**TITLE**: REPUBLIC V MINISTRY OF INFORMATION & COMMUNICATION AND 5 OTHERS

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

**CASE ID**: MISC. APPLICATION NO. 401 OF 2014

**AUTHORING JUDGE**: G V Odunga J

**DATE OF DECISION**: 29th May 2015

**PLAINTIFF**: REPUBLIC OF KENYA (applicant)

**DEFENDANTS**:

1. THE CABINET SECRETARY
2. MINISTRY OF INFORMATION & COMMUNICATION-1ST RESPONDENT
3. COMMUNICATIONS AUTHORITY OF KENYA- 2ND RESPONDENT
4. THE HON. ATTORNEY GENERAl-3RD RESPONDENT
5. CAROLE KARIUKI- 1ST INTERESTED PARTY
6. WILBERT KIPSANG CHOGE- 2ND INTERESTED PARTY
7. KENNEDY MONCHERE NYAUNDI-3RD INTERESTED PARTY
8. GRACE MWENDWA MUNJURI- 4TH INTERESTED PARTY
9. PROF. LEVI OBONYO- 5TH INTERESTED PARTY
10. HELLEN KINOTI - 6TH INTERESTED PARTY
11. BEATRICE OPEE- 7TH INTERESTED PARTY
12. PETER MUNYWOKI MUTIE- 8TH INTERESTED PARTY
13. EX-PARTE: ADRIAN KAMOTHO NJENGA

**KEYWORDS**: ICT, Information Technology

**JUDGEMENT**:

Introduction

1. By a Notice of Motion dated 24th October, 2014 the *ex parte* applicant herein Adrian Kamotho Njenga seeks the following orders:

1. An order of Certiorari to remove into this honourable court and quash the decision and gazette notices Nos. 2915 and 3586 dated 24th April and 20th May 2014 respectively by the 1st Respondent and the 1st Interested Party publishing the names of the shortlisted candidates for appointments to the 2nd Respondent's board and appointing the 2nd to 7th Interested Parties as members of the Communications Authority of Kenya (CAK) Board

2. An order of Mandamus compelling the 1st Respondent to disclose the full composition of the Selection panel chaired by the 1st Interested Party.

3. Costs of an incidental to the application be provided for.

4. Such further and other reliefs that the Honourable Court may deem just and expedient to grant.

Applicant's Case

2. The application was supported by a verifying affidavit sworn by the applicant on 23rd October, 2014.

3. According to the deponent, he is a thirty three (33) year old Kenyan citizen of sound mind who instituted these proceedings as a law abiding citizen and a *bona fide* and qualified Applicant for the appointment to the board of the 2nd Respondent whose name was unlawfully not published in the 2nd Respondent's website nor in the Kenya Gazette as required by the *Kenya Information and Communications (Amendment) Act 2013* Laws of Kenya (hereinafter referred to as "the Act).

4. That among other awards of excellence, he was the holder a Master of Business Administration Degree specializing in Information Systems from the University of Nairobi and was at the time a Doctor of Philosophy candidate at the same University. He was also a Certified Cyber Security Associate (CCSA) and Certified Public Accountant of Kenya (CPA-K), a seasoned scholar, researcher and consultant with a broad range of publications in top rank journals having presented numerous works in International Conferences and Workshops. Apart from these he was, according to him, a reputed lecturer having taught at several institutions including the Catholic University of Eastern Africa, Kenya Methodist University and the University if Nairobi. As a highly development driven and public spirited individual, he had been at the heart of ICT advocacy in Kenya over several years.

5. At the time of swearing the affidavit, he was the Secretary General of the Information Communication Technology Association of Kenya (ICTAK) an organization devoted towards the maximum realization of Kenya's ICT potential.

6. Vide a gazette notice number 1781 dated 12th March 2014 published on 17th March, 2014 pursuant to Section 6B(1)(a), the 1st Respondent declared vacancies for the positions of members of the Board of the Communications Authority of Kenya and invited applications from suitably qualified persons for the said positions. A subsequent re-declaration of the vacancies was done vide gazette notice number 2343 dated 3rd April 2014, ostensibly due to the failure of the initial declaration to attract the requisite number of applicants.

7. Following the re-declaration of vacancies, the 1st respondent was required to set up a selection panel which under Section 6B 1 (b) of the Act, was to be drawn from:

a. Media Council

b. Kenya Private Sector Alliance

c. Law Society of Kenya

d. Institute of Engineers of Kenya

e. Public Relations Society of Kenya

f. Kenya National Union of Teachers

g. Consumer Federation of Kenya

h. Ministry responsible for matters relating to the media

8. According to the applicant the said selection panel was required under Article 6(B) 3 of the Act, in its first meeting to appoint a chairperson and a vice chairperson who had to be of opposite gender. However, the applicant contended that the membership of the said selection panel was never disclosed by the first respondent and the 1st interested party is the only known member of the said selection panel. To him the 1st respondent was and remains

constitutionally obligated to ensure that any of his actions abide by the national values and principles of good governance in Article 10 of the constitution. In failing to disclose the members of the selection panel, the 1st respondent fell short of the principle of good governance and transparency granted that the panel was to preside over a rigorous process of recruiting the lead agency in the communications sector in Kenya.

9. To the applicant, based on legal advice, he was constitutionally entitled to seek and obtain such information under Article 35 (3) of the constitution as the composition of the selection panel and the decisions that it came up with affect the operations and stewardship of the entire communications sector which comprises the media sector which is extremely influential in the running of the affairs of Kenya as a nation.

10. He contended that the selection panel was required to consider the various applications, shortlist and publish the names of and qualifications of all the Applicants within seven (7) days of the expiry date for receiving the applications which qualifications are set out in Section 6A of the Act and were similarly set out in the advertisement for the vacancies.

