



**Republic v Attorney General & 2 others; Kihingo Village (Waridi Gardens) Management Limited (Exparte Applicant) (Judicial Review E169 of 2023) [2024] KEHC 14669 (KLR) (Judicial Review) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 14669 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW E169 OF 2023  
JM CHIGITI, J  
SEPTEMBER 25, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE REGISTRAR OF COMPANIES (BUSINESS REGISTRATION SERVICES) ..... 2<sup>ND</sup> RESPONDENT**

**JAMES NDUNGU GETHENJI ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**KIHINGO VILLAGE (WARIDI GARDENS) MANAGEMENT LIMITED ..... EXPARTE APPLICANT**

**JUDGMENT**

**Background**

1. Through the application dated 20<sup>th</sup> December 2023 the Applicant seeks the following orders;
  1. De do issue that the decision of the 2nd Respondent dated 7<sup>th</sup> March 2023 revoking his earlier decision dated 29<sup>th</sup> January 2021 was unlawful, capricious, unreasonable, procedurally unfair and in breach of the rules of natural justice as no notice of the complaint 13<sup>th</sup> December 2022 was given to the Applicant who was condemned unheard and violated the Applicants fundamental rights to a fair hearing and fair administrative action under Articles 50 and 47 of *the Constitution* and Section 4 of the *Fair Administrative Action Act*.



2. A De do issue that the decision of the 2nd Respondent dated 7<sup>th</sup> March 2023 was an abuse of court process as the matter is res judicata and a collateral attack on:
  - a. The arbitral award dated 28<sup>th</sup> July 2016 Kifaru Investments Ltd & Others v Kihingo Village (Waridi Gardens) Ltd.
  - b. ELC No. 1225 of 2013 Kifaru Investments Ltd & Others v Kihingo Village (Waridi Gardens) Ltd and Kihingo Village (Waridi Gardens) Management Ltd.
  - c. The judgment delivered in HCCC No. E229 of 2019- Kihingo Village (Waridi Gardens) Management One Limited versus William Pike & Another.
  - d. Nairobi Civil Appeal No. E099 of 2021 William Pike & Others v Kihingo Village (Waridi Gardens) Management One Ltd & Others
  - e. Nairobi Civil Appeal No. E069 of 2022 Fredrick Gitahi Gethenji v Director of Criminal Investigations & Others.
  - f. Comm. E188 of 2021 James Ndungu Gethenji v FAPCL & Ano.
3. A De do issue that the 3rd Respondent lodged the complaint dated 13<sup>th</sup> December 2022 without any resolution from the directors or shareholders of Kihingo Village (Waridi Gardens) Management One Limited rendering the complaint a nullity.
4. A De do issue that the 3rd Respondent is a vexatious litigant who should be investigated by the 1st Respondent pursuant to Section 2 of *Vexatious Proceedings Act* for instituting court proceedings and the complaints culminating in the complaint dated 13<sup>th</sup> December 2022 which is a collateral attach on the arbitral award dated 28th July 2016 and in breach of the sub judice and res judicata rules.
5. An order of certiorari be issued to remove to this Court for purposes of quashing the decision of the 2nd Respondent dated 7th March 2023.
6. AN Order Of Prohibition be issued prohibiting the 1st and 2nd Respondents from setting aside the 2nd Respondent's decision contained in the letter dated 29th January 2021 and from entertaining any complaint by the 3rd Respondent, his servants, employees or agents howsoever and in any manner whatsoever from challenging the Special General Meeting Resolution of 13th April 2019 by the shareholders of the Kihingo Village(Waridi Gardens) Management Limited.
7. An order striking out the complaint dated 13th December 2022 for want of authority from the directors/shareholders of Kihingo Village (Waridi Gardens) Management One Limited.
8. An order of mandamus be issued directing the 1st Respondent within 30 days of the court order to formally commence proceedings against the 3rd Respondent pursuant to Section 2 of the *Vexatious Proceedings Act* for habitually and persistently and without any reasonable ground instituting vexatious proceedings and complaints against the Applicant, 95% of its shareholders and its directors.
9. A permanent order of interdict be issued against the 3<sup>rd</sup> Respondent his servants, employees or agents howsoever and in any manner whatsoever from making any complaint or application whatsoever to set aside the shareholders' resolutions dated 13<sup>th</sup> April 2019 other than pursuing his cross appeal in Nairobi Civil Appeal No. E099 of 2021 William Pike & Others v Kihingo Village (Waridi Gardens) Management One Ltd & Others.



10. The court be pleased to award aggravated and exemplary damages against the Respondent jointly and severally for violating the Applicant's fundamental constitutional rights.
  11. Costs of this application on a full indemnity basis to be borne by the Respondents jointly and severally.
2. It is the Applicant's case that the 3<sup>rd</sup> Respondent filed a Replying Affidavit merely raising issues of lack of resolution and if the application was filed within the statutory limitation period. None of the Respondents rebutted the material facts set out in the Verifying Affidavit.
  3. Reliance is placed in the case of *Top Tank Company Limited v Amos Ondiek Wandaye* [2018] eKLR held at paragraph 37 of the judgment that; "where there is credible evidence from the Plaintiff, the failure to adduce any evidence by the defence may well mean that the Plaintiff has attained the standard prescribed in civil proceedings."
  4. It is its case that 3 complaints dated 13<sup>th</sup> April 2019 was lodged by the 3<sup>rd</sup> Respondent with the 2<sup>nd</sup> Respondent. A second complaint dated 19<sup>th</sup> January 2020 was lodged by the firm of Otieno Ogola & Co. Advocates.
  5. It took three years before the 3<sup>rd</sup> Respondent dismissed the first complaint dated 13<sup>th</sup> April, 2019 where it was determined that:
    - a. The SGM of 13<sup>th</sup> April 2019 was called to implement the arbitral award adopted as a decree.
    - b. On 2<sup>nd</sup> November 2019 the high court struck out the suit that had obtained an injunction stopping the implementation of the SGM resolutions of 13<sup>th</sup> April 2019.
    - c. Chacha Mabanga was not qualified as a director and had been unlawfully appointed by James Ndungu Gethenji.
    - d. The issue of class B shares had been resolved in the Arbitral Award and by the shareholders meeting of 13<sup>th</sup> April 2019.
    - e. The SGM of 13<sup>th</sup> April 2019 was held within 90 days of the court order and the registration of the resolutions on 25<sup>th</sup> November 2020 was lawfully done.
  6. The 3<sup>rd</sup> Complaint was filed on 13<sup>th</sup> December 2022 without copying the Applicant or its advocates on record, and raised the identical complaints raised in the past two complaints.
  7. On 13<sup>th</sup> December 2022, the 2<sup>nd</sup> Respondent, on 7<sup>th</sup> March 2023, sat on appeal of its previous decision dated 27<sup>th</sup> January 2021 and revoked the past letter and purported to order the company to revert to its status prior to the meeting of 13<sup>th</sup> April 2019.
  8. It is its case that the Respondents violated the rules of natural justice contrary to Articles 47 and 50 of *the Constitution* by condemning the Applicant unheard and rendering the decision on 7<sup>th</sup> March 2023 without notification to the Applicant contrary to the principle of estoppel and res judicata having dismissed/ rejected the 3<sup>rd</sup> Respondents past identical complaints of 29<sup>th</sup> January 2021 and 13<sup>th</sup> April 2019 and in particular as follows:
    - a. Section 4(2)(a) of the *Fair Administrative Action Act*, entails a person being affected by administrative action be granted an opportunity to be heard and to make presentations in that regard.



