REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 11 OF 2012

BETWEEN

CONSUMER FEDERATION OF KENYA (COFEK) Suing through its registered officials namely

STEPHEN MUTORO, EPHRAIM KANAKE and HENRY OCHIENG.....PETITIONER

AND

HON. ATTORNEY GENERAL .....1ST RESPONDENT

DEPUTY PRIME MINISTER AND MINISTER FOR FINANCE ..... 2ND RESPONDENT

KENYA REVENUE AUTHORITY..... 3RD RESPONDENT

JUDGMENT

Introduction

1. This matter concerns a challenge to the appointment of the Commissioner General of the Kenya Revenue Authority, the Commissioner for Customs Services and Commissioner for Domestic Taxes-Large Taxpayers Office on the ground that the appointments violate the values contained in **Article 10** and **Article 35** of the Constitution.

2. The petitioner's case is set out in the amended petition dated 22nd February 2012 and the further supporting affidavit sworn by Stephen Muhoro on 22nd March 2012. The original action was commenced by a petition dated 17th January 2012. The petition was accompanied by a notice of motion dated 17th January 2012 seeking conservatory relief.

3. When the petition was filed, appointments had not been made to the offices subject of this litigation. As appointments were made during the proceedings, the petition and application for conservatory orders had to be amended. I was satisfied that the amended pleadings were properly before the court and that no party has been prejudiced by the amendments and it was in the interests of justice that this matter be heard substantively.

4. It is in the same vein, I directed on 20th February 2012 that the notice of motion seeking conservatory orders be heard together with the petition in order to fully determine the matter on its merits.

The Kenya Revenue Authority

5. The Kenya Revenue Authority is a statutory corporation established by the ***Kenya Revenue Authority Act*** **(Chapter 469 of the Laws of Kenya)** (hereinafter "the Authority"). It is the body charged with assessment and collection revenue, administration and enforcement of the laws relating to revenue and for connected purposes.

6. The Authority, as a body corporate, has a board of directors (hereinafter "the board") which exercises governing body of the authority. The Commissioner General is designated as the Chief Executive of the Authority. Under **section 11(1)** of the Act, he or she is ***"appointed by the Minister upon the recommendation of the Board upon such terms as are specified in the instrument of appointment."*** For purposes of the Act, the minister referred to is the Minister for Finance who is the 2nd respondent in these proceedings.

7. Under **section 13** of the Act, the board is empowered to appoint to the service of the Authority such commissioners as may be deemed necessary.

Undisputed facts

8. The facts relating to the process of the recruitment and appointment of the Commissioner-General of Authority and the other commissioners are largely undisputed and are set out in the affidavits of Major (Rtd) Marsden Madoka sworn on 3rd February 2012 and are as follows.

9. The Authority placed advertisements in the local daily newspapers inviting competent persons to apply for the position of the Commissioner General and for the positions of two other commissioners namely, Commissioner of Domestic Taxes-Large Taxpayers Office and Commissioner of Customs Services. The advertisements clearly set out the qualifications and competencies expected from the prospective applicants and set the 15th December 2011 as the latest date for submission of the applications.

10. Apart from the daily newspapers, the adverts were available on the 3rd respondents publicly available website and other websites as shown by the annextures of the petitioner's supporting affidavit.

11. The Authority received applications from fifteen persons for the position of Commissioner General whereupon the board set up a technical committee of seven of its members to review and evaluate the applications. After reviewing the applications, the committee came up with seven suitable candidates whose names were advertised in the daily newspapers from the 20th December 2011 to the 22nd December 2011 as those shortlisted for consideration for that position.

12. The Authority received applications from thirty four persons for the position of Commissioner of Domestic Taxes-Large Taxpayers Office. The board then set up a Technical Committee of seven of its members to review and evaluate the applications and came up with suitable candidates. Subsequently the Authority similarly placed advertisements in the newspapers from the 20th December 2011 to the 22nd December 2011 informing the members of the public the identities of the eight short listed candidates.

13. The Authority received applications from fifty four persons for the position of Commissioner of Customs Services upon which the board set up a technical committee of seven of its members to review and evaluate the applications. The committee identified seven suitable candidates. Subsequently the Authority placed advertisements in the newspapers from the 20th December 2011 to the 22nd December 2011 informing the members of the public of the identities of the eight short listed candidates.