11. The applicant deposed that on 15th April 2014, he was fronted/applied, through a nomination by the said ICTAK, for appointment to the board of the Communications Authority of Kenya (CAK) (hereinafter referred to as "the Authority"). To him, this was a strong vote of confidence in him by the said association and he was acutely aware of the qualifications needed and was confident that he fitted the bill.

12. Pursuant to the said advertisement, and as prescribed in Section 6B (4) of the act, he was nominated by ICTAK for the application to serve as a member in the 2nd respondent's board. However, his application which had been forwarded by email was marked undelivered exposing a glaring fault in the selection panel's server or system capacity to possibly handle the email and it went through the second time round. In his view, the technical system lapse of the selection panel email account failed to meet the minimum threshold of guaranteeing the right to fair administrative action as enshrined under Article 47 of the constitution, granted the real and gave possibility that many other applicants were locked out of the process due to this technical fault.

13. The applicant contended that pursuant to Section 6B of the Act, the selection panel was required to publish the entire list of the applicants for the vacancies in the board of the 2nd respondent within seven (7) days of the expiry of the vacancy notice period but it failed to do so and in utter disregard of the mandatory provisions of the Act, acted *ultra vires* and published the said list on 24th April 2014 instead of 22nd April 2014 and failed to include the applicant's name. Based on legal advice, he believed that that the failure to publish the list of shortlisted candidates as well as the list of all the applicants within the statutorily stipulated timelines by the 1st respondent on whose behalf the selection panel was acting, amounted to profound procedural impropriety to warrant the quashing of the subsequent appointments by this honourable court. To him, the appointment of the 2nd respondent's board being the lead agency in the communications sector in Kenya is expected to strictly adhere to its establishing law without exception, lest all its subsequent actions be tainted with illegality.

14. Despite the glaring irregularities in the selection process the 1st respondent proceeded to gazette the 2nd to 8th interested parties as members of the 2nd respondent's board vide

gazette notice number 3586 dated 20th May, 2014. Though the applicant lodged a complaint with the Commission on Administration of Justice (CAJ) seeking its intervention nearly (6) months following the aforesaid selection process, he had not received reprieve either from C.A.J or any of the respondents. Further, despite the express demand by CAJ of the selection panel to give reasons for the applicant's exclusion from the published list of the shortlisted candidates as well as all the applicants for the vacancies, they have in utter impunity failed to do so.

15. The applicant based on legal advice believed that under Article 47(2) of the Constitution of Kenya 2010, where a right or fundamental freedom has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the actions; yet the respondents failed to abide by this constitutional obligation. He was further aggrieved that his constitutional right to equality and freedom from discrimination especially equal benefit of the law as enshrined in Article 27 (1) was violated by the respondents and interested parties when they, without good reason failed to consider his application on the merits and in failing to do so or in the least even to publish his name as an applicant for the said vacancies, the selection panel violated his right to human dignity as enshrined in Article 28 of the Constitution particularly after being nominated by ICTAK, the lead professional body in the communication sector in Kenya. To the applicant, being youthful person, he expected fair treatment pursuant to the provisions of Section 6B (10) of the Act as well as Article 55 (b) of the constitution, but instead, the selection panel disregarded the said provisions. It was therefore the applicant's contention that the totality of the actions of the 1st Respondent in appointing the Interested Parties to the board are *ultra vires* the provisions of the Act, are irrational, unconstitutional; illegal; are tainted with bias and are in flagrant disregard for the rule of law for the above reasons hence the orders sought.

16. In clarifying the source of his grievance the applicant set out what in his view was a chronology of events leading to the appointment as follows:

i. The Kenya information and communications (Amendment) Act, 2013 under which the appointments were made, commenced on 2nd January 2014.

ii. The process leading to the subject appointments was to be triggered by the occurrence of a vacancy in the position of the chairman or a member of the 2nd respondent's board.

iii. The occurrence of a vacancy under the transitional provisions of the act under section 4(1) of the Act was predicated upon either one of two events. First was the expiry of ninety (90) days in office for a member of the board of the former body (after commencement of the act) or secondly the appointment of the members of the authority whichever came first.

iv. The expiry of ninety days post the commencement of the act was on 2nd April 2014.

v. The appointment of the 2nd to 8th interested parties was done vide gazette notice number 3586 dated 20th May, 2014.

vi. The occurrence of the vacancies as per the act was thus 2nd April 2014 seeing that it came earlier than the appointments which were done on 20th May 2014.

vii. Pursuant to Section 6B (1) (a) and (b) the 1st Respondent was required to declare vacancies in the 2nd Respondent's board within fourteen days of 2nd April 2014 – the occurrence of the

vacancies, as well as convene a selection panel for the purpose of selecting suitable candidates for appointment as chairperson or member of the board.

viii. The 1st respondent first declared the vacancies on 17th March, 2014 and subsequently they were re-declared on 3rd April 2014 ostensibly for failure of the 1 declaration to attract the requisite number of candidates.

ix. Pursuant to Section 6B (4) the applications for the vacancies were to be forwarded to selection panel within seven (7) days of the publication of the notice in the Kenya gazette (3rd April, 2014) that would be 10th April 2014.

x. However, the 1st respondent for no stated reason advertised the vacancies in website and in the Newspapers and required applications to be forwarded by the 15th April 2014. This was 5 days post the statutorily set timeline.

xi. Pursuant to Section 6B (6) of the act the selection panel that was to consider the applications, shortlist and publish the names and qualifications of the Applicants and those shortlisted in the gazette and on the official website of the ministry within seven days from the expiry of the deadline of receipt of applications, this computed to 17th April, 2014.

xii. The selection panel, however, published the names of the applicants as well as the shortlisted candidates on the 24th April, 2014 in the Kenya gazette. A copy of the notice to the effect has been exhibited as BIO9 in the 1st Respondent's replying affidavit.

xiii. The applicant's application for the advertised positions as a nominee for information communication technology association of (ICTAK) was forwarded for the first via email at 8.59 am on 15th April 2014, but was not delivered.

xiv. Unrelenting, ICTAK, resent his application for the 2nd time at 12.59 pm on the 15th April, 2014 this time attaching the certificates separately in a bid to beat the server incapacity challenge. No delivery failure was reported this time.

xv. That in all instances when his application was sent, the emails were copied to him and he received both of them immediately and within working hours of 15th April 2014.

xvi. That the email delivery failure that was reported indicated server incapacity on the part of the 1strespondent to be cause.

