



**Republic v Registrar of Companies & 2 others (Miscellaneous Application E547 of 2022)
[2023] KEHC 19417 (KLR) (Commercial and Tax) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19417 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E547 OF 2022**

DAS MAJANJA, J

JUNE 30, 2023

BETWEEN

REPUBLIC APPLICANT

AND

REGISTRAR OF COMPANIES 1ST RESPONDENT

RAMESH DEVSHI VARSANI 2ND RESPONDENT

AND

RNR DEVELOPERS LIMITED EXPARTE APPLICANT

RULING

1. By the Chamber Summons dated 20th July 2022, the Applicant (“the Company”) applied for leave to commence judicial review proceedings for orders of certiorari and mandamus. It sought to quash the 1st Respondent’s (“the Registrar”) decision communicated through the letter dated 16th March 2022 where it allocates/reverts 400 Ordinary shares to the 2nd Respondent (“Ramesh”). The Company also sought to compel the Registrar to rectify the register of the Company accordingly in terms of the shareholding structure, so as to revert to the Company the 400 Ordinary shares which the Company claims it had forfeited from Ramesh in a resolution passed on 11th May 2020 on account of non-payment.
2. On 21st July 2022, the court granted leave to the Company to commence the judicial proceedings. On 29th July 2022, it filed an evenly dated Notice of Motion under section 8(2) of the *Law Reform Act* (Chapter 26 of the Laws of Kenya), Order 53 rule 1 of the Civil Procedure Rules and Part III of the *Fair Administrative Action Act*, 2015 (“the FAA”). This application is grounded and supported by the Company’s Statutory Statement dated 20th July 2022, the verifying affidavit sworn on the same date



by Rajesh Mangalabhai Patel, a director of the Company, his further affidavit sworn on 15th September 2022 and the affidavit of CPA Dipesh Shah, a Certified Public Accountant and the Managing Partner of Grant Thornton sworn on 15th September 2022.

3. The application is opposed by Ramesh through his replying affidavit sworn on 22nd August 2022 and by the Registrar through the replying affidavit sworn on 27th October 2022 by Zacharia Mwangi, the Assistant Registrar of Companies. In addition to their depositions, the parties have also filed written submissions. Since the parties take opposing positions in this matter, I will set out each of the said positions below.

The Application

4. The Company contends that from 2015 until May 2020, Ramesh was a bona fide shareholder of the Company having been allotted 400 Ordinary Shares, but he failed to pay for them for this entire period. According to a Valuation Report dated 23rd August 2016, the unpaid shares held by Ramesh were valued at Kshs. 120,000,000.00 being the market value at the time of Kshs. 300,000.00 per share.
5. On 3rd March 2020, the Company passed a resolution to make a call for the unpaid shares allotted to Ramesh in 2015. On 13th March 2020 it served a Notice of Call-Up of Shares upon Ramesh giving him 30 days, that is up to 13th April 2020, to pay for the shares. The Company served a second Notice of Call-Up of Shares upon Ramesh on 18th April 2020 giving him 14 days to pay up for the shares. The Company avers that this notice was a Notice of Intended Forfeiture issued in compliance with Regulation 75(1) of the Companies (General) Regulations, 2015. The Company avers that despite service of the two Notices aforesaid, Ramesh failed to pay up for the shares, as a result of which the Company passed a resolution on 11th May 2020 forfeiting the unpaid shares and reverting the same to the Company. The Company states that the Registrar acted on this resolution and forfeited the 400 Ordinary shares to the Company in compliance with the law and the Registrar updated the shareholding of the Company accordingly to reflect the changes.
6. On 5th June 2020, Ramesh filed a complaint before the Registrar inter alia, on the issue of the call up and forfeiture of the unpaid shares. By a decision made on 16th March 2020 the Registrar allowed the Ramesh's complaint and reverted all the 400 Ordinary shares to him. It is this decision by the Registrar that the Company faults on the ground that it is ultra vires the *Companies Act*, 2015 and the Companies (General) Regulations, 2015 and that the decision is unreasonable, unlawful, null and void ab initio and should be quashed on several grounds. First, that the Company lawfully and rightfully passed a resolution for calling up of the unpaid shares. Second, that Ramesh was duly served with two Notices of Call-Up of shares but failed to pay up. Third, that he failed to pay for the shares allotted to him, after which the Company lawfully and rightfully passed a resolution forfeiting the shares. Fourth, that in the process of calling up and forfeiting the unpaid shares, the Company complied with Regulations 70, 71, 74, 75 and 76 of the Companies (General) Regulations, 2015. Fifth, that Ramesh did not table any evidence before the Registrar to demonstrate that he had paid up for the shares and that the Registrar does not have any powers under the *Companies Act*, 2015 and the Companies (General) Regulations, 2015 to allot shares to a person, like Ramesh, who has not paid up for the shares.
7. The Company states that it instructed Grant Thornton on 10th May 2022, to carry out an Audit of the Company's books for the years ended 31st December 2011 to 31st December 2016 and that all the Audit Reports confirmed that Ramesh has never paid for the shares. The Audit Reports make the affirmative finding that "All the authorized share capital was fully paid up by Rajesh Mangalabhai Patel and there was no evidence for payment of the share capital by any other shareholder." The Company adds that prior to finalization of the Audit Reports, the Independent Auditor wrote to Ramesh on