14. Psychometric tests were conducted on all the short listed candidates on 4th January 2012 and thereafter interviews for the short listed applicants for the post of Commissioner General were conducted on Monday, the 16th January 2012 in a closed session while those of the persons short listed applicants for the post of Commissioner for Domestic Taxes-Large Taxpayers Office and Commissioner for Customs were conducted on the 17th and 18th January 2012.

15. Following the completion of the interviewing process, the board acting pursuant to **section 11(1)** of the Act, recommended to the Minister for Finance, the following three candidates for consideration and appointment as Commissioner General:-

(a) Mr John Njiraini, MBS

(b) Mrs Rose Wambui Namu, MBS

(c) Ms Alice A Owuor, OGW

16. The Minister in exercise of his powers and discretion as vested under the Act, appointed Mr John Njiraini as the Commissioner General for the Authority with effect from 4th March 2012.

17. Following the completion of the interviews for the position of Commissioner for Domestic Taxes-Large Taxpayers Office, the board considered the following top three candidates for appointment to the position:-

(a) Mr Pancrasius N Nyaga

(b) Mrs Edith N Kingo'ri

(c) Mr Simon Peter Ole Nkeri

18. The board, in accordance its statutory mandate provided for under **section 13(1)** of the Act, appointed Mr Pancrasius N Nyaga as the Commissioner of Domestic Revenue-Large Taxpayers Office.

19. Following the completion of the interviews for the position of Commissioner for Customs Services, the board considered the following top three candidates for the appointment to the position;

(a) Ms Beatrice Memo

(b) Mr John Kipngetich Cheruiyot

(c) Ms Ruth Wachira

20. In line with its statutory mandate as provided for under **section 13(1)** of the Act, the board appointed Ms Beatrice Memo as the Commissioner for Customs Services.

21. The Minister's appointment of Mr John Njiraini as the Commissioner General was formally gazetted in Gazette Notice Number 663 dated 19th January 2012 and a press release issued by the board confirming the appointment of the Commissioners and the relevant gazette notice.

Petitioner's case

22. The petitioner's case is set out in the amended petition dated 22nd February 2012 and it seeks the following prayers;

(a) A declaration that the 3rd respondent's board failure to allow public participation in recruitment of the Kenya Revenue Authority Commissioner General and other commissioners violates Article 10(2)(a)(c) of the Constitution of Kenya, 2010 which provides for participation of the people in good governance, integrity, transparency and accountability and Article 35 of the Constitution of Kenya, 2010 which provides for the right of the people to access important information affecting the nation was against the letter and spirit of the Constitution.

(b) An injunction be and is hereby issued to prevent the implementation of the respondents' decision of 19th January 2012 appointing Mr John K Njiraini as the Commissioner General with effect from 4th March 2012 and 2 other Commissioners of the 3rd respondent without allowing public participation in the recruitment process as provided under Article 10(2)(a)(c) of the Constitution of Kenya, 2010 which provides for participation of the people in good governance, integrity, transparency and accountability and Article 35 of the Constitution of Kenya, 2010.

(c) An order compelling the 3rd respondent through a neutral agency to forthwith re-start the recruitment process and recruit competitively, transparently, fairly, through public participation and in an open manner interview and choose the best candidate for the position of its Commissioner General and other Commissioners within the spirit and meaning of Chapter 6 on integrity, Article 10(2)(a)(c) of the Constitution of Kenya, 2010 which provides for participation of the people in good governance, integrity, transparency and accountability and Article 35 of the Constitution of Kenya, 2010 which provides for participation of the people in good governance, integrity, transparency and accountability and Article 35 of the Constitution of Kenya, 2010 which provides for the right of the people to access important information affecting the nation.

(d) Any other or further remedy that the Honourable Court shall deem fit to grant.

(e) An order that the respondents do pay the costs of this petition.

23. It is the petitioner's contention that the recruitment process contravened the provisions of **Article 10(2)(a)(c)** of the Constitution of Kenya which provides for participation of the people in good governance, integrity, transparency and accountability.

24. It is further alleged that the recruitment process contravenes **Article 35** of the Constitution which provides for the right of people to access to importance information affecting the nation.

25. The petitioner avers that the position for the Commissioner General of the Authority must instill confidence in the public and therefore the recruitment process must inspire public confidence. The Authority's decision to use closed door interviews is unconstitutional, illegal, unlawful, irrational and capricious and is therefore against the rule of law, principles of good governance and constitutionalism.

