



**Okutoyi & 11 others v Attorney General & 4 others (Civil Suit
17 of 2018) [2023] KEHC 25831 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25831 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL SUIT 17 OF 2018
AC MRIMA, J
NOVEMBER 23, 2023
FORMERLY KITALE HIGH COURT CIVIL SUIT NO.. 113 OF 2008**

BETWEEN

WYCLIFFE OKUTOYI & 11 OTHERS PLAINTIFF

AND

THE HON ATTORNEY GENERAL 1ST DEFENDANT

COMMISSIONER OF LANDS 2ND DEFENDANT

THE CHIEF LAND REGISTRAR 3RD DEFENDANT

THE REGISTRAR OF COMPANIES 4TH DEFENDANT

TAWAI LIMITED 5TH DEFENDANT

RULING

Background:

1. This matter was initially instituted in the High Court at Kitale. It was assigned as Civil Suit No. 113 of 2008. At the advent of *the Constitution* of Kenya, 2010, the matter was transferred to the Environment and Land Court where it seems to have still, irregularly though, retained the number assigned to in the High Court.
2. On 2nd October, 2018 the Learned Environment and Land Court Judge Hon. Mwangi Njoroge, J directed that the matter be transferred back to the High Court for purposes of determining issues relating to the incorporation, directorship and membership of Tawai Limited, the 5th Defendant herein.
3. When this case was eventually referred back to the High Court, it was assigned a new number. It became the instant Civil Suit No. 17 of 2018.



4. Be that as it may, the Plaintiffs, through an Amended Complaint dated 11th October, 2017 sought the following reliefs: -
 - i. The issuance of Provincial Certificate of Title by the Registrar of Titles (lands) by Mr.C.S. Kamuyu dated 21st May 2008 be recalled and cancelled.
 - ii. The entries and issuance of the Titles made by C.S. Maina, Registrar of Titles- Nos-235 made on 10th June 2008 to wit;L.R. No.5707/1-I.R.No.112800L.R. No.5707/2-I.R.No.112801L.R. No.5707/3-I.R.No.112802L.R. No.5707/4-I.R.No.112803L.R. No.5707/5-I.R.No.112804
 - iii. A declaration that the plaintiffs are the legal owners of the suit land and an order that the 5th defendant do transfer the five parcels to the respective owners and failing which the Deputy Registrar of the Court do execute the transfer.
 - iv. An order deregistering Tawai Limited (2005) the 5th Defendant herein.
 - v. General damages.
 - vi. Costs.
 - vii. Any other relief this court may deem just to grant.
5. Given the nature of the reliefs sought in this cause, parties herein proposed, and with the concurrence of this Court, it was directed that the hearing before this Court be limited to prayer (iv) of the Amended Complaint.
6. It, therefore, meant that once this Court determines the said issue, the case will again be re-transferred back to the Environment and Land Court for determination of the remainder of the reliefs sought in the Amended Complaint.
7. For purposes of good case management and in order to avoid any confusion in this matter, this Court shall instead render a ruling on the prayer (iv) of the Amended Complaint and a final judgment, which in any event can only be one in a suit, shall be rendered on the consideration of the remainder of the Amended Complaint by the Environment and Land Court.
8. At this point in time, it is instructive to mention that the 1st to 4th Defendants filed their joint Statement of Defence whereas the 5th Defendant herein filed an Amended Defence and Counter-Claim to the suit.
9. This ruling is, hence, limited to prayer (iv) of the Amended Complaint.

The Hearing:

10. The hearing was by way of tendering viva-voce evidence. As the 1st to 4th Defendants' witness had travelled from Nairobi and it was not likely that the Plaintiffs' case would be heard and closed on the very day, the parties proposed, and this Court agreed, that the witness from Nairobi, who was the only one to be called by the said Defendants, do tender his evidence first. He was Josiah Mugendi Njogu who testified as DW1.
11. On the basis of the evidence of DW1, the 1st to 4th Defendants closed their case.
12. The 5th Defendant herein, Tawai Limited, adopted the evidence of DW1 and closed its case without calling any witness.



13. The Plaintiffs called two witnesses. They were an Advocate of the High Court of Kenya one David Nyakang'o Onyancha, (testified as PW1) and the 1st Plaintiff herein, Wycliffe Okutoyi, who testified as PW2.
14. All parties filed their respective written submissions at the end of the closure of the parties' cases.
15. Having stated as much, and to enable this Court to appropriately deal with the matter at hand, the respective parties' cases will be briefly summed up.

The Plaintiffs' case:

16. Limited to the issue at hand, it was the Plaintiffs case that there was only one company registered in the name of Tawai Company which company was incorporated in 1974 and was wound up sometimes in 1985. It is that company that the Plaintiffs alleged to have bought land from.
17. The Plaintiffs vehemently challenged the alleged subsequent change of directorship of Tawai Limited vide a Notification of Change of Directorship lodged with the 4th Defendant on 21st February, 2005 and contended that the new directors were fraudsters out to disposes them of their land. They impugned the manner in which the said directors took office.
18. The Plaintiffs further blamed the 4th Defendant for failing to act in a manner upholding the integrity of the office by authorizing unlawful transactions.
19. The evidence of PW1 and PW2 buttressed the Plaintiffs position on the issue.
20. The Plaintiffs further filed extensive written submissions. They expounded on their case and, by use of case law, urged this Court to declare that Tawai Limited was legally wound up and dissolved and that the alleged new directors were a fraud. They also sought for rectification of the register and costs.

