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## **Corporate Governance Situation in Kenya: An Appraisal in the lens of the Constitution of Kenya, 2010**

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# Corporate Governance Situation in Kenya: An Appraisal in the lens of the Constitution of Kenya, 2010

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## Abstract

Corporate governance and in this case, good corporate governance, is a key and critical enabler to the development of any nation and its institutions economically, socially and even in the context of environmental development. As such, the growth of any nation in both of these aspects requires good corporate governance. The story of Kenya's corporate governance before the promulgation of the Constitution of Kenya, 2010, has not been anything much to be celebrated about but rather one characterized by corporate governance shortcomings. With the coming into force of the Constitution in 27<sup>th</sup> August 2010, there has clearly been a phenomenal and paradigm shift with notable aspects of good corporate governance in the country and/or its institutions. Buoyed by the progressive and purposeful interpretation of the Constitution and passage of new laws to give effect to the various provisions of the said Constitution, the situation is definitely better than it was before. Kenya has done fairly well in enacting laws towards improved governance of parastatals, especially after enacting the Constitution, 2010. The key purpose and objective of this article is to appraise this paradigm shift and ultimately give a verdict for an improved corporate governance situation in the country. A fair verdict is that there is a paradigm shift and, in this case, towards better corporate governance. Regrettably, little has been done in terms of enforcement.

**Keywords:** *Corporate Governance, Governance, Constitution of Kenya, Paradigm Shift*

## 1.0 Introduction

The etymology of 'governance' comes from the Latin words *gubernare* and *gubernator*, which refers to the steering of a ship and to the steerer or captain of a ship respectively. The word 'governance' comes from the old French word 'governance' and means control and state of being governed. According to the *Oxford English Dictionary*, it also means good order. Over the years, corporate governance has been defined in a variety of ways. The term was used, probably for the

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first time, in 1962 by Richard Eells of Columbia Business School in his book *The Government of Corporations*.<sup>1</sup>

Sir Adrian Cadbury, addressing the Global Corporate Governance Forum of the World Bank in 2000, stated thus: -

*“Corporate governance is concerned with holding the balance between economic and social goals and between individual and communal goals. The corporate governance framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources. The aim is to align as nearly as possible the interests of individuals, corporations and society”.*

Such a perspective sets corporate governance at a high level of abstraction. It includes all of the stakeholders involved with the company, including the contractual stakeholders such as the shareholders, managers, and other employees, suppliers, customers, consumers, bankers, but also other stakeholders outside the company whose interests could be affected by corporate behaviour.

Over the years, it has become clear that parastatals have not operated at expected levels due to weak governance structures as well as other factors.<sup>2</sup> A critical look at these institutions will reveal that it is the lack of good corporate governance that is to blame. Rather than enhance wealth creation and the integrity of our institutions, which is central to the health of our economy, the perennial adverse reports expose abundant disregard for ethical behaviour and best management practices.<sup>3</sup>

The confused application of the State Corporations Act<sup>4</sup>, Companies Act<sup>5</sup> and various circulars and directives from the Office of the President or parent ministries on the public entities often creates conflicting structures and procedures. The Executive routinely overrode existing statutory procedures in appointing the Chief Executive Officers (CEOs) and board members for political expediency. This was witnessed in the case of *Mark Ole Karbolo & 4 Others – V - Acting Minister*

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<sup>1</sup> Eells R, *The Government of Corporations*, Free Press of Glencoe, New York, 1962.

<sup>2</sup> Mwongozo, *The Code of Governance for State Corporations*, *State Corporations Advisory Committee*, Kenya January 2015, preface.

<sup>3</sup> Kerrow B, ‘Poor corporate governance remains our Achilles heel’ Standard Digital, 7 March 2010- <<https://www.standardmedia.co.ke/article/2000005034/poor-corporate-governance-remains-our-achilles-heel>> on 17 April 2020.

<sup>4</sup> Cap 446, Laws of Kenya.

<sup>5</sup> No. 17 of 2015.

*Ministry of Industrialisation, Permanent Secretary Ministry of Industrialisation & East African Portland Cement Company Limited (EAPCCL) & 4 Others.*<sup>6</sup>

The common identified problems of governance are corruption, abuse of office and breach of trust, conflict of interest, greed, rent-seeking, tribalism, nepotism and favoritism, negligence, bad or poor strategy in decision making, procurement breaches and malpractices, operation of unauthorized bank accounts, dishonesty, deceit, insider trading, fraudulent accounting, nondisclosures of material transactions, integrity breaches and challenges, competence, mismanagement, political interference<sup>7</sup> and pressures and asset stripping.