26. The petitioner also relies on a circular issued dated 23rd November 2011 issued by the Permanent Secretary and Secretary to the Cabinet and the Head of the Public Service titled, *"Procedure for reappointment of service chief executive officers in state corporations"* (Hereinafter "the circular"). The circular is addressed to Ministers, Assistant Ministers, Permanent Secretaries, the Attorney General and the Controller and Auditor General. The circular outlines the procedure to be followed in regard to re-appointment of chief executives of state corporations. According to the petitioner, the provisions of the circular entitled the Authority to extend the contract of the incumbent Commissioner General for a period of three months to enable a suitable candidate to be recruited competitively and through public participation. In the petitioner's view, the provisions of this circular were breached.

27. The petitioner also contends that board of the Authority ought to have advertised the position of the Commissioner-General through a neutral agency which could be the Public Service Commission. This would allow for transparency and public participation.

28. To support its argument that the process lacked transparency and was devoid of public participation, the petitioner has relied on certain press reports that allege intrigue in the selection of the Commissioner-General and the other commissioners. These reports include the following online articles titled, *"Inside politics of choosing next chief"* in the Standard, *"Anxiety as KRA alters list in race for top job"* in the Daily Nation and *"Namu, Njiraini shortlisted for top KRA job"* in the Star. Moreover, the petitioner contends that the recruitment of the Commissioner-General was shrouded in mystery.

29. Mr Kurauka, who argued the petition on the petitioners' behalf, relied on the written submissions filed in 16th February 2012 which emphasised the values set out on **Article 10** which apply to state and public officers.

30. He submitted that the petitioner was not aware when the interviews were conducted and that the announcement of the appointments was a surprise to the petitioner. On the whole counsel contended that the recruitment did not give sufficient time for public participation. He urged the court to allow the petition.

The 3rd Respondent's case

31. The 3rd respondent opposes the petition on the basis of the replying affidavit of Marsden Madoka and written submissions filed on 9th February 2012 and supplementary submissions filed on 28th February 2012.

32. Mr Gatonye, appearing with Ms Kamande, for the respondent opposed the petition on the ground that it was devoid of merit. Mr Gatonye submitted that he understood that the petitioner challenged the appointment on two grounds; First, there was no public participation and second, they were kept in the dark and were not given any information relating to the recruitment process. Counsel also noted that the petitioners conceded that competence and integrity of the officers so appointed and that the appointment was in strict compliance the ***Kenya Revenue Authority Act***.

33. Mr Gatonye submitted that the appointments were in conformity with the Constitution particularly the values and principles set out in **Article 10**. According to counsel, this court has interpreted **Article 10** as a statement of values that informs the decision making process and not a statement of rights that accrue to a citizen and in this regard the petitioner has not made any attempt to show what public participation was expected and in what way it was breached. The petitioner has not demonstrated a standard to be applied for public participation. Counsel submitted that the issue of public participation is contextual and the process adopted by the Authority provided for public participation to the fullest extent possible.

34. According to the Authority there was a public notification of the vacancies, the vacancies were advertised and shortlisted candidates were also advertised. There is no complaint regarding these advertisements. There was also no complaint by anyone who applied and was not shortlisted. The competences of all the position were open and clear to the public. There was sufficient compliance with all the values of transparency and accountability.

35. Mr Gatonye noted that there was no issue of the constitutionality of the statutory provisions nor was it shown that any part of the Act is unconstitutional. According to counsel, the Constitution and the legislature have formulated a statutory scheme to govern the Authority which has not been challenged. Counsel referred to the case of ***Kizito Mark Ngaywa v Minister of State for Internal Security and Provincial Administration and Another*** **Mombasa Petition No. 4 of 2011 (Unreported)** where the Court observed that the principle of presumption of constitutionality of legislation is imperative in a constitutional state.

36. In regard to the effect of *the Circular* issued by the Head of the Public Service, Mr Gatonye submitted that it is irrelevant as it deals with re-appointment to chief executives who are already in service and whose term has expired. It has nothing to do with the new appointments as was the case herein.

37. The 3rd respondent's contention is that the prayers in the amended petition cannot be granted as this would require the court to descend into the arena of managing a state corporation and re-writing the statutory provisions governing recruitment. Mr Gatonye submitted that the court could not do this and he relied on the decision of ***Jayne Mati and Another v Attorney General and Another*** **Nairobi Petition No. 108 of 2011 (Unreported)** where the court emphasized the separation of powers doctrine inherent in the constitution and noted that the court jurisdiction within this framework is to

state what the law is and to ensure that every authority conforms to the dictates of the constitution. In this case, counsel contended, no basis had been laid for such interference by the court.