- b. Natural justice concerned procedural fairness and it ensured that a fair decision was reached at by an objective decision maker.
  - c. The Applicant was not allowed an adequate opportunity to present its case and it was condemned unheard.
  - d. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were biased when making the decision in the absence of the Applicant and being fully aware of all the various court decisions and the lack of authority by the 3<sup>rd</sup> Respondent by way of a derivative suit to lodge the complaints.
  - e. The administrative decision of 7<sup>th</sup> March 2023 was a collateral attack on the arbitral Award dated 28<sup>th</sup> July 2016, the SGM of 13<sup>th</sup> April 2019, 4 decisions of the high court and one decision of the Court of Appeal. In addition, the issues raised are sub judice and an appeal is pending in the Court of Appeal as demonstrated below.
  - f. The 2<sup>nd</sup> Respondent is estopped from overturning the decision of 29<sup>th</sup> January 2021 and waiting for two years to capriciously condemn the Applicant unheard.
  - g. The 3<sup>rd</sup> Respondent's advocates are guilty of gross misconduct under section 56 of the *Advocates Act* for lodging complaints when they were at all material times aware that they had no written resolution from the company and were privy to the decisions of Justice Majanja and the Court of Appeal.
9. It is further the Applicants case that the administrative decision of 7<sup>th</sup> March 2023 was a collateral attack on the following decisions which are exhibited in the Verifying Affidavit of Gitahi Githinji:
- i. Arbitral Award dated 28<sup>th</sup> July 2016. The Environment and Land Court by the decree dated 6<sup>th</sup> February 2019 in ELC No. 1225 of 2013 Kifaru Investments Ltd & Others v Kihingo Village (Waridi Gardens) Ltd and Kihingo Village (Waridi Gardens) Management Ltd, adopted the Arbitral Award dated 28<sup>th</sup> July 2016.
  - ii. The 3<sup>rd</sup> Respondent's past identical complaints were dismissed by the Registrar of Companies.
  - iii. In HCCC No. E229 of 2019- Kihingo Village (Waridi Gardens) Management One Limited v William Pike & Others, Justice Majanja on 2<sup>nd</sup> November 2020 struck out the Plaintiff's suit and dismissed the counter claim and held:
    - 41. At the heart of this case is the manner in which Class B shares in the Plaintiff were created. Gitahi, as the only other shareholder of the Plaintiff, denied that he was involved in the creation of Class B shares. On this issue, I would only state that the issue of Class B shares, which was an acknowledged fact, has been resolved by the Award."
  - iv. The action of the 3<sup>rd</sup> Respondent was a collateral attack on the pending appeals in Civil Appeal No. E099 of 2021 William Pike & Others v Kihingo Village (Waridi Gardens) Management One Ltd. and Civil Appeal No. E069 of 2022 Fredrick Gethenji v DPP & Others
  - v. The derivative suit seeking to interfere with the management of the Applicant was dismissed with costs in Comm. E188 of 2021 James Ndungu Gethenji v FAPCL & An. The judge observed at paragraph 43 [page 260]:

“My finding is that the present application militates against the doctrine of res judicata. It is clear to this court that the Applicant herein is not willing to let go of



the case that has been determined at various forums starting from Arbitration all the way to the Court of Appeal.” [emphasis mine]

- vi. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were aware of the history of the matter and the critical role of the Applicant in the past complaints where it supplied all requisite documentation leading to the dismissal of the prior complaints.
  - vii. The 2<sup>nd</sup> Respondent was functus officio having dismissed the past complaints it could not unilaterally sit on appeal of its past decisions dismissing the complaints.
  - viii. The 3<sup>rd</sup> Respondent abused due process and the right to fair hearing by proceeding to lodge a complaint without any resolution from the company.
  - ix. The matter on lack of resolution is res judicata as the court had already determined that the 3<sup>rd</sup> Respondent had no authority to institute proceedings without a resolution from the company’s board of directors or the shareholders.
10. Reliance is placed in the case of *Salim Yusuf Mohamed & Another V Nabhan Swaleh Salim & 2 Others* [2012] eKLR the court held that the initiation of proceedings in a Court of justice for the purpose of mounting a collateral attack on a final decision adverse to the intending Plaintiff reached by a Court of competent jurisdiction in previous proceedings in which the Plaintiff had a full opportunity of contesting the matter was, as a matter of public policy, an abuse of the process of the Court. By parity of reasoning the same applies herein where the 3<sup>rd</sup> Respondent commenced the identical complaint before the 2<sup>nd</sup> Respondent which was allowed.
  11. On the issue of Estoppel, according to the Applicant, the 2<sup>nd</sup> Respondent is estopped from overturning the decision of 29<sup>th</sup> January 2021 and waiting for two years to capriciously condemn the Applicant unheard. What is disconcerting is that it conducted the complaint in a surreptitious manner that totally excluded the Applicant.
  12. To advance this, reliance is placed in the case of *Charles Momanyi Mageto v Co-operative Insurance Company of Kenya Limited* [2016] eKLR the court barred the plaintiff from contesting the findings against him in on account of the doctrine of estoppel on record. The court applied the rationale of the doctrine in *Halsbury’s Laws of England* (Vol. 16, 4th edition) at paragraph 1503 which states that:

“Estoppel of record or quasi of record, also known as estoppel per rem judicatam, arises (1) where an issue of fact has been judicially determined in a final manner between parties by a tribunal having jurisdiction, concurrent or exclusive, in the matter, and the same issue comes directly in question in subsequent proceedings between the parties (this is sometimes known as cause of action estoppel); (2) where the first determination was by a court having exclusive jurisdiction, and the same issue comes incidentally in question in subsequent proceedings between the parties (this is sometimes known as issue estoppel); (3) in some cases where an issue of fact affecting the status of a person or thing has been necessarily determined in a final manner as a substantive part of a judgment in rem of a tribunal having jurisdiction to determine that status, and the same issue comes directly in question in subsequent civil or criminal proceedings between any parties whatever”.
  13. No resolution to lodge the complaint by 3<sup>rd</sup> Respondent On another front it is the Applicants case that the 3<sup>rd</sup> Respondent cannot justifiably attack the Applicant’s choice of legal counsel as set out in the Supplementary Affidavit of Gitahi Gethenji dated 24<sup>th</sup> November 2023 for the following reasons:



- a. The Board of Directors of the Applicant on 19<sup>th</sup> November 2020 appointed the firm of Wamae & Allen Advocates to represent the company and “act in any litigation involving the company”. The law firm has been representing the Applicant since 2019 and the 3<sup>rd</sup> Respondent is estopped from challenging the Applicant’s advocates on record.
  - b. The 3<sup>rd</sup> Respondent was removed as a director of the Applicant on 13<sup>th</sup> April 2019 and has never sat on any board meeting since then.
  - c. He has not adduced any evidence to support his baseless allegations in his Replying Affidavit to support any of the allegations raised therein to the effect that no meeting was convened by the company to institute the proceedings.
  - d. He has never produced any resolution by Kihingo Village (Waridi Gardens) Management One Limited to instruct the firm of Otieno Ogola & Co. Advocates to complain to the Registrar of Companies regarding the Class B shares that were removed pursuant to the arbitral award.
  - e. No resolution appointing the firm of Otieno Ogola & Co. Advocates to take up the purported complaint over Class B shares was ever obtained as no shareholders meeting or board of directors meeting was ever conducted.
  - f. The 3<sup>rd</sup> Respondent on his own motion and without any company resolution appointed the firm to lodge the complaint over Class B shares.
  - g. No rebuttal has been made to the fact that the Court of Appeal found that the 3<sup>rd</sup> Respondent herein had not obtained any resolution from Kihingo Village (Waridi Gardens) Management One Limited.
14. The complaint lodged over Class B Shares by the 3<sup>rd</sup> Respondent’s letter dated 13<sup>th</sup> December 2023 was without authority of the Kihingo Village (Waridi Gardens) Management One Limited.
  15. It submits that Justice Majanja in HCCC No. E229 of 2019- Kihingo Village (Waridi Gardens) Management One Limited v William Pike & Others on 2nd November 2020 struck out the Plaintiff’s suit and held:
  16. At the heart of this case is the manner in which Class B shares in the Plaintiff were created. Gitahi, as the only other shareholder of the Plaintiff, denied that he was involved in the creation of Class B shares. On this issue, I would only state that the issue of Class B shares, which was an acknowledged fact, has been resolved by the Award.
  17. On 23<sup>rd</sup> April 2021 the Court of Appeal in Civil Application No. E025 of 2021 Kihingo Village (Waridi Gardens) Management One Ltd v William Pike & Others dismissed the application with costs and noted that James Ndungu Gethenji had not shown any resolution from the company authorising the filing of the application.
  18. Similarly, the 3<sup>rd</sup> Respondent has not adduced any resolution from the company authorising his advocates to lodge the complaint leading to the impugned decision of 7<sup>th</sup> March 2023.
  19. The 3<sup>rd</sup> Respondent orchestrated a complaint over Class B shares, the heart of this dispute, when he instructed the firm of Otieno Ogolla without any resolution of the company. This the classical case of “the pot calling the kettle black.”.
  20. It is jungle law when directors treat companies as their alter egos and run amok to the detriment of other shareholders when they act without any lawful resolution.



21. It is not in dispute that the 3rd Defendant instructed counsel to lodge a cross appeal in Civil Appeal No. E099 of 2021 *William Pike & Others v Kihingo Village (Waridi Gardens) Management Ltd & Others*.
22. Of material importance to point out is that the Cross Appeal seeks to set aside the resolutions held on 13<sup>th</sup> April 2019 which, inter alia, removed the class B shares.<sup>7</sup> Of importance is the question of how the company appointed counsel without a valid resolution.
23. It is its case that it is an abuse of court process for the 3rd Respondent to purport to instruct counsel to lodge the complaint in the absence of any resolution from the company. Of material importance is that no evidence of such resolution has been exhibited.
24. The very issue in the pending appeal regarding the legality of the class B shares is a material issue in both the Memorandum of Appeals and the Cross Appeal. The matter is sub judice and an abuse of court process for the 3rd Respondent to raise the very same complaint before the 2<sup>nd</sup> Respondent.
25. To buttress its case, it relies in the Court of Appeal in the case of *Joel Kenduiywo v District Criminal Investigation Officer Nandi & 4 others* [2019] eKLR held that Section 6 of the *Civil Procedure Act* is meant to prevent abuse of the court of process where parallel proceedings are held before two different courts with concurrent jurisdictions or before the same court at different times so as to obviate a situation where two courts of concurrent jurisdiction arrive at different decisions on the same facts, evidence and cause of action.
26. It believes that it was bad faith to lodge the complaint with the 2nd Respondent when the very same issues are pending determination before the Court of Appeal.
27. The high court in *Samuel Kahiu v Jecinta Akinyi Soso Assistant County Commissioner Iloodokilani Ward/Division & another* [2018] eKLR considered a vexatious suit or action as follows:
  - a. It is a legal action, which is brought regardless of its merits, solely to harass or subdue an adversary. It may take the form of primary frivolous lawsuit or may be repetitive, burdensome and unwarranted filing of meritless motions in a matter which is otherwise a meritorious cause of action”. (Emphasis supplied)
  - b. A vexatious suit is a type of prosecution in an action based on a prior claim. It’s settled that equity may enjoin vexatious litigation. This power of equity exists independently of its power to prevent multiplicity of actions. It’s based on the fact that its inequitable to harass an opponent not for attainment of justice but out of malice
28. In *Republic v Kenya Revenue Authority exparte Paul Makokha Okoiti & 4 others* [2018] eKLR, the court held that a person who repeatedly filed similar suits over the same subject matter risked being referred to the Attorney General to be declared a vexatious litigant for wasting courts time and resources and prejudice and vex the persons who must also expend resources to defend quite frivolous and vexatious proceedings.
29. The Applicant urges court should declare the 3<sup>rd</sup> Respondent as a vexatious litigant and order the Attorney General to commence vexatious litigation proceedings.
30. It is further the Applicant’s case that the Respondents violated the rules of natural justice contrary to Articles 47 and 50 of *the Constitution* by condemning the Applicant unheard and without according it any due process.
31. Reliance is placed in The Supreme Court in the case of *Githiga & 5 others v Kiru Tea Factory Company Ltd* (Petition 13 of 2019) [2023] KESC 41 (KLR) (16 June 2023) (Judgment) held that under Article