## **2.0 The Enactment of the Constitution of Kenya, 2010**

Several laws have been enacted pursuant to and to give life and effect to the various provisions of the Constitution to mention but a few:- The Kenya Information and Communications (Amendment) Act, 2013; the Public Procurement and Asset Disposal Act, 2015; Public Finance Management Act 2012; Leadership and Integrity Act, 2012; Ethics and Anti-Corruption Commission Act (No. 22 of 2011); Public Appointments (Parliamentary Approvals) Act, 2011; Commission on Administrative Justice Act (No. 23 of 2011); The Fair Administrative Action Act to give effect to Article 47 of the Constitution; Access to Information Act, 2016 to give effect to Article 35 of the Constitution and to confer the Commission on Administrative Justice oversight and enforcement functions and powers.

This article will however limit itself to the Constitution and the following statutes which in the my view are key: Public Appointments (Parliamentary Approval) Act, 2011; The Kenya Information and Communications (Amendment) Act 2013; Leadership and Integrity Act, 2012; the Public Procurement and Asset Disposal Act, 2015; the Public Finance Management Act, 2012 and Access to Information Act, 2016. Similarly, a number of decided cases will be looked into.

The Constitution of Kenya provides an important framework on issues bearing on among others ethics, leadership, integrity and national values and principles of governance for public officers in Kenya. Article 10 binds state organs, state officers, public officers and indeed all persons in the implementation of national values and principles of governance. Chapter Six on Leadership and Integrity provides for responsibilities and guiding principles that inform the conduct of all state officers. To give effect to this, the Leadership and Integrity Act was enacted in 2012.

Article 79 requires the Parliament to enact a legislation to establish an independent body to ensure compliance with and enforcement of Chapter Six of the Constitution. Pursuant to this Article, Parliament enacted the Ethics and Anti-Corruption Commission Act.<sup>8</sup> Being the successor institution to the Kenya Anti-Corruption Commission, the Ethics and Anti-Corruption

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<sup>6</sup>*Mark Ole Karbolo & 4 Others – V - Acting Minister Ministry of Industrialisation, Permanent Secretary Ministry of Industrialisation & East African Portland Cement Company Limited (EAPCCL) & 4 Others* (2011) eKLR.

<sup>7</sup> This would make one skeptical about the will and technical ability of political appointees. This can be mainly attributed to the appointment structures under the State Corporations Act. Appointment under Section 6 and direction and removal under Section 7 is majorly political. Also Section 26(1), (3), (4) and (5) on appointment of State Corporations Advisory Committee members and directions and payments. Appointment under a number of other principal statutes are also political.

<sup>8</sup>(No. 22 of 2011). The Act amended the Anti - Corruption and Economic Crimes Act by repealing the provisions establishing the Kenya Anti - Corruption Commission and its Advisory Board., while retaining all other provisions relating to corruption offences and economic crimes, their investigation and prosecution.

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Commission is mandated to implement the provisions of the Anti-Corruption and Economic Crimes Act.

Article 232 on values and principles of public service sets very high expectations and thresholds in the delivery of public service. It provides for high standards of professional ethics, efficient, effective and economic use of resources, responsive, prompt, effective, impartial and equitable provision of resources, transparency and provision to the public of timely, accurate information, fair competition and merit as the basis of appointment and representation of Kenya's diverse communities.<sup>9</sup> It also provides that the values and principles apply to public service in all state organs and state corporations.<sup>10</sup>

Article 10 lays down the National Values and Principles of Governance binding all State Organs, State Officers, Public Officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law, makes or implements any public policy decisions. The principles include among others: patriotism, the rule of law, participation of the people, good governance, integrity, transparency and accountability. These principles and values if faithfully implemented would no doubt change the manner in which board appointments are made, how parastatals are run, how overlapping legislations are to be dealt with. This Article was the basis of *Petition No.161 of 2011*<sup>11</sup> which dealt with the appointment of the Chairman of the Standards Tribunal by the Cabinet Secretary for Industrialisation. The Court observed as follows:-

*“However, it would be expected that the Minister, in making the appointments to the Tribunal would be guided by the national values and principles set out in Article 10 of the Constitution, in particular participation of the people, equity, good governance, integrity, transparency and accountability. Section 7(1) of Schedule 6 provides that ‘All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.’ Any appointments under the Standards Act should have been done in conformity with the provisions of the Constitution and should have observed the national values and principles. 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 any other members of the tribunal was, from all appearances and regrettably so, more in keeping with the older 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 the 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 the constitutional values and principles”.*<sup>12</sup>

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<sup>9</sup>Article 232(1), *Constitution of Kenya* (2010).