17. From the said chronology, it was his view that the selection process leading to the appointment of the 2nd to 8th interested parties as members of the 2nd Respondent's board were marred by manifest procedural impropriety, illegality as well as irrationality for non-compliance with the statutory timelines as well as the constitutional provisions relied upon. To him, 1st Respondent in its replying affidavit exhibited emails that were delivered past the working hours and allegedly out of time in a bid to justify the consideration of his application. A close scrutiny of the said emails disclosed that even the initial email by ICTAK forwarding his application at 8.59 am on 15th April 2014, and to which a delivery failure had been reported, was received by the 1strespondent at 8.23pm while the subsequent emails forwarding the application and certificates were received by the 1st Respondent at 8.43 pm and 8.58 pm respectively. The applicant's view was that the only plausible explanation for the delay in delivery of the said emails to the 1strespondent, in his experience and knowledge as an information technology professional was server incapacity following heavy email traffic leading to the "queuing" of incoming emails by the server and eventual late

delivery since all emails forwarding his application were copied to him and he received them immediately and within working hours of 15th April 2014.

18. The applicant contended that the 2nd Respondents reply claiming it was wrongly enjoined in the suit, was without merit so long as it was actively involved and eventually benefited from the appointment process that is being challenged as well as the fact that the remedy sought will directly affect its operations.

19. It was his position that the entire process leading to the appointment of the 2nd to 8th interested parties as members of the 2nd Respondent's board cannot stand the tests of legality, rationality and procedural propriety warranting the granting of the orders sought.

20. It was submitted on behalf of the applicant that the 1st Respondent by failing to observe strict adherence to the statutory timelines in the process of appointing the 2nd to 8th interested parties as members of the 2nd Respondent's Board failed to abide by the rule of law hence the entire recruitment and appointment process was tainted with illegality and irrationality due to the use of a server with insufficient capacity that led to unjustified disregard of the ex parte applicant's application.

21. To the applicant the said action violated his right to dignity and realisation of his potential. It was further submitted that the 1st respondent's appointment process fell short of integrity and violated the principle of accountability under Article 10 of the Constitution.

22. It was submitted that under Article 35(3) of the Constitution, the 1st Respondent was under a duty to publicise the persons nominated by the Selection Panel to the Board in compliance with the principle of accountability and transparency under Article 10 of the Constitution. By unfairly excluding the applicant due to malfunctioning of the 1st respondent's server, it was contended that the recruitment process violated the applicant's entitlement to fair administrative action. Further, despite the applicant through the CAJ seeking reasons from the 1st respondent, no such reasons were furnished.

23. According to the applicant the 1st Respondent failed to adhere to the provisions of section 6B as read with section 41 of the said Amendment Act with respect to adherence to specific timelines. The failure to adhere to the said timelines, it was contended rendered the entire appointment process void *ab initio*.

24. On the issue of the joinder of 2nd Respondent, it was submitted that since it was the beneficiary of the flawed process it stood to be directly affected by the orders sought hence was a proper party to the proceedings.

25. By failing to address the issues raised by the CAJ, it was contended that the applicant was justified in seeking the order of mandamus as sought.

26. To the applicant the issue of holidays falling in between the timelines does not arise since the last day did not fall on the excluded days as contemplated under section 57 of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya.

27. Apart from citing various constitutional provisions, the applicant relied on PLO Lumumba and Louis Franceschi, *The Constitution of Kenya, 2010* and Petition No. 337 of 2013 – Hon. Mr. Justice Joseph Mbalu Mutava vs. The Attorney General and Another.

1st Respondent's Case.

28. On behalf of the 2nd Respondent it filed a replying affidavit sworn by its Secretary of Administration, Brown I Otuya, on 17th November, 2014.

29. According to him, the Ministry pursuant to the provisions of section 66 (2) of the *Kenya Information and Communications Act, 1998* wrote to the organizations named thereunder to nominate a member to constitute the selection panel to conduct interviews for the chairperson and members of the board of the Authority and these organisations forwarded the names of their nominees to the Ministry after which the selection panel nominated Ms Carole Kariuki a nominee of the Kenya Private Sector Alliance as the Chairperson and Mr. Stephen Mutoro a nominee of the Consumers Federation of Kenya as Vice Chairperson.

30. It was deposed that the Ministry declared vacancies for the position of members of the board of the Communications Authority of Kenya in the Kenya Gazette as Gazette Notice No. 1781 of the 17th March 2014 under section 66 (1) (a) of the *Kenya Information and Communications Act, 1998* and invited suitably qualified candidates to apply which advertisement was placed in the Ministry's website instructing suitably qualified candidates on the requirements for the position and how to apply. Pursuant thereto the, applications which were received within the stipulated time and were presented to the selection panel and candidates who had complied with the advertisements and had been shortlisted were advertised on the Ministry website as well as the Kenya Gazette. However, in light of the few applications received and a consideration of the principles enshrined in section 232 of the Constitution, the selection panel directed that a press statement be placed in the newspapers and Ministry website directing applicants to apply for the board member positions which was done.

31. It was therefore the deponent's view that the Ministry duly followed the law in the appointment of the selection panel and that the Ministry website from which all applicants obtained information about the vacancies was exhaustive regarding the requirements for suitable candidates and application procedures. Further, the Ministry website clearly defined the deadline for receiving applications as 5.00pm on the 15th April 2014 which time requirement the applicant did not meet as his application was received past 8.00 pm on the 15th April 2014 and as such was not amongst the considered applicants for the post. He averred that the ex parte applicant received an email delivery failure report for his application at 8.59 am.