- 50(2) of *the Constitution* procedural fairness in the administration of justice involved the fair hearing rule that required a decision maker to inter alia afford a person an opportunity to be heard before making any decision affecting his/her interests.
32. The consequence of breach of the rules of natural justice Nancy Musili v Joyce Mbete Katisi [2018] eKLR is the denial of the right to be heard that renders any decision made null and void ab initio.
33. In the case of Republic v Commission on Administrative Justice & 2 others Ex parte Michael Kamau Mubea [2017] eKLR the importance of an affected party being accorded an opportunity to be heard as follows:
- “112. In my view, reference to hearing the other side must have been with respect to oral representation since I do not see how a decision affecting a person can be made without affording that person an opportunity to present his case either orally or by in writing in light of the provisions of Article 47 and 50 of *the Constitution*. However, the law is clear that where a tribunal decides to hear one party then it must hear all the parties.”
34. On the claim for Damages the Applicant refers to The Verifying Affidavit which sets out the history of persistent interference by the 3<sup>rd</sup> Respondent through his vexatious suits and complaints. In addition, the blatant disregard of the rules of natural justice by the 2<sup>nd</sup> Respondent who condemned the Applicant unheard, sat on appeal of its earlier decision and acted sub judice should be punished by the award of damages.
35. In Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another [2018] eKLR awarded exemplary damages of Kshs. 2 million. In this case, the court frowned upon violation of the law and abuse of power reposed on public officers who illegally cancelled the 1st petitioner’s registration thus closing its operations in total disregard of *the Constitution* and the law, a conduct that was contemptuous to a decision of the Court.
36. The Applicant argues that it has incurred colossal costs in defending itself against all vexatious suits filed by the 3<sup>rd</sup> Respondent, spent years in defending itself before the 2<sup>nd</sup> Respondent, engaged in various suits in the high court and Court of Appeal and the court should penalise the Respondents jointly and severally and award damages of Kshs. 5 million.
37. In its supplementary submissions, the Applicant responds to some of the preliminary issue raised in the 3<sup>rd</sup> Respondent’s submissions dated 11<sup>th</sup> April 2024.
38. In the Supplementary Affidavit dated 24<sup>th</sup> November 2023 that provided evidence authorising the filing of the suit as follows:
- a. The Board of Directors of the Applicant on 19<sup>th</sup> November 2020 appointed the firm of Wamae & Allen Advocates to represent the company and “act in any litigation involving the company”. That resolution has never been set aside and stands to date. A copy of the resolution is exhibited at pages 5 to 9 of the Supplementary Affidavit.
  - b. At all material times, the firm of Wamae & Allen Advocates have been representing the company as set out in the various proceedings set out in the Verifying Affidavit in support of the Notice of Motion dated 2<sup>nd</sup> November 2023.
  - c. The firm represented the Applicant in the HCCC Comm. E188 of 2021 Hon. James Ndungu v FAPCL, Ltd, Kihingo Village (Waridi Gardens) Ltd [see paragraphs 24 to 26 of the Verifying Affidavit]. No objection was raised in that suit on the company’s representation by the firm of Wamae & Allen Advocates.



- d. The firm of Wamae and Allen Advocates has been representing the shareholders and the Applicant in litigation since 2019 as set out in the various proceedings set out in the Verifying Affidavit and been personally involved in the fighting of the past complaints addressed with finality by the Registrar of Companies.
39. It is its case that the 3rd Respondent falsely submitted at the last paragraph in page 2 of his submissions that Gitahi Gethenji resigned as a director vide his letter of 20<sup>th</sup> September 2011.
40. It is its case that Gitahi is a director as shown in the Annual Returns of 12<sup>th</sup> April 2022 exhibited at page 96 of the Verifying Affidavit and continues to be a director. Cherry picking and peddling old news with a view to mislead the court is unfortunate as no evidence to controvert the recent annual returns has been availed.
41. On the issue of lack of resolution, the Applicant argues that the Applicant’s advocate, Allen Gichuhi SC, was involved in the case of East African Safari Air Ltd v Anthony Ambaka Kegode & Ano [2006] eKLR and succeeded in overturning the high court’s decision in the Court of Appeal. The Court of Appeal judgment will be cited below. The 3rd Respondent has failed to bring to the attention the Court of Appeal judgment that set the new law on authorisation and ratification to file suit by an advocate.
42. It is its case that all the authorities cited by the 3<sup>rd</sup> Respondent do not reflect the current position of law as set out in the following cases in the Applicant’s Supplementary List of Authorities:
- a. Paragon Electronics Limited v Njeri Kariuki [2021] eKLR;
 