- 30th May 2022 seeking information from him as to whether he had incurred any expenses or financial transactions on behalf of the Company and to forward evidence of the same. That Ramesh failed to respond to the said query even as at the date of the finalization of the Audit Reports.
8. The Company claims that on 6th July 2022, it supplied the Registrar (via email and physical delivery) with the Audit Reports aforesaid and despite a further reminder via email dated 13th July 2022, the Registrar not only failed to respond, but it also failed to take the necessary corrective action of rectifying the shareholding of the Company.
 9. For these reasons, the Company urges that it will be lawful, just, fair and proper that an Order of Certiorari be issued to remove the matter into the Court for purposes of being quashed, and to quash the Registrar's decision communicated through the letter dated 16th March 2022, purporting to allocate/revert 400 Ordinary shares to Ramesh when the said shares had already been forfeited by the Company in a resolution passed on 11th May, 2020, for non-payment by Ramesh. That an Order of Mandamus be issued compelling the Registrar to rectify the register of the Company accordingly in terms of the shareholding structure, so as to revert to the Company the 400 Ordinary shares which the Company had forfeited from Ramesh in a resolution passed on 11th May 2020, on account of non-payment.

The Registrar's response

10. The Registrar confirms that it received a complaint on 5th June 2020 prompted by the firm of Kabiru & Co. Advocates regarding changes effected on the directorship and shareholding of the Company. It protested the resolution by the Board of Directors to forfeit the shares allotted to Ramesh back to the Company due to non-payment, yet he is a fully paid-up shareholder. It complained that Ramesh had been illegally and fraudulently removed as a director and one Patel Bhaveshkumar Thakorbbhai appointed in his place without Ramesh's knowledge or consent.
11. The Registrar called for a response from the Company Secretary, Jophece Obonyo Yogo, on the matters raised through its letters dated 23rd June 2020 and 14th July 2020. That the Company Secretary indicated a transfer of shares took place on 13th April 2015 where Abdulkadir Mohammed Haji transferred back to Ramesh 300 shares which he had acquired from Ramesh on 31st July 2014 and further received 100 shares from Rajesh Mangalbbhai Patel on the same date. As regards the appointment of Patel Bhaveshkumar Thakorbbhai as a director, he received a letter on 1st June 2016 from Rajesh Mangalbbhai Patel indicating he was unable to reach Ramesh for the purpose of re-appointing him to the Board of Directors and that he was unable to run the Company's affairs as a sole director and went further to appoint Patel Bhaveshkumar Thakorbbhai as a director to achieve the minimum threshold of two directors in the Company. On the issue whether Ramesh is a fully paid-up shareholder and the re-appointment of Ramesh as a shareholder, he indicated there was indeed movement of shares from Ramesh to Abdulkadir Mohamed Haji and back to Ramesh and it included a shareholder agreement between two companies that is RNR Developers and Pagoda Limited which seems to reflect the shares are fully paid up. He went further to state he had not checked the accounting records that would confirm payment of shares. On the re-appointment of Ramesh, the Company Secretary stated it was clear he resigned as a director on 31st July 2014 at the time he transferred the shares to Abdulkadir Mohamed Haji and it was clear when he came back into the Company he was not re-appointed as a director as guided by the Minutes of a meeting dated 13th April 2015. That a process to re-appoint Ramesh was initiated in 2016 but was never concluded.
12. Based on the Company Secretary's response, the Registrar addressed the complaint through the letter dated 7th August 2020. The Registrar addressed whether the appointment of Patel Bhaveshkumar Thakorbbhai as a director of the Company through a Board of Directors meeting held on 9th June 2016