32. To the deponent, the *ex parte* Applicant was the architect of his own misfortune as he would have been in a position to check his mail to confirm that his correspondence had been sent and if not resend the application in time instead of doing so after 8.00pm on 15th April 2014, a period of approximately 12 hours. In any event, the website wherefrom all the applicants for the position received information carried a telephone number namely (+254) 4920000/1. It was asserted that the e-mail designated for receiving the applications for the position was in good working order as numerous applications were received from other applicants through the same and in good time hence the claims by the ex parte applicant that article 47 of the Constitution or any part thereof was violated by the Ministry is misguided. He added that the names of applicants who had duly applied for the position as well as shortlisted candidates were published in the Kenya Gazette and Ministry website.

33. His position therefore was that the Ministry did not violate the provisions of section 6B of the Act as alleged by the ex parte applicant at paragraph 17 of the verifying affidavit and

urged the Court to take judicial notice that the Easter holidays were celebrated between 18th April 2014 and 21stApril 2014 and publishing the Gazette Notice described in the paragraph above was within the time stipulated by the law. The reason, according to him, why the Applicant's name did not appear in the Gazette Notice was because his application was not received as advertised. After successful interviews, the members of the Board of the 2nd Respondent were appointed vide a Gazette notice of dated 20th May 2014.

34. It was further deposed that as correspondence from the Commission on Administrative Justice ("CAJ") indicates that it was written on the 19th June 2014, it would have been impossible for the selection panel to review the ex parte applicant's case as their duties in the selection of the members of the board of the 2nd Respondent had already been concluded by the time CAJ wrote the letter annexed to the *ex parte* Applicant's Affidavit. He reiterated that any documents received past the deadline were not considered for the position. To him, at the very least, if the ex parte applicant had made a follow up telephone call, or visited the physical address provided in the advertisements on the Ministry's website, or sent his representative, the officers thereat would have ensured that his case would have been brought to the attention of the selection panel for consideration.

35. It was therefore his position that the application did not meet the basic tenets of a judicial review application as no illegality, irrationality, improper considerations or impropriety of procedure has been demonstrated by the *ex-parte* Applicant and the application should be dismissed.

2nd Respondents' Case

36. In response to the application the 2nd Respondent filed a replying affidavit sworn by Francis Wangusi, its Director General on 9th December, 2014.

37. According to the deponent, the *ex parte* Applicant has failed to place before this honourable court any or any sufficient grounds upon which relief can be granted to it.

38. According to him, the 1st Respondent declared vacancies for the positions of members of the Board of the 2nd Respondent vide Gazette Notice No. 1781 published on 17th March, 2014 and invited applications from qualified candidates. A re-declaration of the vacancies was done vide Gazette Notice No. 2343 dated 3rd April, 2014 and the selection panel was indeed required to consider the various applications shortlist and publish the names and qualifications of all the Applicants within seven days of the expiry date of receiving the applications. The requisite qualifications are set out in Section 6A of the *Kenya Information and Communications (Amendment) Act 2013*, and were similarly set out in the advertisement for the vacancies. To him, the selection, short listing and appointment of members to the 2nd Respondent's Board is entirely a function of the 1st Respondent herein, with respect to which the 2nd Respondent and the 2nd to 8th Interested Parties have no role to play.

39. It was therefore his view based on legal advice that that this application is misconceived and lacks legal and factual foundation, and no claim can lie against to 2nd Respondent as it had no role, statutorily or otherwise in the selection or short listing of candidates for the aforementioned positions. He prayed that this honourable court dismiss this application as against the 2ndRespondent with costs.

40. It was submitted on behalf of the 1st and 2nd Respondents that there was no statutory requirement to disclose the composition of the selection panel in the first instance and secondly, Article 35 of the Constitution gives the State the discretion to publish and publicize the information the State considers important as affecting the nation and thirdly, that it was incumbent upon the applicant to seek the information sought which he never did. In any case, as the composition of the selection panel has been availed in these proceedings, the order of mandamus would not serve any end.

41. According to the respondents apart from mere allegations, the applicant had not demonstrated with particularity specific provisions of the Constitution which were breached and that the only grounds which the Court can consider in these proceedings are the grounds contained the Statement.

42. As the CAJ's letter was not addressed to any of the respondents it was submitted that it cannot be the basis of the orders sought.. In any case the said letter was written after the Selection Panel had concluded its duties of selecting the members of the Board. As the Selection Panel is not a respondent to these proceedings, it was contended that to grant the orders sought herein would breach the principles of natural justice.

43. The Court was urged to decline to issue the orders sought in the exercise of its discretionary jurisdiction.

44. In support of their submissions, the respondents relied on Khobesh Agencies Limited and Others vs. Minister of Foreign and International Relations and Others Nairobi JR No. 262 of 2012 [2013] eKLR, Northern Nomadic Disabled Person's Organisation (Nondo) vs. Governor County Government of Garissa & Another [2013] eKLR, Republic vs. Judicial Service Commission exp Pareno [2004] 1 KLR 203, *Halsbury's Laws of England*, 4th Edn. Vol. II P 805 Para 1508 and R vs. Kenya National Commission on Human Rights exp Uhuru Kenyatta [2010] eKLR.

Determinations

45. I have considered the application, the various affidavits filed in support of and in opposition to the application as well as the submissions filed.