<sup>10</sup>Article 232(2), *Constitution of Kenya* (2010).

<sup>11</sup> *David Kariuki Muigua – V - Attorney General & Another* (2012) eKLR.

<sup>12</sup> *David Kariuki Muigua – V - Attorney General & Another* (2012) eKLR para. 13 and 15.

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A similar decision was reached by Abuodha J in the case of *Dr Anne Kinyanjui – V - Nyayo Tea Zone Development Corporation, Honourable Attorney General, Dr Romano Kiome, Permanent Secretary Ministry of Agriculture*.<sup>13</sup>

There is no doubt that enforcement of Articles 10 and 232 among other provisions of the Constitution has taken shape with increased judicial activism as witnessed in recent cases. The space for this 'activism' and public interest litigation has been created through Article 258 of the Constitution.<sup>14</sup>

Article 47 on the other hand grants the right to fair administrative action. The provisions of this Article have been given effect and bolstered through the enactment of the Right to Fair Administrative Action Act.<sup>15</sup>

Article 73(1)(a) & (b) provides that authority assigned to a state officer is a public trust that is to be exercised in a manner that promotes public confidence in the integrity of the office and vests in the state officer the responsibility to serve the people. Further, Article 73(2) provides that the guiding principles of leadership and integrity shall include:-

- (a) selection on the basis of integrity, personal competence and suitability;
- (b) objectivity and impartiality in decision making, and ensuring that decision making is not influenced by nepotism, favoritism, other improper motives or corrupt practices;
- (c) selfless services based solely on the public interest, demonstrated by-
  - (i) honesty in the execution of public duties;
  - (ii) the declaration of any personal interest that may clash with public duties;

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<sup>13</sup> *Dr. Anne Kinyanjui – V - Nyayo Tea Zone Development Corporation, Honourable Attorney General, Dr Romano Kiome, Permanent Secretary Ministry of Agriculture* (2012) eKLR. In this matter the Plaintiff sought orders to compel the Ministry of Agriculture to approve the renewal of her term as the Chief Executive Officer of the Nyayo Tea Zone for a fourth term of three (3) years as had been recommended by the parastatal's board. The court held that in light of the new Constitutional dispensation such renewal ought to be in line with the values and principles of public service as enshrined in the Constitution. It declined to grant an injunction stopping the recruitment of a new Chief Executive Officer by the parastatal after the Ministry declined the recommendations.

<sup>14</sup> The Article provides that every person has a right to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention. Cases in point have been the suits by Okiya Omtatah challenging the renewal of the term of the former Kenyatta University Vice-Chancellor Professor Olive Mugenda and former Kenya Power Managing Director Ben Chumo. Others are the petition by George Bala against the Rural Electrification Authority Managing Director Ng'ang'a Munyu to have his three (3) year contract terminated in May when he turns sixty (60) years and to proceed on terminal leave six (6) months before then. There was also the successful petition (High Court of Kenya at Nairobi, Constitutional Petition No. 331 of 2016 by the Katiba Institute & African Center for Open Governance (Africog) against The Hon. Attorney General and the Public Service Commission seeking a declaration that appointment of parastatal board members ought to be done in compliance with Articles 10 and 232 of the Constitution and the Public Service (Values & Principles) Act and specifically by the Public Service Commission and arguing that the President and Cabinet Secretaries should play no such role in light of the new constitutional dispensation. Justices J.W. Lesiit, E.C. Mwita and L.M. Njuguna on 4<sup>th</sup> December 2020 held in favour of the Petitioners.

<sup>15</sup> Act No. 17 of 2015.

- (d) accountability for public decisions and actions;
- (e) discipline and commitment in service to the people;