- was quorate and properly convened, whether Ramesh is a director of the Company and whether the Board of Directors followed the proper procedure in the forfeiture of shares issued to Ramesh effected on or about 11th May 2020.
13. On the issue whether the appointment of Mr. Bhaveshkumar Thakorbbhai Patel was valid, the Registrar noted that the meeting of the Board of Directors held on 9th June 2016 was only attended by Rajesh Mangalbbhai Patel as the only member, it was thus not quorate and or properly convened. On that basis the Registrar concluded that the appointment of Bhaveshkumar Thakorbbhai Patel was void. On the issue whether Ramesh is a director of the Company, the Registrar found his resignation on 31st July 2014 was proper as according to the Company Secretary, he found documents for his re-appointment as a director sometimes in 2016 but the said documents were never filed. The Registrar thus directed the Company to comply with Article 13 of the Articles of Association of the Company and ensure the number of directors not being less than two is complied with having nullified the appointment.
 14. On the issue whether the Board of Directors followed the proper procedure in the forfeiture of shares issued to Ramesh, the position was that upon reviewing the documents lodged with the Registrar, the procedure on forfeiture was not adhered to. The Registrar therefore invoked section 862 of the *Companies Act*, 2015 and notified the parties that the purported changes together with all the accompanying documents that led to the appointment of Patel Bhaveshkumar Thakorbbhai as a director and the forfeiture of shares allotted to Ramesh lodged on 11th May 2020 had been expunged from the Company's register.
 15. The Registrar further states that on 28th August 2020, it received a letter from the firm of Mohammed Muigai LLP acting on behalf of Rajesh Mangalbbhai Patel. It requested for a review of the decision contained in the letter dated 7th August 2020 on grounds of their client, Rajesh Mangalbbhai Patel, being a majority shareholder, was not afforded a hearing contrary to the rules of natural justice and contrary to Article 42 of *the Constitution* on fair administrative action. The firm stated that the appointment of Patel Bhaveshkumar Thakorbbhai, as director, was done under Regulation 100 of Table A (Now Repealed *Companies Act* (Chapter 486 of the Laws of Kenya) which was adopted as part of the Company's articles). The firm stated that this provision was invoked as Ramesh did not show any interest in the Company or its operations, and it was therefore necessary to invoke the provision of Regulations 100 of Table A to appoint another director for the purpose of increasing the number of directors to the minimum prescribed number for the Company to transact business. It stated that the meeting was convened for the sole purpose of increasing the number of directors in the absence of Ramesh.
 16. On the issue of forfeiture of shares held by Ramesh, the firm noted the Registrar's did not elaborate the deficiencies in documents provided regarding the application lodged effecting the changes. It pointed out the provisions on forfeiture of shares in Regulations 15, 16, 33, 34 and 38 of Table A and referred to the Board of Directors meeting held 3rd March 2020 called to discuss the payment of the Company's unpaid shares and the resolution passed to call up the shares. The firm stated on 13th March 2020, the Company wrote to Ramesh calling up the shares and for the payment of the shares not later than 13th April 2020. The firm stated that Ramesh failed to respond, and a final reminder dated 18th April 2020 addressed to him requesting him to make payments. As Ramesh failed to make payment, the meeting held on 11th May 2020 by the Board of Directors passed a resolution forfeiting Ramesh's shares. The firm further stated the Company lodged the documents with the Registry including Notice of Special Resolution Form CR19 and Statutory Declarations in compliance with the Regulations and in support of the process. The firm urged the Registrar to set aside its decision made on 7th August 2020 on the ground that the procedure used to forfeit the shares was therefore in line with the law and applicable procedures.