46. Section 6B of the *Kenya Information and Communications (Amendment) Act 2013*, provides:

*(1) Within fourteen days of the occurrence of a vacancy in the office of chairperson or member, the President or the Cabinet Secretary, as the case may be, shall—*

*(a) by notice in the Gazette and on the official website of the Ministry, declare a vacancy in the Board, and invite applications from qualified persons; and*

*(b) convene a selection panel for the purpose of selecting suitable candidates for appointment as the chairperson or member of the Board.*

*(2) The selection panel referred to under subsection (1) shall comprise of persons drawn from the following organisations—*

*(a) Media Council of Kenya;*

*(b) Kenya Private Sector Alliance;*

*(c) Law Society of Kenya;*

*(d) Institute of Engineers of Kenya;*

*(e) Public Relations Society of Kenya;*

*(f) Kenya National Union of Teachers;*

*(g) Consumers Federation of Kenya; and*

*(h) the Ministry responsible for matters relating to media.*

*(3) At their first meeting, the panel shall appoint a chairperson and a vice-chairperson who shall be of opposite gender.*

*(4) An application in respect of a vacancy declared under subsection (1) shall be forwarded to the selection panel within seven days of the publication of the notice, and may be made by—*

*(a) any qualified person; or*

*(b) any person, organisation or group of persons proposing the nomination of any qualified person.*

*(5) The selection panel shall, subject to this section, determine its own procedure and the Cabinet Secretary shall provide it with such facilities and other support as it may require for the discharge of its functions under this section.*

*(6) The selection panel shall consider the applications, shortlist and publish the names and qualifications of all the applicants and those shortlisted by the panel in the Gazette and on the official website of the Ministry, within seven days from the expiry of the deadline of receipt of applications under subsection (4).*

*(7) The selection panel shall interview the shortlisted applicants within fourteen days from the date of publication of the list of shortlisted applicants under subsection (6).*

*(8) Upon carrying out the interviews, the selection panel shall select—*

*(a) three persons qualified to be appointed as chairperson; and*

*(b) two persons, in relation to each vacancy, qualified to be appointed as members of the Board,*

*and shall forward the names to the President or the Cabinet Secretary, as the case may be.*

*(9) The President or the Cabinet Secretary shall, within fourteen days of receipt of the names under subsection (8), appoint the chairperson and the members, respectively.*

*(10) In selecting, shortlisting and appointing the chairperson and members of the Board, the President and the Cabinet Secretary shall—*

*(a) ensure that the appointees to the Board reflect the interests of all sections of society;*

*(b) ensure equal _opportunities for persons with disabilities and other marginalised groups; and*

*(c) ensure that not more than two-thirds of the members are of the same gender.*

*(11) Every appointment made under this section shall be published in the Kenya Gazette.*

47. It is the applicant's case that the membership of the selection panel save for the 1st interested party was never disclosed despite the 1st respondent being constitutionally obligated to ensure its actions complied with Article 10 of the Constitution with respect to good governance and transparency.

48. Article 35 of the Constitution of Kenya provides:

*(1) Every citizen has the right of access to—*

*(a) information held by the State; and*

*(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.*

*(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.*

*(3) The State shall publish and publicise any important information affecting the nation.*

49. This provision is a reflection of Article 19(2) and (3) of the *International Covenant on Civil and Political Rights* which provides:

2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in wring or in print, in the form of art, or through any other media of his choice.*

3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

a. *for respect of the rights or reputations of others;*

b. *for the protection of national security or of public order, or of public health or morals.*

50. Similar provisions appear in Article 19 of the *Universal Declaration of Human Rights* (UDHR) and Article 9 of the *African Charter on Human and People's Rights* (The Banjul Charter).

51. Article 2(5) and (6) of the Constitution provide:

*(5) The general rules of international law shall form part of the law of Kenya.*

*(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.*

52. Article 35(1)(a) of the Constitution does not seem to impose any conditions precedent to the disclosure of information by the State. I therefore agree with the position encapsulated in *ThePublic's Right to Know: Principles on Freedom of Information Legislation – Article 19* at page 2 that the principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances and that public bodies have an obligation to disclose information and every member of the public has corresponding right to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information. Where therefore a public authority seeks to deny access to information, it should bear the onus of justifying the refusal at each stage of the proceedings. I also endorse the definition of public bodies to include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quasi-non-governmental organisations, judicial bodies, and private bodies which carry out public functions.

53. The rationale for right to access information was explained by Majanja, J in Nelson O Kadison vs. The Advocates Complaints & Another NBI HC Petition No. 549 of 2013 as follows:

"The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the Constitution and Article 10 cannot be achieved unless the citizen has access to information."

54. I also wish to defer to the decision of Ngcobo, J in Steffans Conrad Brummer vs. Minister for Social Development & Others Constitutional Court of South Africa Case No. CCT 25/09where the learned Judge expressed himself as follows:

"...section 78(2) has a dual limitation; it limits not only the right to seek judicial redress, but in effect also the right of access to information by imposing a very short period within which a person seeking information must launch litigation. The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency "must be fostered by providing the public with timely, accessible and accurate information."...Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas. As the present case illustrates, Mr Brummer, a journalist, requires information in order to report accurately on the story that he is writing. The role of the media in a democratic society cannot be gainsaid. Its role includes informing the public about how our government is run, and this information may very well have a bearing on elections. The media therefore has a significant influence in a democratic state. This carries with it the responsibility to report accurately. The consequences of inaccurate reporting may be devastating. Access to information is crucial to accurate reporting and thus to imparting accurate information to the public."

55. In Dr. Christopher Ndarathi Murungaru vs. The Standard Limited & Others Nairobi HCCC (Civil Division) No. 513 of 2011 this Court pronounced itself as follows:

"Freedom of expression is one of the fundamental freedoms pertaining to the citizens as a human being. Freedom of the press is a special freedom within the scope of freedom of expression. The freedom of press is considered as the right to investigate and publish freely. It covers not only the right of the press to impart information of general interest or concern but also the right of the public to receive it. Freedom of expression and freedom to impart and disseminate opinions and ideas is a right recognised internationally and is protected not only by all democratic states but by International instruments as well. What constitutes freedom of expression, it is generally accepted, entails the freedom to hold opinions and to seek, receive and impart information and ideas of all kinds, either orally, in writing, in print, in the form of art, or through other chosen media, without interference by public authority and regardless of frontiers. This recognition underpins the important role played by the media in the development of a society. It is difficult to imagine a right more important to a democratic society than freedom of expression. Indeed a democratic society cannot exist without that freedom to express new ideas and put forward opinions about the functioning of public institutions. The vital importance of the concept cannot be over-emphasised. Democracy is based essentially on a free debate and open discussion for that is the only corrective of government action in a democratic set up. If democracy means government of the people by the

people, it is obvious that very citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential. When men govern themselves it is they and no one else who must pass judgement upon unwisdom and unfairness and danger, and that means that unwise ideas must have a hearing as well as wise ones, fair as well as unfair, dangerous as well as safe. These conflicting views must be expressed, not because they are valid, because they are relevant. To be afraid of ideas, any idea, is to be unfit for self-government. Freedom of expression is recognised and protected by many international conventions and declarations as well as national Constitutions. The importance of freedom of expression including freedom of the press to a democratic society cannot be over-emphasised. Freedom of expression enables the public to receive information and ideas, which are essential for them to participate in their governance and protect the values of democratic government, on the basis of informed decisions. It promotes a market place of ideas. It also enables those in government or authority to be brought to public scrutiny and thereby hold them accountable. Democracy is a fundamental constitutional value and principle in this Country. Kenya like many other countries in the world have chosen the path of democratic governance and hence the importance of the freedom of expression as being the cornerstone of every society that is democratically governed. Having chosen the path of democratic governance we have a duty to protect the rights regarding the free flow of information, free debate and open discussion of issues that concern the citizens of this country. In order to exercise these rights there must be an enabling regime for people to freely express their ideas and opinions as long as in enjoying these rights such people do not prejudice the rights and freedoms of others or public interest. As long as in expressing one's opinion even if it is false, the person doing so does not prejudice the rights and freedoms of others there would be no harm done. Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that they are in line with *Rousseau's* version of the Social Contract theory. In brief the theory is to the effect that the pre-social humans agreed to surrender their respective individual freedom of action, in order to secure mutual protection, and that consequently, the *raison d'etre* of the State is to facilitate and enhance the individual's self-fulfilment and advancement, recognising the individual's rights and freedoms as inherent in humanity. Protection of the fundamental human rights therefore is a primary objective of every democratic Constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. Meaningful participation of the governed in their governance, which is the hallmark of democracy, is only assured through optimal exercise of the freedom of expression. This is as true in the new democracies as it is in the old ones. The Preamble to the Constitution, as already stated declares that the people of Kenya aspire for a government based on democracy and in fact the entire Constitution reflects a commitment by the people of Kenya to establish a free and democratic society. The breadth and importance of the right of free speech is inherent in the concept of a democratic and plurist society. Our 2010 Constitution has ushered into this country a new constitutional order whose one of the objectives is to build democracy. No society can build democracy and strong institutions to defend that democracy if there is no free flow of information even if some of that information is false. Democracy by its very nature comes at a price." See also*Obbo and Another vs. Attorney General [2004] 1 EA 265 (Scu).*

56. However, the key words in Article 35(1)(a) is "*held by the State"*. The "State" is defined in Article 260 of the Constitution as "*the collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution*". That the Respondents

are state organs is not in dispute. Accordingly, they are under the obligation to furnish a citizen with information held by them under the said provision.

57. However, before the Court can order that the information be furnished, it is my view that the applicant ought to adduce evidence showing that the information sought by the applicant is in possession of the Respondent. In Nairobi Law Monthly vs. Kenya Electricity Generating Company & Others case (supra), Mumbi, J held that "*in order to enforce this right, a citizen claiming a right to access information must not only show that the information is held by the person from whom it is claimed; the citizen must go further and show that the information sought is required for the exercise or protection of another right*." Although Mumbi, J's comments were directed at Article 35(1)(b), it is my view that the first part of the learner's Judge's pronouncement that the applicant must prove that the information is held by the person from whom it is claimed applies both to the State and to another person.

58. Once the information is proved to be in possession of the Respondent, it is my view that the burden shifts to the Respondent to show why the said information ought not to be disclosed to the applicant. In other words a basis ought to be laid for the State to be directed to furnish the required information and that basis in my view is provided by the Constitution itself that the State is holding the information. As stated in *General Comments on the Covenant*, it is for the State party to demonstrate the legal basis for any restrictions imposed on the freedom of expression and if with regard to a particular State party, the Committee has to consider whether a particular restriction is imposed by law, the State party should provide details of the law and of actions that fall within the scope of the law.

59. I associate myself with the holding of Mumbi, J in Nairobi Law Monthly vs. Kenya Electricity Generating Company & Others case (supra) that "*the reasons for non-disclosure must relate to a legitimate aim; disclosure must be such as would threaten or cause substantial harm to the legitimate aim; and the harm to the legitimate aim must be greater than and override the public interest in disclosure of the information sought. It is recognised that national security, defence, public or individual safety, commercial interests and the integrity of government decision making processes are legitimate aims which may justify non-disclosure of information*."

60. Apart from that it is now trite that before an applicant seeks orders from the Court compelling the Respondent to give him access to certain information, he must show that the said information was requested for. As was held in Charles Omanga & 8 Others vs. Attorney General and Another [2004] eKLR:

"This case concerns Article 35(1). The petitioner argues that this provision is self-propelling and that a person is entitled to apply to the court directly for such information to be given. In my view, this is the wrong approach. Article 35 is part of the Bill of Rights and any person is entitled to enforce these rights under Article 22(1) claiming, *"that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."*[Emphasis mine] How is the right to information threatened unless a person has been requested and has been denied the information? A person moving the court to enforce fundamental rights and freedoms must show that the rights sought to be enforced is threatened or violated and that is why in the case of *Kenya Society for the Mentally Handicapped (KSMH) v Attorney General and Others* Nairobi Petition No. 155A of 2011 (Unreported), the court stated that, *"[43] I am not inclined to grant…the application as the Petitioner has not*