38. As regards the petitioner's invocation of **Article 35**, it was submitted that it has not been shown that information was requested by the petitioners or the public in relation to the recruitment and such request denied by the Authority.

39. Finally, Mr Gatonye urged the court to look broadly at the conduct of the entire process and the only conclusion it would come to is that it complied with the standards and dictates for the Constitution. He asserted that the Court cannot substitute itself as the decision maker and in the circumstances the application must be dismissed.

National Values, Principles and Public Service Appointments

40. In the case of ***Community Advocacy and Awareness Trust and Others v Attorney General* Nairobi Petition No 243 of 2011 (Unreported)**, the Court in relation to public appointments stated, ***"[73] 27th August 2010 ushered in a new regime of appointments to public office. Whereas the past was characterised by open corruption, tribalism, nepotism, favouritism, scrapping the barrel and political patronage, the new dispensation requires a break from the past. The Constitution signifies that the end of 'jobs for the boys' era. Article 10 sets out the values that must be infused in every decision making process including that of making appointments."***

41. **Article 10** contains the National values and principles of governance. **Article 10** provides as follows:

10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and (d) sustainable development.

42. These values and principles provide a foundation upon which Kenyans have determined that our democratic state shall be build; they are the intestinal fluid which nourishes the bill of rights and the Constitution. Thus when making appointments to public office, every selecting, appointing and nominating authority must take into account these values and principles.

43. In addition to these values, in relation to public appointment **Article 232** is relevant**. Article 232** provides as follows:

232. (1) The values and principles of public service include—

(a) high standards of professional ethics;

(b) efficient, effective and economic use of resources;

(c) responsive, prompt, effective, impartial and equitable provision of services;

(d) involvement of the people in the process of policy making;

(e) accountability for administrative acts;

(f) transparency and provision to the public of timely, accurate information;

(g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;

(h) representation of Kenya's diverse communities; and

(i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—

(i) men and women;

(ii) the members of all ethnic groups; and

(iii) persons with disabilities.

(2) The values and principles of public service apply to public service in—

(a) all State organs in both levels of government; and

(b) all State corporations.

(3) Parliament shall enact legislation to give full effect to this Article.

44. By reason of **Article 2** of the Constitution these provisions apply with full force to all the activities of the Kenya Revenue Authority and as I stated in ***Samura Engineering Limited & Others v Kenya Revenue Authority*** **Nairobi Petition No. 54 of 2011 (Unreported)** that, ***"the values contained in Article 10 must at all times permeate its functions and activities which it is mandated to carry out by statute."***

45. While I agree with counsel for the 3rd respondent that the values contained in **Article 10** of the Constitution may not be of themselves justiciable, it must be remembered that a Constitution devoid of values and principles is like an empty tin. These values are what give real meaning to the dry letter of the law and provide a vision of the kind of society we would all like to build. They must be given full effect by every person and authority at all times.

46. In the case of ***David Kariuki Muigua v Attorney General and Another*** **Nairobi Petition No. 161 of 2011 (Unreported)**, the court declined to uphold the appointment of the petitioner as chairperson of the Standards Tribunal notwithstanding a concession by the State that indeed the revocation of his appointment was contrary to the statute. In so doing the court stated, ***"There is no evidence that there was a competitive process that would enable public participation in the process and show the transparency and accountability required under the Constitution, thereby giving legitimacy to the appointment of the petitioner. Like his successor, the petitioner was appointed on the basis of a Gazette Notice; the basis of the appointment, the criteria followed in appointing him and the other members of the Tribunal was, from all appearances and regrettably so, more in keeping with the old order that preceded and indeed gave impetus to the clamour for the new Constitution when public officers were appointed at the whim of the Minister or President. To uphold the appointment of the petitioner would be to give a seal of approval to the old order. It is imperative that all public appointments are made in accordance with constitutional values and principles***."

47. These values therefore must be instilled in every public institution at all levels and undermining these values and principles may be a threat to the Constitution itself and may entitle a person to move the court under the provisions of **Article 258** to arrest any action that threatens to undermine the Constitution.

48. In considering the petition, I am obliged to comply with the provisions of **Article 259(1)** which provides that the Constitution shall be interpreted in a manner that promotesits purposes, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and permits development of the law and contributes to good governance.

49. The main complaint by the petitioner is that the process of appointment of the Commissioner General and the other Commissioners was not transparent and was carried out without public participation.