17. The Registrar contends it considered the email correspondences and letters sent by the firm of Mohammed Muigai LLP in regards to the complaint as well as the letter dated 7th July 2021 prompted by the firm of HMS Advocates LLP acting on behalf of Ramesh on the implementation of the Registrar's decision dated 7th August 2020 by the Company. It communicated its decision by the letter dated 16th March 2022 which is the subject of the present application.
18. On the alleged illegal and fraudulent removal of Ramesh as a director, the Registrar noted that Ramesh resigned as director on 31st July 2014. That the Resignation Letter and Affidavit were attached in support the changes in the Form 203A on Notice of Notification on Change of Particulars, Board of Directors Minutes dated 31st July 2014. The Registrar states that there were no documents in its records that showed his re-appointment as director of the Company, but he remained a shareholder when Abdulkadir Mohamed Haji transferred back his 300 ordinary shares when he resigned, and he received 100 ordinary shares by Mr. Rajesh Mangalbhaj Patel and having been allotted the 2,500 12.6% Cumulative Redeemable Preference.
19. On the appointment of Patel Bhaveshkumar Thakorbhaj as Director, the Registrar departed from its earlier decision declaring the appointment void. It observed that the appointment was made at the meeting held on 9th June 2016 attended by Rajesh Mangalbhaj Patel as the only director together with the invited incoming director and the Company Secretary. It noted that the Regulations in Table A and the Company's Articles of Association provides that the number of directors shall not be less than two and more than eight and further noting the meeting was for the purpose of increasing the set minimum requirement of directors.
20. On the issue of forfeiture of shares, the Registrar found that the Regulations in Table A provided the procedure for forfeiture of shares. That Ramesh stated he was a paid-up shareholder having assisted the Company acquire a property; LR No. 1870/172/1 IR NO. 20902 and that without notice he was removed as a shareholder on the pretext of not having paid for the shares which he stated are fully paid up. On the other hand, Mohammed Muigai LLP stated the Company followed the due procedure to forfeit the shares. The Registrar noted the firm did not address the issue whether the shares were fully paid up. From the Company's records, it noted that the Company consistently filed its Annual Returns indicating that the shares had been fully paid up and that this is indicated in the Annual Returns for the years 2013, 2014, 2015, 2016 and 2017. That the Company's nominal capital is indicated as Kshs. 36,600,000.00 200,000 divided into 2,000 ordinary shares of Kshs. 100.00 and 36,500.00 12.6% Cumulative redeemable preference shares of Kshs. 1,000.00 each and that further, the Annual Returns indicate the amount called up on number of shares at Kshs. 100.00 per share 1,000 ordinary shares, Kshs. 1,000.00 per share and 36,500 12.6% Cumulative Redeemable Preference shares and that the total amount of calls received, including payments on application and allotment and any sums received on shares forfeited was Kshs. 36,600,000.00.
21. The Registrar stated that having not received any financial statements or books of accounts to the contrary, it took the position as per the Annual Returns and upheld its decision on the forfeiture of shares on grounds the shares are fully paid up and it invoked the provision of section 862 of the [Companies Act](#), 2015. That however, if the contrary were to be proved on the paid-up shares, then the position could be reversed.
22. The Registrar stated that it sent a letter to notify the parties that from the date thereof, the irregular entry into the register causing the alteration to the position in the Company file on the directorship and shareholding of the Company, had been expunged from its records and that the consequence of which reverted to the original position before the purported entry, including Ramesh being a shareholder with 400 shares with 2,500 12.6% cumulative redeemable preference.



23. The Registrar depones that notwithstanding its decision, the Company has the power to alter its shareholding structure under the [Companies Act, 2015](#) and its Articles of Association.

