidates who have the basic prescribed qualifications at the shortlisting stage and then for each candidate progressing to the subsequent steps such as oral or written interviews. The Court holds that the 2nd respondent enjoys the discretion on the weight of scoring under any such headings in the score sheet but must show it was predetermined and objectively applied to all applicants. It is that individual scores are held in confidence to be disclosed to the concerned individual as he or she may request – but the score sheets and the related documentation guiding the process must be available for ascertaining the compliance in the recruitment process. In absence of such documentation of scores upon predetermined and objective criteria, the Court returns that it is difficult to make a finding of a recruitment, selection and appointment process that is consistent with the relevant statutory and constitutional provisions. The Court therefore returns that taking the material on record into account, it cannot be said that the recruitment, selection, and appointment process as challenged is continuing in accordance with the law.”**

The **3rd issue** for determination is whether the appointment of an acting Director General after the lapsing of the term of the former Director General on 21.08.2019 was lawful. It is not in dispute that the appointing authority was the Board. On 21.08.2019, by reason of the Court orders in Petition 138 of 2019 herein and given on 16.08.2019, there was no proper Board of CAK in place. Thus there was no Board to appoint an acting Director General. In such circumstances, the Court finds that there was indeed a unique circumstance. The functions of the State Corporations Advisory Committee are provided under section 27 of the State Corporations Act. In particular the Committee’s functions are advisory and include, under section 27 (c) of the Act thus, **“where necessary, advise on the appointment, removal or transfer of officers and staff of state corporations, the secondment of public officers to state corporations and the terms and conditions of any appointment, removal, transfer or secondment;”** Within that provision, the Court returns that when the advisory is given, then it applies provided the advisory is shown not to contravene statutory or other written law – that is, that the advisory is lawful. Such advisory was given on 16.08.2019, the same day the Court had suspended the operation of Gazette Notice No.6657 dated 18.07.2019. No letter of an acting appointment was exhibited to the Court and therefore the Court cannot make findings on whether there exists a valid acting appointment and whether it may have been made by the lawful appointing authority. The Court further finds that there was no dispute that it was the Board which is vested with the power to appoint the Director General and therefore only the Board enjoys statutory power to appoint an acting Director General.

To answer the **4th issue** for determination, the Court returns that following the lapsing of the term of the former Director General on 21.08.2019, he has not handed the office over because the Board was not in place and operational as at that date. The Court has considered

the unique circumstances. The Court considers that the proper duty of the former Director General is to handover the office to the Board once the Board is properly constituted. There was no dispute that the Director General answers or reports and accounts to the Board. It was urged for the petitioners that the Court should allow the gone Director General to resume duty within the doctrine of necessity. However, the Court finds that save for the proper handover to a properly constituted Board, Francis Wamukota Wangusi's contract as Director General having lapsed on 21.08.2019, there is no established basis for his recall except for purposes of proper handover to the Board once it is properly and lawfully constituted. The Court further finds that the State Corporations Act such as in section 7 thereof vests in the President such powers for remedial measures as may be necessary and appropriate. In particular the Director General being the Chief Executive Officer of CAK, the holder of the office is a member of the Board of CAK under section 6(1) (b) of the State Corporations Act. Thus, the Court considers that in the unique situation of absence of a proper Board and a vacancy in the office of the Director General, remedial measures by the President as envisaged in section 7 and specifically subsection 7(3) of the Act is available. The Court further considers that the Cabinet Secretary is already vested with power to appoint a Board in accordance with the Constitution and the relevant statutory provisions. Further the State Corporations Advisory Board has the necessary advisory role under section 27 of the State Corporations Act. The Court considers that it will not write an extension contract of service for Francis Wamukota Wangusi but it is for the respondents within the relevant statutory and constitutional provisions to make such appropriate decisions which if deemed necessary may entail the recall of Francis Wamukota Wangusi or requesting the President to take such remedial measures in the interim. In view of the cited available statutory provisions, the invoking of the doctrine by the petitioner for the recall of Francis Wamukota Wangusi and the respondents to justify any irregular appointment of an acting Director General is found to have been misconceived. There are no established circumstances for taking an otherwise unlawful or irregular action to fill the vacancy in the office of the Director General substantively or in acting capacity whereas there are clear statutory provisions for lawful appointment of the Board and the Director General, on normal or even remedial basis. While making that finding the Court is alert that it must be made clear to all that creation of a crisis through schemes of avoidance, muddling or undermining well designed legal regimes should not be permitted to justify unlawful administrative and other decisions (on account of necessity) to defeat the clear provisions of law about the correct action or omission. For avoidance of doubt, there is nothing unlawful or in breach of his contract of service as Director General, for Francis Wamukota Wangusi to withhold the handing over of the office until such time a proper and lawful Board is in place and an acting or substantive Director General is lawfully appointed to receive the handover.