“There is no necessity in law that the resolution must be filed together with the pleadings. Looking at it differently, to require the filing of a resolution alongside the pleading is to elevate procedural technicalities above substantive justice. That goes against the grain in Article 159(2)(d) of *the Constitution*.”
  - b. Kenya Agricultural and Livestock Research Organization v Okoko & another (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) applied the dicta in the following decisions:
    - i. East African Safari Air Ltd v Anthony Ambaka Kegode [2011] eKLR where the Court of Appeal overturned the high court decision [applied by the 3rd Respondent) and held that the proper thing for the High Court to have done was not to strike out the proceedings (for want of authority by the advocate to file suit) but to stay the suit and refer to the shareholders for ratification.
    - ii. Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC no 391 of 2000: As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company.
  - c. Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR; The Court of Appeal cited the case of United Assurance co Ltd v Attorney General: SCCA no 1 of 1998 where the Supreme Court of Uganda held that:
 

“...it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is



authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”

- d. East African Safari Air Limited v Anthony Ambaka Kegode & another [2011] eKLR. The Court of Appeal held:

Cordery’s Law Relating to Solicitor states that:

“Proceedings will not be set aside because the solicitor acted without authority, if the party on whose behalf they were taken adopts what has been done, but ratification of an agent’s act can only be effective where, at the time of the act, the principal was himself competent to perform it, or to authorize its performance, and a plaintiff cannot so adopt an action after having apparently repudiated it to the defendant.”

43. We think we have said enough to show that the High Court erred in striking out the suit at that stage, instead of giving the appellant the opportunity to demonstrate that the appointment of its advocates, even if irregular at the beginning, had been regularized. We say nothing at this stage about whether the directors were appointed validly, and about other issues. Those are for hearing at the High Court. We simply say the High Court was wrong in striking out the suit on the grounds that it did, at that early stage.
44. The 3<sup>rd</sup> Respondent has not produced any resolution authoring the appointment of a law firm to act on behalf of Kihingo One as Majanja J confirmed that it is impossible on account of deadlock
45. The 3<sup>rd</sup> Respondent has never produced any resolution by Kihingo Village (Waridi Gardens) Management One Limited to instruct the firm of Otieno Ogola & Co. Advocates to complain to the Registrar of Companies regarding the Class B shares that were removed pursuant to the arbitral award.
46. It argues that even if the Court of Appeal decision in the Kegode case were applied herein, the 3<sup>rd</sup> Respondent would never obtain any shareholder’s resolution on account of the deadlock if the matter was referred back to the shareholders for ratification.
47. It is its case that the complaint lodged by the 3<sup>rd</sup> Respondent’s advocate was null and void ab initio for want of a resolution to act for the company.

### **1<sup>st</sup> Respondent’s Case**

48. In opposing the application, it filed grounds of opposition dated 21.11.2023 where in it argues that the Application is frivolous vexatious and an abuse of court Process and that it offends the provisions of section 8 & 9 of the [\*Law Reform Act\*](#).
49. It argues that the suit offends Order 53 Rule 1& 2 of the Civil Procedure Rules 2010 which stipulates that leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.
50. It is its case further that the application as presented is fatally defective in three folds.
51. Firstly, the Application is presented to court through a Notice of Motion as opposed to a Chamber Summons Application.



52. Secondly, the leave sought cannot issue as the decision sought to be quashed (the letter dated 7<sup>th</sup> March 2023) was issued way after six months thus Order 53 Rule 2 comes into play.

53. Section 9 (2) of the Law Reform Act provides state as follows; -

9(2) subject to the provisions of subsection (3) rules made under sub-section (1) may prescribe the applications for an order of mandamus, prohibition or certiorari shall. In specified proceedings be made within six months or such shorter period as may be prescribed, after the act or omission for which the application for leave relates."

54. Reliance is placed in the case of Raila Odinga & 6 Others vs. Nairobi City Council Nairobi HCCC No. 899 of 1993; (1990-1994) EA 482 where the court held that;

"Order 53 contains the procedural rules made in pursuance of s. 9(1) of the Law Reform Act. S. 9(2) of that Act states that the rules made under subsection (1) may prescribe that an application for mandamus, prohibition and certiorari shall be made within six months or such shorter period as maybe prescribed. Thus, it will be seen that on one hand s.9(2) of the Act enjoins that the court may make rules prescribing that application for mandamus prohibition and certiorari shall be made within six months or such shorter period as may be prescribed by the rules. On the other hand, Order 53 rule 2(1) which is a procedural rule made under that very section says that the court may for good reason extend the period of six months. The rules of court made under the Act cannot defeat or override the clear provisions of s.9(2)of the Act. An Act of Parliament cannot be amended by subsidiary legislation. The parliament in its wisdom has imposed this absolute period of six months and it is the Parliament alone which can amend it. The Court's duty is to give effect to the law as it exists. Thus that part of Order 53 rule 7 as amended by Legal Notice No.164 of 1997 which reads "unless the High Court considers that there is good reason for extending the period within which the application shall be made" is ultra vires section 9(2) of the Act. Thus, an application for judicial review, may it be for an

order of mandamus, prohibitor or certiorari should be made promptly and in any event within a maximum period of six months from the date when the ground for Court and quash the minutes in question of the meeting of 4.8.1992 of them from doing any act or deed in pursuance of the said meeting of 4.8.1992 it is time barred."

55. Section 2(1) of the Vexatious Proceedings Act Cap 41 Laws of Kenya (herein "the Act") provides for the remedy against vexatious litigation as follows;

(1) If, on an application made by the Attorney-General under this section, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground instituted vexatious proceedings, whether civil or criminal, and whether in the High Court or in any subordinate court, and whether against the same person or against different persons, the Court may, after hearing that person or giving him an opportunity of being heard, make an order declaring such person to be a vexatious litigant.

56. Under Section 3 of the Act; with regard to restraint of civil proceedings the Act provides that:

"No suit shall, except with leave of the High Court or of a judge thereof, be instituted by or on behalf of a vexatious litigant in any court, and any suit instituted by him in any court before the making of an order under section 2(1) of this Act shall not be continued by him without such leave; and such leave shall not be given unless the Court or the judge is satisfied



that the suit is not an abuse of the process of the court and that there is a prima facie ground for the suit.”