50. Before I proceed to examine whether a case has been made out by the petitioner, it is proper to set out the responsibility of the court when called upon to pronounce on the proprietary public appointments. In the case of ***FIDA-K & Others v Attorney General and Others*** **Nairobi Petition No. 102 of 2011 (Unreported)**, the court observed, in respect of the decision by the Judicial Service Commission to appoint judges of the Supreme Court, that, ***"It is not our mandate to consider the***

merits of their decision but only whether the choice JSC made was extraneous to the purpose for which the discretion was granted and whether due process in that regard was followed in the execution of their mandate."

51. In this case, there is no contention that the provisions of the ***Kenya Revenue Authority Act*** are unconstitutional. The petitioner does not allege that the process established by the statute was breached. The only issue is whether the process undertaken and which I have set out above meet the standards set by the Constitution.

52. The values outlined in **Article 10** of the Constitution are not defined nor are they cast in stone. I would agree with Mr Gatonye, that they are applied in a particular context and the court in examining whether particular values are fulfilled must look at the legislative architecture of the statute and the facts and circumstances of the case bearing in mind that every statute rule, regulation or policy must be read in a manner that is intended to fulfill these values.

53. Public participation and transparency as values are relative to the context of the case. In this respect I would adopt the dictum of the Supreme Court of Appeal of South Africa in the case of ***King and Others v Attorneys Fidelity Fund Board of Control and Another*** **2006(1) SA 474 (SCA)** where the court observed as follows, ***"Public involvement might include public participation through submission of commentary and representations: but that is neither definitive nor exhaustive of its content. The public may become 'involved' in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on Parliament the obligation to facilitate public involvement in its processes, the Constitution sets a base standard, but then leaves Parliament significant leeway in fulfilling it."***

54. In the case of ***Minister of Health and Another v New Clicks (Pty) Limited and Others*** **CCT 59/2004, [2005] ZACC 14,** the Constitutional Court of South Africa per Sachs J (at para. 630) observed that**, *"The forms of facilitating an appropriate degree of participation in law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and have an adequate say. What amount to a reasonable opportunity will depend on the circumstances of each case."***

Appointments under the Kenya Revenue Authority Act

55. Under the ***Kenya Revenue Authority Act,*** the legislature has provided an outline for the appointment of officers of the Authority, leaving it to adopt a means that fits its own circumstances subject to **section 7(1)** of the **Sixth Schedule** of the Constitution which requires that the statute be read to comply with necessary adaptations and modifications to make it comply with the Constitution which includes the national values and principles. In my view and in light of the facts set out in

paragraphs 9 to 21 above, I am satisfied that the process was transparent and fair and meets the object of good governance.

56. In commencing the process of recruitment, the Authority advertised the vacant positions to enable Kenyans who qualify to apply for those positions. The adverts are clear in the requirements and it is not argued by the petitioner that the medium adopted denied a chance for Kenyans to participate by making applications to be considered for those positions.

57. Secondly, the shortlisted candidates were also advertised. This meets the object of public participation and transparency. On one part, the public is entitled to know who has been shortlisted. The public participates by being able to send any reports or objections on any of the persons who have been selected. Those who have not been shortlisted are given an opportunity to make inquiries as to why they have not been shortlisted. The petitioner has not shown that there was any complaint by any of the persons who applied for the position and was not shortlisted or any Kenyan who was aggrieved by the process.

58. Finally even the persons selected are still advertised giving an opportunity to participate in the process. It is by reason of the advertisement of the person so nominated, that Kenyan can also participate in the process by launching a challenge to the process of appointment.

59. I would like to point out that the means to be adopted to carry out the process of appointment is dependent on the legislative scheme. For example, the appointment of judges is governed by a Constitution and the ***Judicial Service Act, Act No. 1 of 2011*** where the **rule 10(5)** of the **First schedule** provides that the interviews of judges shall be done in public. This is in consideration of the fact that judges hold state offices and have security of tenure once appointed.

60. The appointment of Commissioners to the National Gender and Equality Commission under ***the National Gender and Equality Commission Act*** is commenced by applications to an independent selection panel provided for under **section 11** of the Act which is given the mandate to interview, shortlist and nominate candidates for appointment.

61. In respect of certain offices, the principles of public participation, accountability and transparency is further achieved by the requirement that they must be approved by the National Assembly. There is no such requirement for the officers under the ***Kenya Authority Act*** yet it cannot be said that the process does not meet the constitutional values and principles.