To answer the 5th **issue** the Court returns that the Public Service Commission Act, 2017 is not the only legislation contemplated in Article 234 (2) (a). The Article refers to legislation generally and therefore it was misconceived for the petitioner in petition 138 of 2019 herein to seek to restrict the provision to the Public Service Commission Act, 2017. Indeed section 260 of the Constitution defines "**legislation**" to include an Act of Parliament, or law made under authority conferred by an Act of Parliament; or a law made by an assembly of a county government, or under authority conferred by such law. Further, Article 234 (5) of the Constitution empowers the Commission to delegate any of its functions and in view of the provisions in Article 234 (2) (a) the Court returns that the Parliament may by legislation Pursuant to the said Article 234 (2) (a) legislate on the permitted matters therein without being chained by the Commission's power to delegate in Article 234(5) – the only test being that the legislation is consistent with and not in contravention of constitutional provisions. The Court returns accordingly.

The **6th issue** for determination is whether the contempt application should be allowed. The Court has found that the term of service of Francis Wamukota Wangusi as Director General lapsed on 21.08.2019. The lapsing was by effluxion of the contractual term and it was automatic. There was no order stopping such effluxion of the contractual term and there has been no order exhibited that the respondents were to recall the said Francis Wamukota Wangusi after his term of service had lapsed. The order of status quo given on 13.08.2019 was clarified by the order given on 27.08.2019 that it applied to stay of the recruitment, selection and appointment of the new Director General. The evidence is that the processes of recruitment, selection and appointment did not proceed and the alleged contempt has not been established. Further the orders of 16.08.2019 suspended Gazette Notice No.6657 dated 18.07.2019 and further issued a temporary injunction prohibiting giving effect to the notice. There was no evidence that the orders of 16.08.2019 had been disobeyed. There was no established justification for the orders as prayed against the cited persons. Thus the application for contempt fails.

The Court has considered the parties' margins of success and returns that the respondents will pay 50% of the petitioners' costs of the proceedings.

In conclusion and in view of the findings in this judgment, judgment is hereby entered for the parties for:

- a) The declaration that Articles 10, 27, 73, and 232(1) (g) of the Constitution require appointments to public office to be transparent, competitive, merit based, and inclusive and to be subjected to public participation, which includes among others, announcing and holding interviews in the open.
- b) The declaration that Articles 1, 2, 3(1), 10, 129, and 153 (4) (a) of the Constitution bind the 1st respondent to exercise his powers under section 6 (1) (e) of the Kenya Information and Communications Act strictly in accordance with the Constitution and relevant statutory provisions.
- c) The declaration that section 6 (1) (e) of the Kenya information and communications Act does not empower the 1st respondent to handpick and appoint persons to the CAK Board, without subjecting them to a fair, open, competitive, merit based and inclusive recruitment process and without involving the 2nd respondent pursuant to relevant provisions of the Public Service Commission Act, 2017.
- d) The declaration that the 1st respondent's appointment (in petition 138 of 2019) of the 1st, 2nd, 3rd, and 4th interested parties was constitutionally invalid and therefore is null and void **ab initio**.
- e) The declaration that the Public Service Commission Act, 2017 is not the only legislation anticipated under Article 234(2) (a) of the Constitution.
- f) The order hereby issued by the Honourable Court quashing Gazette Notice No. 6657 of 18.07.2019 published in Nairobi on 19.07.2019 in the Special Issue of the Kenya Gazette Vol. CXXI – No. 91.

h) That any purported recruitment of the successor of the Francis Wamukota Wangusi as Director General of the Communications Authority of Kenya as single-handedly conducted by the Chairman of the Board of the Authority is unconstitutional and unlawful as is hereby nullified.

i) The respondents to ensure that seamless transition in leadership in public agencies be a norm rather than an exception and that the same should form what is envisaged in the Constitution under the rule of law and safeguarding public interest.

g) The respondents to pay 50% costs of the petition.

Signed, dated and delivered in court at **Nairobi** this **Friday, 15th November, 2019**.

BYRAM ONGAYA

JUDGE