57. It is its case that there exists rights and freedoms in *the Constitution*, whose provisions challenge the Constitutionality of sections 2 and 3 of Cap 41 and the whole Act in general.
- a. Article 22 (1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.
  - b. Article 23 places upon the High court the authority to uphold and enforce the Bill of Rights.
  - c. Article 27(1) provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.
  - d. Article 48 on the right of access to justice provides that the State shall ensure access to justice for all persons.
  - e. Article 50(1) of *the Constitution* stipulates that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body.
  - f. Article 25 (c) provides that despite any other provision in *the Constitution*, the right to a fair trial is a right that cannot be limited.
  - g. Article 159 2 (c) provides for alternative forms of dispute resolution that are not inconsistent with *the Constitution*, do not contravene the Bill of Rights and are not repugnant to justice and morality.
58. It is its case that Section 2 of the *Vexatious Proceedings Act* imposes a legal obligation on the Attorney-General to institute vexatious proceedings for a court to declare a party as a vexatious litigant.
59. Reliance is placed in Republic v Kenya Revenue Authority exparte Paul Makodha Okiti & 4 Others [2018] eKLR where the court held that;
- “ what the Respondent can do is perhaps refer the Applicant to the Attorney-General under Section 2 of the *Vexatious Proceedings Act* for institution of proceedings that would lead to his being declared a vexatious litigant if the Respondent is aggrieved by the conduct of the Applicants habitually and persistently and without any responsible ground instituting vexatious proceedings and after the court has given the Applicant an opportunity to be heard on the application seeking to declare him a such vexatious litigant”
60. In Peter Kipkemoi Cheruiyot & Cheruiyot & 6 Others V James Finlay (K) Ltd & 2 Others [2021] eKLR the Court held that only the Attorney-General can move the Court for a party to be declared as a vexatious litigant. The Court held;
- “Such a De would need to be made in an application filed at the instance of the Attorney-General to which the Court would have to afford the person so sought to be declared vexatious an opportunity to be heard in those proceedings.”
61. Although the Act does not define a vexatious litigant, courts have in various decisions defined a vexatious litigant as a litigant who advances or re-advances a claim that has no merit, or brings a multiplicity of actions where one is sufficient with the motive of harassing or sabotaging the other party, or postponing a result he considers unfair, or simply to satisfy some urge to engage in litigation.



62. In the case of *Gerald Munene Mugo v Muriithi Maganjo & 2 others* [2016] eKLR; the High Court further defined a vexatious proceeding as follows,
- “There is plainly no prospect of success or where the motive of the plaintiff is aimed solely at harassing the defendant. Such a proceeding is usually instituted without good or just cause. It is also synonymous with what can be termed as an abuse of the process of the Court.”
63. The Court of Appeal in *Kivanga Estates Limited v National Bank of Kenya Limited* [2017] eKLR described a vexatious action to wit,
- “A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses.”
64. It argues that it is thus clear from the foregoing that the test for a vexatious claim is that which is instituted without good faith or a just cause or for the purpose of causing annoyance, unnecessary expenses or a claim aimed at gaining a fanciful advantage over the respondent.
65. The Applicant has not demonstrated the above against 3<sup>rd</sup> Respondent thus the orders sought must fail.
66. It argues that the Applicant has not proven its claim for damages and the order cannot issue as there is no specific legal duty that the 1st Respondent has failed/neglected to do to ascertain a compelling order.
67. In the case of *Bernard Njiinu Njiraini v Clerk of the Justice Enterprise National Development & 4 others (Interested Parties)* [2020] eKLR held,
- “Proceedings, the applicable law is Order 53 Rule 1 of the Civil Procedure Rules, leave of the court was sought and granted. The main reason for the leave ensures that an Applicant is only allowed to proceed to substantive hearing if they ought not to delve deeply into the arguments of the parties, but should make an Applicant's case is sufficiently meritorious to justify leave. It was explained by challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.”
68. It is the 1st Respondent's case that this suit should be dismissed with costs.

### **2<sup>nd</sup> Respondent's Case;**

69. In opposing the application, the 2<sup>nd</sup> Respondent relies on a ground of opposition dated 21<sup>st</sup> November 2023 on the following limbs;
- a. The application is an abuse of court process.
  - b. The court lacks jurisdiction to preside over the matter.
  - c. The matter is res judicata.
  - d. The court is functus officio.
70. It is its case that the court lacks jurisdiction to preside over the matter since the matter revolves around the provisions of The [Companies Act](#) No 17 of 2015 (herein after referred to as the act), The court lacks



jurisdiction to preside over the matter AND practice directions issued by the Chief Justice on the 18<sup>th</sup> November, 1997 (herein after referred to as the directions)

71. The Applicant herein has filed this application principally seeking orders against the office of The Registrar of Companies to quash the 2nd Respondent's impugned decision dated 7th March 2023 among other prayers all touching on the affairs of the Applicant company.

72. It invokes Section 3 of the Act which defines court as "the Court" means (unless some other court is reproduced hereunder provide as follows; The following matters shall be deemed to be Commercial matters, suitable for trial Courts, Upper Hill Nairobi.

1 .....

2. All company matters and applications including winding-up, excluding cases in which a Company is suing or being sued as an entity.

73. Reliance is placed in Judicial review E059 of 2022 Waterfront outlets Limited vs Registrar of Companies wherein the court appreciated the above position and proceeded to promptly dismiss the application.

74. In Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR, the supreme court pronounced itself on jurisdiction thus [paragraph 68]:

(68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which

Is conferred upon it by law. We agree with counsel for the first and second Jurisdiction to entertain a matter before It, is not one of mere procedural Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, Commission (Applicant), Constitutional Application Number 2 of 2011. Where the cannot expand its jurisdiction must operate within the constitutional limits. It confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, court or tribunal by statute law." (Emphasis provided).

Where it quoted with approval it cited the case of Owners of Motor Vessel 'Lillian S' v Caltex in the matter of the Interim Independent Electoral Commission where the Court stated: -

(29) Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."

[30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*."