Ramesh's response

24. Ramesh depones that he is a promoter, founding director and a fully paid up shareholder of the Company with 400 Ordinary Shares and 2500 Preference Shares. That the Company was incorporated with a view to purchase property and for construction work only and the construction was to be done on LR No. 1870/172/1. He insists that he subscribed and paid in full for the 400 ordinary shares and he is thus entitled to the paid-up shares by virtue of his financial contribution amounting to Kshs. 33,064,400.00 which he expended on behalf of the Company in obtaining, inter alia, building plans approval fee, construction site-board, change of user and the National Environment Management Authority approval. He also entered into an agreement for subscription for 36,500 cumulative preferential redeemable shares at Kshs. 1000 each for which he paid Kshs. 2,500,000.00 and was allotted 2500 preferential shares and that the consideration for the preferential shares went to the purchase of the property. That save for a duration of which he resigned as director and transferred his shares to Abdulkadir Mohammed Haji, Ramesh states that he has at all material times in these proceedings been a fully paid-up shareholder of the shares aforementioned and he reiterates that he does not have any outstanding obligations with respect to the payment of the shares.
25. Ramesh states that the Company engaged Pagoda Limited to actualize the purpose for which the Company was incorporated and entered into an agreement with the said Pagoda Limited where all the shareholders executed and acknowledged that all issued shares were fully paid up. That thereafter, one of the shareholders Navit Chhabildass Radjev transferred 100 shares to Ramesh and 100 shares to Rajesh Manglabhai Patel and that after Ramesh's resignation in 2014 and reappointment as a director, the position is yet to be filled.
26. Ramesh denies receiving any notices of forfeiture that were allegedly sent to him and notes that the dates indicated on the notices coincide with the lockdown due to COVID 19. He states that the impugned decision by the Registrar on 16th March 2022 captured the correct position regarding his shareholding as a paid-up shareholder and maintained the records as they were before the alleged forfeiture after finding that the forfeiture was not founded on any merits. Ramesh admits that on 30th May 2022, he was notified of the appointment Grant Thornton who demanded that he shares evidence of having incurred expenses or any financial transaction on behalf of the Company during the period 2011-2016 by 1st June 2022. That he requested for more time to send the documents on 31st May 2022, but the auditors failed to respond.
27. Ramesh avers that despite providing the auditors with the documents requested from him, the same were not mentioned, referred to or captured in the audit and that the decision to appoint the auditor and subsequent audit was done after the Registrar's decision and the said audit makes numerous references to the shareholder dispute, the complaint and Registrar's decision and is openly biased. Ramesh contends that the Audit reports made were completely erroneous and contained extraneous information which were not supported by documentation making it apparent that the Audit was tailored to achieve an intended purpose of reversing the Registrar's decision. That the entire audit report did not refer to any document which supports any payment by the other shareholders for their shares.
28. Ramesh depones that the Company, having requested to review the Registrar's decision in their letter dated 6th July 2022 have not exhausted the remedies available for review by the Registrar before coming to this court and that the Company, in haste, is indirectly seeking the court to review the decision of



the Registrar instead of waiting for the proper procedure to be adhered to by the Registrar in reviewing the said decision.

Analysis and Determination

29. From the contentions I have set out above, the issue for determination is whether the court should review and quash the decision of the Registrar. Before delving into this issue, I think it is appropriate to set out the jurisdiction and scope of the court's intervention. The ex-parte Applicant has applied for an orders of judicial review under Order 53 of the Civil Procedure Rules. He has also invoked section 15 of the FAA. The former provisions governed the application of the common law powers of the court to issue orders of judicial review as provided by the *Law Reform Act*. The limits of traditional judicial review have been determined in several cases illustrated by the Ugandan case of *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300 where the court stated as follows:

In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.

30. In *Municipal Council of Mombasa v Republic and Umoja Consultants Ltd* [2002] eKLR, the Court of Appeal drew a distinction between judicial review and an appeal where it stated that:

Judicial review is concerned with the decision making process, not with the merit itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether the in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.....The court should not act as a court of appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.

31. The FAA was enacted to give practical effect to the right to fair administrative action protected by Article 47 of *the Constitution*. Under *the Constitution*, every person is entitled to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Section 7(2) of the FAA, which falls under Part III titled, "Judicial Review" provides as follows:

7(2) A court or tribunal under subsection (1) may review an administrative action or decision, if-

- (a) the person who made the decision-
 - (i) was not authorized to do so by the empowering provision;



- (ii) acted in excess of jurisdiction or power conferred under any written law;
 - (iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;
 - (iv) was biased or may reasonably be suspected of bias; or
 - (v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;
- (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - (c) the action or decision was procedurally unfair;
 - (d) the action or decision was materially influenced by an error of law;
 - (e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;
 - (f) the administrator failed to take into account relevant considerations;
 - (g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
 - (h) the administrative action or decision was made in bad faith;
 - (i) the administrative action or decision is not rationally connected to-
 - (i) the purpose for which it was taken;
 - (ii) the purpose of the empowering provision;
 - (iii) the information before the administrator; or
 - (iv) the reasons given for it by the administrator;
 - (j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;
 - (k) the administrative action or decision is unreasonable;
 - (l) the administrative action or decision is not proportionate to the interests or rights affected;
 - (m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;
 - (n) the administrative action or decision is unfair; or
 - (o) the administrative action or decision is taken or made in abuse of power.

32. It is clear from the above provisions; the scope of judicial review is expanded to include not only procedural but also substantive aspects of the impugned decision. In *Suchan Investment Limited v Ministry of National Heritage and Culture and 3 Others* [2016]eKLR, the Court of Appeal accepted that section 47 of the FAA had expanded the scope of judicial review but explained that the court



did not have the mandate to substitute its own decision for that of the decision maker. It observed as follows:

(56) Analysis of Article 47 of *the Constitution* as read with the *Fair Administrative Action Act* reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7(2)(f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7(2)(j) identifies abuse of discretion as a ground for review while Section 7(2)(k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7(2)(k) subsumes the dicta and principles in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp.* [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7(2)(i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7(2)(i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in Section 7(2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the *Fair Administrative Action Act*.