The application of this Article was subject of in the case of *Benson Riitho Mureithi (Suing on his behalf and that of the general public) – V - J.W. Wakhungu (Cabinet Secretary Ministry of Environment, Water and Natural Resources & The Hon. Attorney General)*.<sup>16</sup> In the petition dated 15<sup>th</sup> January 2014, the Petitioner challenged the constitutionality and propriety of the appointment of one Ferdinand Waititu who had just lost the elections and had been appointed as the Chairman of the Athi Water Services Board by the 1<sup>st</sup> Respondent for a term of three (3) years vide Gazette Notice No. 115 dated 10<sup>th</sup> January 2014. The basis of the petition was that the 1<sup>st</sup> Respondent failed to take into consideration the provisions of Article 73 of the Constitution when making the said appointment. It was argued by the Counsel for the Petitioner that since the Water Act 2002 under which the appointment had been done was enacted before the Constitution, and in the absence of repeal of the same by another law after the promulgation of the Constitution<sup>17</sup>, it required to be read, in accordance with Section 7 of the Sixth Schedule to the Constitution, and in this case, in a manner that brings it into conformity with the Constitution. Justice Mumbi Ngugi directed that the 1<sup>st</sup> Respondent, in exercise of the powers vested in her office by virtue of Section 51 of the Water Act, 2002, commence the process of appointment of the Chairman of the Athi Water Services Board in accordance with the provisions of Chapter 6 of the Constitution and in particular Article 73, paying due regard to the personal integrity, character, competence and suitability of the appointee, and ensure that there is in place a mechanism to allow public participation in the process as required under Article 10 of the Constitution. She emphasized that the findings of the Court were not related to nor were they commentary on the character or integrity of the appointee, or his suitability to hold the Chairmanship of the Athi Water Services Board but rather relate to the failure on the 1<sup>st</sup> Respondent to exercise her mandate in accordance with the Constitution, particularly Chapter 6.

Joining the plethora is also the case of *Republic – V - Hon. Attorney General, Minister for Information and Communication, Communication Commission of Kenya and Ex Parte Consumers Federation of Kenya*.<sup>18</sup> In this case, the Court in a compelling account by Mwera J, Warsame and Mwilu J nullified and revoked the appointment which they deemed a violation of the spirit and letter of the Constitution. This decision set the stage for the amendment of the Kenya Information and Communication Act to align it to the provisions of the Constitution through the enactment of the Kenya Information and Communications (Amendment) Act, 2013 as hereunder discussed.

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<sup>16</sup>*Benson Riitho Mureithi (Suing on his behalf and that of the general public) – V- J.W. Wakhungu (Cabinet Secretary Ministry of Environment, Water and Natural Resources & The Attorney General* (Petition No. 19 of 2014) eKLR.

<sup>17</sup> The Water Act, 2002 has since been repealed and replaced with the now prevailing Water Act, 2016 now more aligned to the Constitution, 2010. Reference is made to, among others Sections 14(1)(a); (3), 31, 66, 71, 79 and 115 of the Water Act, 2016.

<sup>18</sup>*Republic – V - Hon. Attorney General, Minister for Information and Communication, Communication Commission of Kenya and Ex Parte Consumers Federation of Kenya* (2012) unreported. Also see the judgment of Korir J, in the case of *Republic – V - Hon Attorney General, Minister for Information and Communication, Communication Commission of Kenya and Ex Parte Consumers Federation of Kenya (COFEK)* (2012) eKLR. The question was whether the Minister exercised untrammelled power when appointing the Director General as he appeared to state.

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## 2.1 The Kenya Information and Communications (Amendment) Act, 2013

This is an Act of Parliament to amend the Kenya Information and Communications Act, 1998. It commenced on 2 January 2014. The Act incorporates a number of provisions from the Constitution. Among other things, it introduced section 5A (2) which provides that in fulfilling its mandate, the Communications Authority of Kenya (CAK) shall be guided by national values and principles of governance in Article 10 and the values and principles of public service in Article 232(1) of the Constitution. The Act also introduces section 5B (1) which provides that the Authority shall, in undertaking its functions under the Act comply with the provisions of Article 34 (1) and (2) of the Constitution. Pursuant to section 6A(1)(d), for a person to qualify for appointment as a chairperson or member of the Board he or she must satisfy the requirements of Chapter Six of the Constitution. Further, section 6B (10) (b) and (c) provide that in selecting, short-listing and appointing the chairperson and members of the Board, the President and the Cabinet Secretary shall ensure equal opportunities for the persons with disabilities and other marginalised groups; and ensure that no more than two thirds of the members are from the same gender. Section 93 provides that access to information and restrictions on disclosure of information held by the Authority shall be implemented pursuant to Article 35 of the Constitution.

The Act stipulates appointments on the basis of relevant qualification and merit, transparency, integrity, financial probity<sup>19</sup> among other principles in line with the Constitution. Section 6D (7) provides that the procedure for the removal of the chairperson or a member under section 6D shall be carried out in accordance with Article 47 of the Constitution on fair administrative action. Section 23 is amended by inserting a new paragraph (e) to have regard to the values and principles of the Constitution. It therefore clearly comes out that the whole essence of this legislation was to mainstream various constitutional principles and values into the Kenya Information and Communication Act, 1998 to align it with the Constitution.