*requested the information from the state or state agency concerned and that request rejected. Coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state or its agency and such request denied. Where the request is denied, the court will interrogate the reasons and evaluate whether the reasons accord with the Constitution. Where the request has been neglected, then the state organ or agency must be given an opportunity to respond and a peremptory order made should the circumstances justify such an order."* In *Andrew Omtatah Okoiti v Attorney General and 2 Others* (Supra), Musinga J., stated that, "*Before an application is made to court to compel the state or another person to disclose any information that is required for the exercise or protection of any right or fundamental freedom, the applicant must first demonstrate that a request for the information required was made to the state or to the other person in possession of the same and the request was disallowed. The court cannot be the first port of call. The petitioner herein did not demonstrate that he requested the JSC to avail to him any information that he considered necessary and the same was not granted. In that regard, prayer 4 of the applicant's application is rather premature."* There may well be circumstances where the Court may be required to make an order in the first instance but I think the Court should not exercise coercive power before the State organ, institution or body is given an opportunity to meet its constitutional obligation to provide the information. The right to information is not an absolute right. Each institution or person is entitled to assert any limitations consistent with Article 24 of the Constitution."

61. In the instant case, there is no evidence that the applicant directly sought for the information. He however contends that he sought for the same through the CAJ. I have perused the CAJ's letter dated 19th June, 2014. Nowhere in the said letter was a request made for disclosure of the names of the selection panel. Instead what was sought was the reason why the applicant's name was not published as required under section 6B of the Act. In my view, the letter by the CAJ cannot be construed to have been a request for information relating to the names of the Selection Panel.

62. From the provisions of section 6B aforecited, it comes out clearly that where a vacancy arises in the Board, within 14 days of that vacancy arising an advertisement is to be made in the Gazette and on the Ministry's official website page declaring the vacancy and inviting applications for the same. Within the same period a selection panel is to be convened for the purpose of selecting suitable candidates for the Chair or Membership of the Board. At the first meeting of the Panel it is expected to elect its chairperson and vice-chairperson who are to be from opposite gender. An application for the vacancy is to be made within 7 days of the publication of the notice. In this instance, the public notice which appeared in the daily newspaper appeared on 10th April, 2014 and the applicants were given till 15th April, 2014 to submit their applications, which was within the said 7 days.

63. Within 7 days of the deadline for submission of the applications, the panel is supposed to consider the applications, shortlist and publish the names and qualifications of all the applicants and those shortlisted by the panel in the Gazette and on the official website of the Ministry. The 1st respondent was therefore expected to consider the applications, shortlist and publish the names and qualifications of all the applicants and those shortlisted by the panel in the Gazette and Official website of the Ministry by latest 22nd April, 2014. The said names were however published in the Gazette dated 28th April, 2014. It was however contended that the Easter holidays fell in between and were celebrated between 18th April,

2014 and 21st April, 2014 hence the publication was within the stipulated time. Section 57(d) of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya provides:

*"where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time."*

64. What I understand by the foregoing provision is that if the period of time prescribed by a legal instrument for doing any act is six days or less, excluded days are to be excluded when calculating the time. In this case, the period stipulated was ***within 7*** days which period clearly fell outside the six days or less. It is not alleged that time was extended assuming that was possible.

65. Thereafter, the panel was expected to interview the shortlisted applicants within fourteen days from the date of publication of the list of shortlisted applicants and forward the names selected to the President or Cabinet Secretary for appointment within 14 days of receipt thereof. Therefore the conduct of the interviews was to be completed by 6th May, 2014 in which the appointment of the Board Members ought to have taken place by latest 20th May, 2014. However, as a result of the non-compliance with the said timelines, the appointments were done by way of Gazette Notice dated 30th May, 2014.

66. In Republic vs. Kenya National Examinations Council *ex parte* Geoffrey Githinji and 9 Others Civil Appeal No. 266 of 1996 it was held:

"the remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment."

67. It was contended that since the Selection Panel is not a party to these proceedings, the orders sought cannot be granted. The applicant however contends that he was unaware of the particulars of the said panel save for the 1st interested party. This contention was not controverted. Order 53 rule 6 of the *Civil Procedure Rules* provides:

*On the hearing of any such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the High Court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with the notice or summons, and shall be liable to costs in the discretion of the court if the order should be made.*

68. The respondents have not alluded to the impediment if any that barred the members of the selection panel from participating in these proceedings more so as the 1st interested party was aware of these proceedings. In any case non-joinder of parties, is never fatal to legal proceedings unless it amounts to breach of the rules of natural justice. In this case, I am not satisfied that that would be the case in light of the fact that the 1st interested party, the Chairperson of the said panel is a party to these proceedings.

69. In my view if the 1st Respondent's decision was outside the timelines set out by the Act, its decision was arrived at without or in excess of jurisdiction and whatever proceedings flowed from that decision would be null and void since a decision made without jurisdiction must of necessity be null and void. This is in line with the celebrated decision in Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172 to the effect that where an act is a nullity it is

trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance thereof must therefore break down once the superstructure upon which it is based is removed; since you cannot put something on nothing and expect it to stay there as it will collapse.

70. A similar position was adopted by Nyamu, J (as he then was) in Republic vs. Kajiado Lands Disputes Tribunal & Others *ex parte* Joyce Wambui & Another Nairobi HCMA. No. 689 of 2001 [2006] 1 EA 318 in which he held that despite the irregularities the Court cannot countenance nullities under any guise since the High Court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role and it has powers to strike out nullities.