33. Recently, the Supreme Court, in *Edwin Harold Dayan Dande & 3 Others v The Inspector General, National Police Service & 5 Others*; Petition No. 6 [E007] Of 2022 (Consolidated With Petition Nos. 4 [E005] & 8 [E010] of 2022)(UR) stated that when a party approaches a court under the provisions of *the Constitution* then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of Order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of *the Constitution*, then the Court can only limit itself to the process and way the decision complained of was reached or action taken and not the merits of the decision per se.
34. With the above principles in mind, I now turn to the substance of the application. It is common ground that the Company impugns the decision of the Registrar dated 16th March 2022 where the Registrar reversed the Company decision to forfeit the 400 shares allotted to Ramesh on the grounds I have already outlined.
35. It is not disputed that the Registrar has a role to ensure that the acts of a company are within the purview of the *Companies Act*, 2015 and the law in general and that it has jurisdiction to receive complaints involving any alleged illegal and unprocedural alteration of directorship and shareholding of a company. The Registrar has explained that after receiving the complaint from Ramesh, it sought a response from the Company and that the Company through its Company Secretary gave various responses. The Registrar also received a response from one of the Company's directors, Rajesh Mangalbai Patel. The Registrar then stated that it considered all these responses and supporting documentation and concluded on 7th August 2020 that the procedure on forfeiture of shares had not been adhered to. Consequently, the Registrar invoked the provision of section 862 of the *Companies*



Act, 2015 and notified the parties that the purported changes together with all the accompanying documents that led to the appointment of Patel Bhaveshkumar Thakorbbhai as a director and the forfeiture of shares allotted to Ramesh Devshi Varsani lodged on 11th May 2020 had been expunged from the company's register.

36. The parties have also not disputed that the Registrar acted on a review sought by Rajesh Mangalbhai Patel on this decision by the Registrar that led to a review decision by the Registrar dated 16th March 2022 which is the subject of these proceedings. In that decision, the Registrar set aside part of its earlier decision in respect of the directorship of Patel Bhaveshkumar Thakorbbhai but upheld the decision on the forfeiture of shares. Based on the entirety of the evidence, I do not find any procedural impropriety, illegality or irrationality in the way the Registrar arrived at its decision.
37. Turning to the substance of the Registrar's decision. The question is whether the Company had established that Ramesh had paid for his shares. The Company contended that it commissioned reports by Grant Thornton which showed that Ramesh had not paid for the shares allotted to him. In response to this contention, Ramesh complained that his evidence, in the form of contribution to the purchase of and development of the Company property, had not been considered. On its part, the Registrar concluded that the Company's annual returns for the years 2013-2017 indicated that all shares had been fully paid up and since it had not received any financial statements or books of accounts to the contrary, it set aside the forfeiture proceedings and resolution.
38. Ultimately, the decision to forfeit shares belongs to the Company in the first instance. In exercising this power, it must ensure that due process is followed and give the shareholder an opportunity to present its case. This is why the Registrar concluded that it was still open to the Company to forfeit the shares. I accept the decision of the Registrar and decline to review the merits of the decision on the ground that the Registrar did actually consider the totality of the evidence on the issue of payment of the shares. As stated by the Registrar, the Company may reconsider its decision afresh and make a properly guided decision.

DIVISION - Disposition

39. In conclusion, I find and hold that the process followed by the 1st Respondent throughout the proceedings before it as well as the making of the decision of 7th August 2020 and 16th March 2022 was fair, objective and procedural.
40. The ex-parte Applicant's Notice of Motion dated 29th July 2022 is dismissed but with no order as to costs.

SIGNED AT LONDON, ENGLAND

D. S. MAJANJA

JUDGE

DATED and DELIVERED at NAIROBI this 30th day of JUNE 2023

F. MUGAMBI

JUDGE

Court Assistant: Mr M. Onyango

Mr Rene instructed by Rene and Hans LLP Advocates for the Ex-parte Applicant.

Mr Okumu, Advocates instructed by Business Registration Service for the 1st Respondent.

Mr Kabiru instructed by Kabiru and Company Advocates for the 2nd Respondent.