Another relevant legislation attributed to the coming into place of the new Constitution is the *Public Appointments (Parliamentary Approval) Act, 2011*.<sup>20</sup> Section 7 provides that before Parliament approves a nominee for a public position it should consider the procedure for arriving at the nominee, any constitutional or statutory requirements relating to the office in question and the suitability of the nominee for the appointment proposed having regard to whether the nominee's abilities, experience and qualities meet the needs of the body to which the nomination is being made. Article 75 legislates against personal interests in overriding public or official duties.

Article 77(3) provides that a retired State officer who is receiving pension from a public pension fund shall not hold more than two concurrent remunerative positions as a chairperson, director or employee of - (a) a company owned or controlled by the state; or (b) a state organ whereas Article 77(4) provides that a retired state officer shall not receive remuneration other than contemplated under Article 77(3). Chapter 12 on public finance stipulates the applicable public finance principles. These include: openness and accountability, the fact that public money shall be used in a responsible way and that the financial management shall be responsible and fiscal reporting shall be clear.<sup>21</sup> Public Finance Management Act, 2015 was enacted to give effect to this Article. It also provides that when a State Organ or any public entity contracts for goods or services, it shall do

<sup>19</sup>Sections 6A and 6B, *Kenya Information and Communications (Amendment) Act (2013)*.

<sup>20</sup>(Chapter 33 Laws of Kenya).

<sup>21</sup>Article 201, *Constitution of Kenya* (2010).

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so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.<sup>22</sup> The resultant effect of the foregoing was that the Public Procurement and Asset Disposal Act, 2015 was enacted to give effect to this Article.

## **2.2 Public Finance Management Act, 2012 (Chapter 412C) (PFMA)**

The Act provides that it shall be the responsibility of the accounting officer for national entities to ensure that the resources are used in a lawful, authorised, effective, efficient, economical and transparent ways.<sup>23</sup> It further provides that the accounting officer of a public entity shall be responsible for the management of the entity assets and liabilities, and manage those assets in a way to achieve value for money and disposal shall only be done in accordance with an Act of Parliament as envisaged under Article 227 of the Constitution (in this case the Public Procurement and Asset Disposal Act, 2015) and shall ensure that the proceeds are deposited in a bank account held in the name of the public entity.<sup>24</sup> The Act further provides for disciplinary measures against public and accounting officers, preparation of quarterly reports of the national government entity<sup>25</sup> and also provides that a public officer shall not spend public money otherwise than as authorised by the Constitution or an Act of Parliament<sup>26</sup> among other things.

## **2.3 Public Procurement & Asset Disposal Act, 2015 (PPADA)**

The PPADA repealed the Public Procurement and Asset Disposal Act of 2005. The PPADA is an Act of parliament enacted to give effect to Article 227 of the Constitution. The PPADA establishes the Public Procurement Regulatory Authority<sup>27</sup> and provides for its regulatory functions.<sup>28</sup> It also establishes the Public Procurement Administrative Review Board<sup>29</sup> and provides for its functions and powers being reviewing, hearing and determining tender and asset disposal disputes.<sup>30</sup>

The Primary responsibility to ensure compliance with the Act is placed upon the Accounting Officer.<sup>31</sup> In ensuring the compliance above, he or she shall ensure that the procurement is within the budget,<sup>32</sup> constitute all the procurement and asset disposal committees within the Act (i.e. Tender Opening, Tender Evaluation, Contract Implementation Committee for complex projects, Inspection and Acceptance Committee and that proper documentation of procurement proceedings and safe custody of procurement records is done as well as ensuring compliance with Sections 68, among others of the Public Finance Management Act, 2012.

The Act places limitations on contracts with state or public officers and disclosure of interest,<sup>33</sup> outlaws corrupt, coercive, obstructive, collusive or fraudulent practice, conflict of interest.<sup>34</sup> In addressing challenges and mischief whereby alternative procurement methods would be utilised

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<sup>22</sup> Article 227, *Constitution of Kenya* (2010).

<sup>23</sup>Section 68, *Public Finance Management Act* (2012).

<sup>24</sup> Section 72, *Public Finance Management Act* (2012).

<sup>25</sup>Section 74, *Public Finance Management Act* (2012).

<sup>26</sup>Section 196, *Public Finance Management Act* (2012).

<sup>27</sup> Section 8, *Public Procurement and Asset Disposal Act* (2015).

<sup>28</sup> Section 9, *Public Procurement and Asset Disposal Act* (2015).

<sup>29</sup> Section 27, *Public Procurement and Asset Disposal Act* (2015).

<sup>30</sup> Section 28, *Public Procurement and Asset Disposal Act* (2015).