62. What is important is that there is flexibility and discretion in achieving the values and principles of the Constitution. The petitioner has argued that the process of adopted by the Authority is unconstitutional, illegal, unlawful, irrational and capricious because it is against the rule of law, principles of good governance and the idea of constitutionalism. This contention was answered in the

case of ***Community Advocacy Awareness Trust and Others v Attorney General (Supra)***.The court stated, "***Mr Ongoya, in his argument, emphasised that the hallmark of Constitutionalism is curbing arbitrariness and limiting discretion. In my view, it is has never been the intention of the Constitution to subject decision making to the "tyranny of tabulated legalism"(per Lord Wilberforce in Minister of Home Affairs (Bermuda) v Fisher (1980) AC 319). There is a margin of discretion conferred by the Constitution and the law upon those who make decisions and the test of rationality ensures that any legislation or official act is confined within the purposes set by the law. It is the insistence that decisions must be rational that limits arbitrariness and not discretion by itself."***

63. Furthermore, I would adopt the dictum of the Court in the case of ***Jayne Mati & Another v Attorney General*** **(Supra)** in respect of the Court's intervention where it stated, ***"[34] The collective effect of Articles 3, 10(1) and 20(4) is that every person has the obligation to respect, uphold and defend the Constitution and that the Constitution binds every state organ, state officer, public officer, person, or authority. In the day-to-day running of the affairs of state, the court will hardly intervene nor be called upon to give guidance of certain aspects of the Constitution. It is neither expected nor required that the Courts will be involved in the minutiae of running government."***

64. I am satisfied that there is no requirement under the ***Kenya Revenue Authority Act*** for the board appoint an independent panel to conduct or shortlist candidates for appointment or that interviews be conducted in public as urged by the petitioners. How the Authority accomplishes its mandate is matter entirely for the board and it has not been demonstrated by the petitioner that the manner in which the Authority acted was in breach of its statute or was inconsistent with the Constitution to enable the court intervene.

65. In the absence of a specific constitutional, legislative or policy standard of what constitutes transparency, public participation, accountability and good governance in matters of public appointments, the actions of the Authority must be tested on the basis of rationality (see the case of ***Community Advocacy Awareness Trust and Others v Attorney General (Supra)***).

66. On examination of the entire process of appointment of the Commissioner General and the other two other Commissioners, I am satisfied that the board adopted a rational procedure intended to fulfill the national values and principles and as such there is no basis for this court's intervention in the circumstances.

Freedom of information

67. The petitioner has invoked the provisions of **Article 35** to impugn the decision making process. **Article 35** states as follows;

35. (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.

68. This courts approach to **Article 35(1)** was considered in the case of ***Kenya Society for the Mentally Handicapped v Attorney General & Others*** **Nairobi Petition No. 155A of 2011 (Unreported)** where the court stated, ***"[43] I am not inclined to grant prayers 8 and 9 of 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. I find that the petitioner did not make the request for information to the respondents hence I dismiss this request."***

69. The petitioners did not request any information regarding the process of appointment of the officers from the Authority. Nor has it been shown that it was denied such information upon such request. There is also no complaint that the information that was published by the Authority at all stages of the recruitment process was inadequate so as to fall short of **Article 35(3)**.

70. One of the objects of the right to information contained in **Article 35** is to promote open and transparent government. It is a specific right that underpins the values of transparency, accountability, good governance and public participation. It is a right that implicitly recognizes that the citizen has a role to play, and indeed a responsibility, in prying open the affairs of state in order to achieve the values of the Constitution. Had the petitioner utilized the right granted to it by the provisions of **Article 35**, it would have been unnecessary to found part its case on hearsay statements from unnamed and unidentified sources contained in media reports.

71. I therefore find no merit on the claim founded on the alleged violation of **Article 35** of the Constitution.

Conclusion

72. It is clear that this petition has not been successful. It must be dismissed and it is hereby dismissed.

73. I am not inclined to award costs. Though the petitioner has not succeeded, its claim was founded on public interest and it is hoped that this decision has clarified aspects of the law in regard to public appointments.

DATED and **DELIVERED** at **NAIROBI** this 29th day of March 2012.

D.S. MAJANJA

JUDGE

Mr Kurauka instructed by Kurauka and Company Advocates for the petitioner.

Mr W. Gatonye with him Ms J.Kamande instructed by Waweru Gatonye and Company Advocates for the 3rd respondent.