75. It is its case that the matters raised in the application are matters that substantively require a merit review a function which the judicial review court cannot embark on as judicial review largely concerns itself with the decision-making process.
76. For the court to delve into the impugned decision by the 2nd Respondent, the court would be forced to embark on the merit review of the contested facts of the decision through viva voce evidence and Judicial review having a limited scope would not be the best tool to resolve the dispute in court.
77. It refers the court to the case of Republic v Attorney General & 2 others Ex-parte Xplico Insurance Company Limited [2014] eKLR JR Case261 of 2014 wherein while dismissing a similar matter made a finding

“It is apparent that the core issue herein is a vicious fight for the heart and soul of Xplico Insurance Company Limited. I do not know what the company will look like at the end of the looming battle but I think that judicial review being limited in its reach may not be the appropriate tool for resolving such a dispute. However, it is upon the parties to decide on the most appropriate course of action”.

78. On the issue of Res Judicata, it maintains that the importance of the principle is aimed at achieving two objectives namely: that there must be finality to litigation and that a litigant should not be harassed twice with the same account of litigation. (Nicholas Njeru vs. Attorney General & 8 Others, Civil Appeal No 110 of 2011 (2013) eKLR).
79. Reliance is placed in the case of John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport and Infrastructure & 3 Others Civil Appeal No 42 of 2014 (2015) eKLR, the court of appeal addressed itself in this regard as follows:

“Res Judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do not better than re-produce the re-indentation of the doctrine many centuries ago as captured in the case of Henderson vs. Henderson [1843] 67 ER 313 “Where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time....”

80. Reliance is further placed in the case of Okiya Omtatah Okoiti vs. Communications Authority of Kenya & 14 Others, Petition No 59 of 2015 (2015) eKLR, the court cited with approval the two decisions of E.T vs Attorney General & Another (2012) eKLR and Njangu vs. Wambugu and Another in HCC No 2340 of 1991. In E.T vs Attorney General & Another, the court Observed that:

“The Courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the Court



in another way and the form of a new cause of action which has been resolved by a court of competent jurisdiction”

81. The Black’s Law dictionary (8th Edition) defines res-judicata as follows:

“Res-judicata has been used in this section as a general term referring to all of the ways in which one judgment will have a binding effect on another. That usage is and doubtless will continue to be common, but it lumps under a single name two quite different effects of judgments. The first is the effect of foreclosing any litigation of matters that never have been litigated, because of the determination that they should have been advanced in an earlier suit. The second is the effect of foreclosing litigation of matters that have once been litigated and decided. The first of these, preclusion of matters that were never litigated has gone under the name “true res judicata” or the names “merger” and “bar”. The second doctrine, preclusion of matters that have once been decided has usually been called “collateral estoppels”

82. The Black’s Law dictionary (9th Edition) defines res-judicata as follows:

- (i) An issue that has been definitively settled by judicial decision;
- (ii) An affirmative defence barring the same parties from litigating a second lawsuit on the same claim or any other claim arising from the same transaction, or series of transactions and that could have been -but was not- raised in the first suit.”

83. It is its case that there are four pre requisites to be met for a matter to be deemed res judicata. These were set out in the case of Uhuru Highway Development Limited vs. Central Bank of Kenya & 2 Others (1996) eKLR as follows: -

- i. A previous suit in which the same matter was in issue
- ii. The parties are the same or litigating under the same title
- iii. A competent court heard the matter in issue and determined
- iv. The issue has been raised once again in a fresh suit. (Emphasis Ours)

84. In Prisca Auma Misachi vs. County Assembly of Kisumu & 5 Others (2015) e KLR the Learned Judge in this matter relied on several authorities to emphasize the definition and especially what amounts to res judicata which emphasis we would also want to rely on this matter. To start with, in Nicholas Njeru vs. Attorney General & 8Others (2013) eKLR, the Court of Appeal expressed itself as follows: -

“This Doctrine has been applied in a number of cases including, No 1 of 2007 EACJ, James Katabazi & 21 Others vs.The Attorney General of the Republic of Uganda where the court stated that for the doctrine to apply; the matter must directly and substantially in issue in the two suits.” (Emphasis Ours)

85. Similarly, Onguto J stated in the case of Edward Akongo Oyugi & 2 Others vs.Attorney General, Petition No 441 of 2015, (2016) eKLR thus:

“The law is also now relatively clear that for a plea of res judicata to succeed, the Respondent must establish four critical factors. First, that the parties must be the same or parties under whom they claim or litigate. Secondly, the matter must be directly and substantially in issue in both suits. Finally, there must be shown a concurrence of jurisdiction: see Nicholas Njeru



vs. Attorney General & 8 Others (2013) eKLR and also DSV Silo vs. The Owners of Sennar (1985) 2 ALL ER 104"

86. It argues that the court rendered a judgment in JR 033 of 2023 and dismissed the application.
87. It is its case that the instant application seeking to have a second bite of the cherry.
88. It argues that having invoked the provision of order 53 of the civil procedure rules, the application must of necessity conform to that requirement and therefore ought to have challenged the impugned decision of 7<sup>th</sup> March 2023 within 6 months and in any event, the application as is time barred and ought to be dismissed.

#### **Analysis and determination;**

89. Upon perusing the pleadings and the rival submissions of parties alongside the authorities cited, this court finds the following to be the issues for determination:
  1. Whether or not this court has Jurisdiction to hear and determine this suit.
  2. Whether or not the Applicant is entitled to the orders sought.

#### **Whether or not this court has Jurisdiction to hear and determine this suit.**

90. In Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR, the supreme court pronounced itself on jurisdiction thus [paragraph 68]:

(68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Jurisdiction to entertain a matter before it, is not one of mere procedural Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, Commission (Applicant), Constitutional Application Number 2 of 2011. Where they cannot expand its jurisdiction must operate within the constitutional limits. It confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, court or tribunal by statute law." (Emphasis provided) where it quoted with approval the oft cited case of Owners of Motor Vessel 'Lillian S' v Caltex In Re The Matter of the Interim Independent Electoral Commission where the Court stated:-

- [29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."(underlining supplied)

- [30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there



is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*."