<sup>31</sup>Section 44(1), *Public Procurement and Asset Disposal Act* (2015).

<sup>32</sup>Section 44(2), *Public Procurement and Asset Disposal Act* (2015).

<sup>33</sup>Section 59, *Public Procurement and Asset Disposal Act* (2015).

<sup>34</sup>Section 66, *Public Procurement and Asset Disposal Act* (2015).

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by parastatal chiefs and procurement staff without justification and against procurement principles, to secure individual interests or hand contracts to cronies or companies they have interests in, the Act proceeds further to provide that open tendering shall be the preferred procurement method for goods, works and services.<sup>35</sup>

## 2.4 Access to Information Act, No. 31 of 2016

This is an Act of Parliament that gives effect to the rights of access to information under Article 35 of the Constitution. In year 2011, Nairobi Law Monthly, backed by lawyer Ahmednasir Abdullahi took Nairobi bourse listed Kenya Electricity Generating Company PLC to court citing failure to avail information relating to a disputed tender for drilling of geothermal wells. Even though Justice Mumbi Ngugi ruled that the rights of Nairobi Law Monthly were not breached, she asserted companies have the obligation to make information public upon request. ‘This petition succeeds to the extent that i have found that the 1<sup>st</sup> Respondent (KenGen) has an obligation, on the request of a citizen, to provide access to information under Article 35(1)(a) of the Constitution’ ruled lady Justice Ngugi.<sup>36</sup> The High Court also clarified that the right to information can only be enjoyed by natural persons and not corporate bodies.

The recent petition of *Khelif Khalifa & Wanjiru Gikonyo – V – Permanent Secretary, Ministry of Transport, Permanent Treasury, National Treasury & Planning, the Hon. Attorney-General, Solomon Kitungu, Dr. Julius Muia & Katiba Institute & Commission on Administrative Justice (the SGR Case)*<sup>37</sup> has given a further opportunity for the courts to provide the much needed jurisprudence on the extent to which a public entity is expected to make information available to the public.

The Petitioners filed the case, contesting that the extraordinary expenditure incurred in the construction of the Standard Gauge Railway (the SGR) to the tune of USD 4.5 billion, was undertaken with controversy and opaqueness. Further, they alleged that fundamental information about the project’s financing, tendering process, and construction was not released to the public in violation of (inter alia) articles 10<sup>38</sup>, 35<sup>39</sup> and 201<sup>40</sup> of the Constitution of Kenya.

The SGR was largely financed through a concessional and commercial loan by the China Exim Bank. The Respondents upon receiving the request for information from the Petitioners responded to the letters and explained that the information sought related to contracts between the two governments; that the agreements have non-disclosure clauses; that the information falls under section 6 (1) & (2)<sup>41</sup> of the Access to Information Act (the Act); that the Petitioners did not establish the necessity of the documents; that if granted the orders will endanger national security; that the information is protected under section 3(6) & (7) of the State Secrets Act; and, lastly, that the Petitioners have not exhausted available dispute resolution mechanism under the Access to Information Act.

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<sup>35</sup>Section 91(1), *Public Procurement and Asset Disposal Act* (2015).

<sup>36</sup> *Nairobi Law Monthly Company Limited - V - Kenya Electricity Generating Company & 2 Others* (2013) eKLR.

<sup>37</sup> High Court of Kenya at Mombasa, Constitutional Petition No. E032 of 2021, decided on 13<sup>th</sup> May, 2022.

<sup>38</sup> This article provides for the national values and principles of governance. These include: - rule of law, participation of the people, human rights, good governance, transparency and accountability.

<sup>39</sup> This Article provides that every citizen has the right of access of information held by the state.

<sup>40</sup> This Article provides for the principles of openness and accountability of public finance management and participation of Kenyans in financial matters.

The Court emphatically stated that entrenchment of the right to access information as a fundamental right should, as a constitutional principle, expand, rather than limit the scope of the right. First, parties, who were denied access to information on the basis of the now obsolete provisions of the Official Secrets Act cited by the Respondents on the mere allegation of “state secret dichotomy,” should have access information only subject to the exemptions under the Access to Information Act. Second, the right to access information held by the State is now constitutionally guaranteed. On whether a state entity can rely on non-disclosure provisions in its tenders and contracts to withhold certain information from the public, the Court stated that disclosure will only be declined if releasing that information would cause harm to the commercial or financial interests of the business. Such interests included trade secrets of the business or a third party; financial, commercial, scientific or technical information of the business or a third party which, if disclosed, is likely to cause harm to the commercial or financial interest(s) of the body or third party; or information supplied in confidence by a third party and where disclosure of such information could reasonably be expected to put the business at a disadvantage in contractual or other negotiations, or prejudice the business in commercial competitions. In the current case, the confidentiality of the information did not apply because the tender had already been awarded and tender documents were therefore public documents. The court further held that releasing the records would not prejudice the company, on probability of harm, noting that the tender document was already a public document.