71. As was held in Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240,while citing Reg vs. Secretary of State for the Environment Ex Parte NottinghamShire Country Council [1986] AC:

"A power which is abused should be treated as a power which has not been lawfully exercised…Thus the courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise. As held in *ex parte Unilever Plc* (*supra*) the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations. It is no defence for a public body to say that it is in this case rational to change the tariffs so as to enhance public revenue. The change of policy on such an issue must a pass a much higher test than that of rationality from the standpoint of the public body. The unfairness and arbitrariness in the case before me is so clear and patent as to amount to abuse of power which in turn calls upon the courts intervention in judicial review. A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the *ex-parte Preston* where he stated the principle of intervention in these terms: "I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law." The same principle was affirmed by the same Judge in the House of Lords in *Reg vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd [1982] AC 617* that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: "Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers." Abuse of power includes the use of power for a collateral

purpose, as set out in *ex-parte Preston,* reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further find as in the case of *R (Bibi) vs. Newham London Borough Council [2001] EWCA 607, [2002] WLR 237*, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief."

72. It was contended that the failure to consider the applicant's application was as a result of the defect in the system used by the 1st respondent. The applicant speculated that this must have been the reason why his first application was returned undelivered. It is, however upon the ex parte applicant to satisfy the Court that the orders sought are merited and the Court cannot be satisfied where the application is based on speculation and conjecture.

73. This burden and standard was expounded in Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69 where it was held:

"A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law…an order of prohibition cannot also be given without any evidence…"

74. In this case I am not satisfied that the failure of the delivery of the applicant's application was necessarily due to the defect in the 1st respondent's server. It could have been due to a myriad of problems which may or may not have been attributable to the 1st respondent. To determine the real cause, it might be necessary to call for evidence and that is outside the scope of a judicial review court.

75. The Respondent contended that the decision whether or not to grant judicial review orders being discretionary, the Court ought to consider the effect of setting aside the entire process on the communication sector as against the interest of the individual who if properly advised may have recourse in other legal proceedings if his claim is merited. In support of the submissions, the Respondent relied on Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203 at 219; *Halsbury's Law of England* 4th Edn. Vol. II page 805 para 1508 and R vs. Kenya National Commission on Human Rights exp Uhuru Kenyatta [2010] eKLR. It is true that the decision whether or not to grant orders of judicial review is discretionary and the Court may well take into account the circumstances of the case and decline to grant the same even where merited. However, it is my view that the determinant factor in granting judicial review is not the circumstances divorced from the grounds for judicial review. Such circumstances though relevant cannot be the sole basis for denial of an otherwise merited relief. In Stephen S. Pareno vs. Judicial Service Commission of Kenya [2014] eKLR, which was an appeal from Republic vs. Judicial Service Commission ex parte Pareno (supra), the Court of Appeal expressed itself as follows:

"We have on our own, considered the above findings in the light of the facts and principles of law applicable and we find that the appellant was genuinely aggrieved not only by the learned trial Judge's reasoning but also by his digression from the core business he had been invited by the appellant to adjudicate upon which was namely to issue an order of certiorari by way of Judicial review. Instead he digressed into other extraneous issues which according to the appellant were calculated to justify the withholding of a relief which had in fact crystallized in his favour… We however agree with the finding of the learned trial Judge that the relief of judicial review by way of

certiorari is available where breach of rules of natural justice is proven. Having said so, we find it strange that the learned judge withheld this relief from the appellant despite agreeing with the appellant's contentions that regulation 26 of the Judicial Service Commission Regulations had been flouted… The appellant's grievance in the judicial review proceedings was not that reasons had not been given by the respondent for his dismissal, but that a wrong process had been employed to relieve him from his employment service with the respondent. In other words, he alleged excess jurisdiction by a public body which is a criteria for one to seek the relief of judicial review by way of certiorari. What the appellant moved to attack was the process leading to the decision reached and not the merits of the decision reached. He should have therefore been accorded the relief sought."

76. In my view a relief cannot be denied solely on the basis that the decision sought to be quashed has been undertaken and that the quashing thereof would lead to difficulties. Though that is factor to be considered in deciding whether or not to exercise the undoubted discretionary jurisdiction, to hold that in all cases where hardship is likely to result from the grant of otherwise merited reliefs would be to grant to administrative bodies and authorities blank cheques as it were to disobey statutory provisions with impunity and make decisions which are otherwise illegal.

77. As was held in Resley vs. The City Council of Nairobi [2006] 2 EA 311:

"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. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent's statements that the Court's role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed…If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of "chaos" and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law: and it is essential that bureaucracy should be kept in its place."

78. In High Court in Misc. Application No.220 of 2005 in the matter of Republic vs. Evans Gicheru (Hon) & 3 Others exparte Joyce Manyasi it was held that (i) the remedy of judicial review is not concerned with the merits or demerits of the decision in respect of which the application for Judicial review is made, but rather, it is concerned with the decision making process itself, and if that process is flawed, the decision reached is equally flawed and will not be allowed to stand; (ii) that where a regulation is couched in mandatory terms, it demands strict compliance. Non-compliance with the spirit and letter of such a regulation is fatal to any action taken in pursuance thereof.

79. However, having found that the appointment of the 2nd to the 7th interested parties was tainted with illegality in that they were appointed outside the statutory timelines provided under section 6B of the *Kenya Information and Communications (Amendment) Act, 2013,* it

follows that I find merit in the instant application. I decline to entertain extraneous issues in order to deny the applicant an otherwise merited relief. I do not see any likely chaos which will result if the 1st Respondent commences the process of the appointment of the members of the Board afresh in compliance with the law after all, the said appointments are not for life but are term appointments.

Order

80. Accordingly, the order which commends itself to me and which I hereby grant is an order of certiorari removing into this honourable court and quashing the decision and gazette notices Nos. 2915 and 3586 dated 24th April and 20th May 2014 respectively by the 1st Respondent and the 1st Interested Party publishing the names of the shortlisted candidates for appointments to the 2nd Respondent's board and appointing the 2nd to 7th Interested Parties as members of the Communications Authority of Kenya (CAK) Board.

81. The costs of this application are awarded to the ex parte applicant.

Dated at Nairobi this day 29th day of May 2015

*G V ODUNGA*

*JUDGE*

*Delivered in the presence of:*

*Mr Kabathi for the ex parte applicant*

*Cc Patricia*