91. The Applicant herein has filed this application principally seeking orders against the office of The Registrar of Companies to quash the 2nd Respondent's impugned decision dated 7th March 2023 among other prayers all touching on the affairs of the Applicant company.
92. The Applicant prays for a De to issue that the decision of the 2<sup>nd</sup> Respondent dated 7<sup>th</sup> March 2023 was an abuse of court process as the matter is res judicata and a collateral attack on:
  - a. The arbitral award dated 28<sup>th</sup> July 2016 Kifaru Investments Ltd & Others v Kihingo Village (Waridi Gardens) Ltd.
  - b. ELC No. 1225 of 2013 Kifaru Investments Ltd & Others v Kihingo Village (Waridi Gardens) Ltd and Kihingo Village (Waridi Gardens) Management Ltd.
  - c. The judgment delivered in HCCC No. E229 of 2019- Kihingo Village (Waridi Gardens) Management One Limited versus William Pike & Another.
  - d. Nairobi Civil Appeal No. E099 of 2021 William Pike & Others v Kihingo Village (Waridi Gardens) Management One Ltd & Others
  - e. Nairobi Civil Appeal No. E069 of 2022 Fredrick Gitahi Gethenji v Director of Criminal Investigations & Others.
  - f. Comm. E188 of 2021 James Ndungu Gethenji v FAPCL & Ano.
93. This court is not in a position to determine whether or not the decision of the 2<sup>nd</sup> Respondent dated 7<sup>th</sup> March 2023 was an attack on the suits that the Applicant has listed herein above without analyzing them one by one alongside the impugned decision.
94. They are suits that existed or were determined by different courts. If this court were to get into an analysis of all these commercial, arbitration, criminal and civil matters so as to ascertain whether or not the impugned decision amounts to a collateral attack on the foregoing matters then this court would end up getting into a multiplicity of compounded an examination of volumes of documents, minutes, resolutions just but to mention a few entries. That would be tantamount to an extreme merit analysis that spans into multiple court files and evidence. This court does lack the jurisdiction to do that.
95. Further the Applicant is asking this court to issue A De that the 3<sup>rd</sup> Respondent lodged the complaint dated 13<sup>th</sup> December 2022 without any resolution from the directors or shareholders of Kihingo Village (Waridi Gardens) Management One Limited rendering the complaint a nullity.
96. The issue of whether or not the 3<sup>rd</sup> Respondent lodged the complaint dated 13<sup>th</sup> December 2022 with or without any resolution from the directors or shareholders of Kihingo Village (Waridi Gardens) Management One Limited is clearly not within this court's remit or powers.
97. Convening meetings and the passing of resolutions inter alia are the core business of running companies. Disputes around the validity of resolutions as invited by the Applicant herein cannot be resolved by the judicial review court when there is a competent court that has the statutory machinery to deal with such disputes.
98. This court lacks the jurisdiction to deal with issues of resolutions and shareholders of a company. These are Company Law matters that can only be determined under the *Companies Act*.



99. Section 11(1) of the *High Court (Organization and Administration) Act* provides that for purposes of promoting effectiveness and efficiency in the administration of justice and promoting judicial performance, the Chief Justice may, where the workload and the number of judges in a station permit, establish any of the following divisions—
- a. the Family and Children Division;
  - b. the Commercial Division;
  - c. the Admiralty Division;
  - d. the Civil Division;
  - e. the Criminal Division;
  - f. the Constitutional and Human Rights Division;
  - g. the Judicial Review Division; and
  - h. any other division as the Chief Justice may, on the advice of the Principal Judge determine.
100. This court lacks jurisdiction to preside over the matter since the matter revolves around the provisions of The *Companies Act* No 17 of 2015 (herein after referred to as the act) and the practice directions issued by the Chief Justice on the 18<sup>th</sup> November, 1997 (herein after referred to as the directions).
101. Section 3 of the act defines court as "the Court" means (unless some other court is reproduced hereunder provide as follows;
- The following matters shall be deemed to be Commercial matters, suitable for trial Courts, Upper Hill Nairobi.
- 1 .....
  2. All company matters and applications including winding-up, excluding cases in which a Company is suing or being sued as an entity.
102. From the facts of the case as read alongside the provisions of section 3 of the Act and the practice directions, it is my considered view that the issues raised by the Applicant herein are company matters that would be best solved at the Commercial Division of The High Court.
103. Although the judicial review division is a court with the status of the High Court under Article 165 of *The Constitution*, I take the humble view that the Commercial division of the High Court is best suited in the circumstances to hear the matter.
104. In so finding, I am guided by the finding in Republic v Registrar of Companies & 5 others Ex-Parte Midlands Company Limited [2019] eKLR the court while faced with a similar matter and in dismissing the application held that;
38. Secondly, there are alternative fora that are more appropriate to resolve the factual disputes raised in this application, such as the Civil or Commercial Division of the High Court, where no restrictions or limitations exist as those that arise in judicial review."
105. This court is further guided by the finding in Republic v Registrar of Companies & 2 others; Waterfront Outlet Limited (C.147966) (Interested Party); Waterfront Outlets Limited



(CPR/2015/214503) (Exparte) (Miscellaneous Application E059 of 2022) [2023] KEHC 227 (KLR) (Judicial Review) (19 January 2023) (Ruling) wherein the court held;

“Suffice to note that even with the expanded scope of judicial review under the new constitutional dispensation, judicial review still remains a special jurisdiction that is majorly restricted to examination of whether an administrative decision conforms to the requirements of legality, rationality and procedural propriety. It is opportune to add that the judicial review process cannot be a substitute to statutorily provided for jurisdiction of other courts or bodies and the judicial review court cannot and should not assume jurisdiction where statute clearly places jurisdiction at the door of another court or body. To echo the words of the Supreme Court in Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others (supra), ‘ A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.’”

It is this court’s finding and I so hold that this court lacks the jurisdiction to determine this suit.

**Whether or not the Applicant is entitled to the orders sought.**

- 106. Having found that this court lacks jurisdiction this court cannot determine the other issues and I so hold.
- 107. In arriving at this finding, I am guided by the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.

**Disposition:**

- 108. Having applied my mind to the rival positions taken by the parties, the facts and the applicable law, it is clear that the jurisdiction of the court is set out in the Companies Act and further clarified by the practice directions of 1997.

**Order:**

This suit is hereby transferred to the commercial division of The High Court.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

.....

**J. M. CHIGITI (SC)**

**JUDGE**