The presiding Judge Justice Mativo, stated that the failure to take a decision, in the context of the Act migrates into a refusal of the request. That the culture of justification permeates the Act and that the mere request for information held by a public body obliges the public officer to produce it or justify withholding it. Public bodies have a constitutional duty to give people access to information so that they can access their rights and that when they subvert a person’s constitutional right by being unresponsive and playing possum their conduct should be deprecated. The upshot is that the learned judge ordered, inter alia, that the failure by the Respondents to provide information sought under Article 35(1)(a) and also to publicize the information in accordance with Article 35(3) on the basis of the 1<sup>st</sup> Petitioner’s request is a violation of the right to access to information. The jury is still out in this matter as of the time of publication of this article as the Honourable Attorney General has since filed a notice of appeal against the decision.

**In essence**, the Access to Information Act, advances the constitutional principles of accountability, transparency, public participation and efficiency in service delivery. These are linchpins, crucial levers and drivers of good governance. It opens up entities and inculcates trust in public administration as well as fostering better understanding of decision making by the government.

### **3.0 Conclusion**

Kenya has done fairly well in enacting laws towards improved governance of parastatals especially after the enactment of the Constitution, 2010 as aforementioned in this article. A fair verdict is that there is a paradigm shift and, in this case, towards better corporate governance. Regrettably, little has been done in terms of enforcement. What we have witnessed is lack of political will to enforce laws and practices that ensure accountability and compliance. The theme is that the constitutionally

introduced reforms will need to be backed with political and government will,<sup>42</sup> the laws before and after the passage of the Constitution will need to be re-enacted, and in the intervening period, interpreted and applied in a way to give live to the constitutional principles and values.<sup>43</sup> So far efforts have been made towards this.<sup>44</sup>

Above all, executive commitment to embrace good corporate governance in the public service is imperative. Political interference in board appointments and activities of regulatory bodies would make one skeptical about the will and technical ability of political appointees.<sup>45</sup> Concerted efforts and mutual support between and from the offices of the Director of Public Prosecutions, Criminal Investigations Department, Attorney-General, Ethics and Anti-Corruption Commission, Financial Reporting Center, the Police, Commission on Administrative Justice, Office of the Auditor General, Asset Recovery Agency and importantly professional body organisations like the Institute of Certified Public Accountants of Kenya (ICPAK), Institute of Certified Secretaries of Kenya (ICPSK), The Law Society of Kenya (LSK) and whose members are involved in corporate governance are crucial in this. Increased shareholder engagements and awareness on corporate governance, shareholder and citizen activism and judicial support should come in handy.

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<sup>42</sup>One of President Uhuru Kenyatta's first policy initiatives was to appoint a task force on parastatal reforms. The task force was appointed in July 2013. It submitted its report three (3) months later in October. Not so long after, the President announced a long list of appointments to boards of parastatals — his second controversial list in as many months. The big gripe with the list is the recycling of old politicians and cronyism. The list includes appointments to boards for all the existing parastatals including those that were to be merged. Economic pundits have seen this as a death knell for the parastatal reform initiative.

<sup>43</sup>A step towards this has already been made in the case of *Timothy Njoya & 17 Others – V - Attorney General & 4 Others (2013) eKLR*. It was held that the National Assembly Remuneration Act will continue to be in force with regard to the remuneration of the members of the National Assembly but since the Act was enacted before the promulgation of the current Constitution, the Act must however and by virtue of section 7 of the Sixth Schedule be brought into conformity with the Constitution. As a result, any legislation made by parliament or agreement that is made in violation of the Constitution is void.

<sup>44</sup>A case in point was the enactment of the Kenya Information Communications (Amendment) Act, 2013. Discussed previously in this article.

<sup>45</sup>Regrettably, recent appointments by the President have tended to include people who had lost in the general elections. For example, out of the ten appointments of government owned entities Chairpersons done through a special gazette notice (Vol. CXV - No. 182) dated 27th December 2013, six of the them were allies of the President and the Deputy President who contested and lost in the 2013 general elections. These appointments were done three months after the Taskforce had presented its report to the President who committed to fully implement its recommendations. Since then, other appointments that have been done have followed a similar trend. Further, in May 2015 the President appointed 302 people directors to the Boards of Government Owned Entities some of which the Taskforce had proposed to be merged or dissolved.

## Bibliographies

- Bates C, *Traversing the avalanche, A practical guide to the implementation of effective governance for SME growth*, Sirdar Press, 2014.
- Berle A, and Gardiner M, *The Modern Corporation and Private Property*, Macmillan, New York, 1932.
- Bloomfield S, *The Theory and Practice of Corporate Governance: An Integrated Approach*, Cambridge University Press, 2013. <https://doi.org/10.1017/CBO9780511998003>
- Bourne N, *Bourne on Company Law*, 5th Edition, Routledge, 2010. <https://doi.org/10.4324/9780203849927>
- Committee on the Financial Aspects of Corporate Governance, *Report of the Committee on the Financial Aspects of Corporate Governance*, Gee, London, 1992.
- Drucker PF, *The Practice of Management*, Harper & Row, New York, 1954.
- Eells R, *The Government of Corporations*, Free Press of Glencoe, New York, 1962.
- Kaen FR, *A blue Print for Corporate Governance: Strategy, Accountability and the Preservation of Shareholder Value*, AMACOM, 2003.
- Kerrow B, 'Poor corporate governance remains our Achilles heel' Standard Digital, 7 March 2010. <https://www.standardmedia.co.ke/article/2000005034/poor-corporate-governance-remains-our-achilles-heel>>.
- Lutz D and Mimbi P, *Shareholder Value & the Common Good*, LawAfrica Publishing Ltd, 2005
- MacAvoy PW and Millestein IM, *The Recurrent Crisis in Corporate Governance*, Stanford Business Books, 2004. <https://doi.org/10.1057/9781403946881>
- Mwaura K, 'Constitutional Restructuring of Corporate Governance in State Owned Enterprises: Dynamism or Distraction?' 1 *University Journal of Mount Kenya Law School* (2012).
- Mwaura K, 'The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatised Enterprises: The Case of Kenya' 31 *Fordham International Law Journal*, (2007).
- Njenga G, *Thriving on Borrowed Time: Reviving Invesco Assurance; Case for Reforming Insurance Industry*, Hope Centre International, Nairobi, 2011.
- Ouko A, 'Appointment of Parastatal Directors and Chief Executive Officers in the New Constitutional Landscape amidst perceived Judicial Activism' 9 *The Law Society of Kenya Journal*, (2013).
- Ouko A, 'The Presidential Taskforce Report on Parastatal Reforms: A case for Review' 12 *The Law Society of Kenya Journal*, (2016).
- Ouko A, 'Management of Parastatals in Kenya: A Critique in Light of the New Constitution' 7 *The Law Society of Kenya Journal* (2011).

<https://doi.org/10.53819/81018102t5073>

## Cases

*Benson Riitho Mureithi (Suing on his behalf and that of the general public) – V - J.W. Wakhungu (Cabinet Secretary Ministry of Environment, Water and Natural Resources & The Attorney General (Petition No. 19 of 2014) eKLR.*

*David Kariuki Muigua – V - Attorney General & Another (2012) eKLR.*

*Dr Anne Kinyanjui – V - Nyayo Tea Zone Development Corporation, Honourable Attorney General, Dr Romano Kiome, Permanent Secretary Ministry of Agriculture (2012) eKLR.*

*Mark Ole Karbolo & 4 Others – V - Acting Minister Ministry of Industrialisation, Permanent Secretary Ministry of Industrialisation, & East African Portland Cement Company Limited (EAPCCL) & 4 Others (2011) eKLR.*

*Nairobi Law Monthly Company Limited – V - Kenya Electricity Generating Company & 2 Others (2013) eKLR.*

*Republic – V - Hon. Attorney General, Minister for Information and Communication, Communication Commission of Kenya and Ex Parte Consumers Federation of Kenya (2012) eKLR.*

*Timothy Njoya & 17 Others – V - Attorney General & 4 Others (2013) eKLR.*

## Legislations

*Access to Information Act (2016).*

*Anti-Corruption and Economic Crimes Act (2003).*

*The Constitution of Kenya, 2010.*

*Ethics and Anti - Corruption Commission Act (No. 22 of 2011).*

*Kenya Information and Communications (Amendment) Act (2013).*

*Mwongozo, The Code of Governance for State Corporations (2015).*

*Public Officers Ethics Act (2003).*

*Public Finance Management Act (2012)*

*Public Procurement & Asset Disposal Act (2015)*

*State Corporations Act (Cap 446)*