The 1st – 4th Defendants' case:

21. These Defendants opposed the Plaintiffs' claim that Tawai Limited was wound up and that the 4th Defendant acted outside the law by allowing further dealings in the company.
22. Through the evidence of DW1, it was narrated that although there was an attempt to wind up the company, the process was not completed, hence, the company is still current and a going concern. It was also revealed that the original file for Tawai Limited was misplaced and a temporary file opened on which the changes in the directorship of the company were effected.
23. Through their written submissions, the Defendants argued that Tawai Limited was still current, that there was only one Tawai Limited on record and that there are directors on board. Any actions allegedly undertaken by the 4th Defendant against the law were declined.
24. They also raised an objection on the issue of the directorship of the company. They argued that the issue was not pleaded and as such not to be determined in this ruling.
25. Several decisions were referred to in the Defendants' extensive and persuasive submissions.
26. In the end, the Defendants prayed that the claim be disallowed.

The 5th Defendant's case:

27. This Defendant highly associated itself with the rest of the Defendants on the issue at hand. Through its pleadings, it also posited that there was only one Tawai Limited on record which has duly and lawfully appointed directors in office. It refuted any allegations that Tawai Limited was wound up.



28. The Defendant further denied that it was associated with any actions or dealing that were contrary to law.
29. The 5th Defendant did not call any witnesses on the issue. It also filed brief submissions in urging its position.

Analysis:

30. Having carefully considered the pleadings, the evidence, the written submissions and the decisions referred to by the parties, this Court will resolve the aspect of the de-registration of Tawai Limited by addressing the following issues: -
 - i. The Tawai Limited incorporated in 1974 and the Tawai Limited incorporated in 2005;
 - ii. The Directorship of Tawai Limited;
 - iii. Reliefs, if any;
31. The Court will deal with the issues in seriatim.

a.The Tawai Limited incorporated in 1974 and the Tawai Limited incorporated in 2005:

32. For ease of this discussion, this Court will, henceforth, refer to the Tawai Limited incorporated in 1974 as 'the Tawai Limited' or 'the Company' and to the Tawai Limited incorporated in 2005 as 'the 5th Defendant'.
33. Without belaboring the issue at hand, all the parties agreed that there is only one company in issue in this case which is Tawai Limited. It was further agreed that the 5th Defendant was never incorporated and that the 4th Respondent does not hold any such records.
34. Tawai Limited was incorporated on or about 15th June, 1974 and a Certificate of Incorporation duly issued. It had a share capital Kshs. 20,000/= divided into 100 shares of Kshs. 200/= each. Tawai Limited had two subscribers who were Zakayo Richard Chesoni and Mary Aherwa Chesoni with each holding 50 shares. It came out at the hearing that the two were a husband and wife.
35. There was also the issue as to whether Tawai Limited was wound up. According to the evidence on record, it was revealed that there was an intention by the subscribers to wind up Tawai Limited sometimes in 1985. To that end, a Petition to wind up the company was lodged before the High Court of Kenya at Nairobi as Winding Up Cause No. 1 of 1985. Subsequently, a Gazette Notice No. 558 published in the Kenya Gazette of 8th February, 1985 was issued. The company was then placed under liquidation.
36. Pursuant to Gazette Notice No. 7330 published in the Kenya Gazette of 24th November, 1995 the Liquidator planned for the payment of the first and final dividend to creditors to be on 4th December, 1995.
37. Apart from the above evidence of the filing of a Petition in the Winding Up Cause, the appointment of the Liquidator and the intention by the Liquidator to pay the final dividend, there is no other evidence that the Company's winding up process was finally and fully completed.
38. The foregoing position was affirmed by DW1 who stated that their efforts to get the final position on the winding up process did not yield any fruits. DW1 even produced a copy of the 4th Defendant's letter dated 31st March, 2022 addressed to one Linos Masika Moli who had filed a Linking application



of the Company in their pursuit to the final position of the winding up process and more importantly, the status of the company's assets. However, nothing came forth.

39. Acknowledging the above position, the Plaintiffs, however, urged this Court to deem Tawai Limited as duly dissolved since the final dividend was paid to the creditors and the liquidator only failed to apply to Court for the final dissolution order under Section 269(1) of the Companies Act which failure rendered the Liquidator criminally liable under Section 296(3) of the said Act.
40. On the other hand, the Respondents posited that Tawai Limited was never wound up.
41. The Winding up of the Company in this instance was under the Court's supervision. The Companies Act, Cap. 486 of the Laws of Kenya (now repealed and hereinafter referred to as 'the repealed Companies Act') had extensive provisions on such winding proceedings from commencement to the finality of the process.
42. Whenever a Court appointed Liquidator had fully discharged his/her/its obligations under the repealed Companies Act, such would be required to bring the winding up process to an end by complying with Section 269 of the repealed Companies Act.
43. The said provision provided as follows: -
- 269.
- (1) When the affairs of a company have been completely wound up, the court, if the liquidator makes an application in that behalf, shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.
 - (2) A copy of the order shall within fourteen days from the date thereof be delivered by the liquidator to the registrar for registration.
 - (3) If the liquidator makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding one hundred shillings for every day during which he is in default.
44. Drawing from the said Section 269 of the repealed Companies Act, the liquidator would only apply to Court for dissolution of any company once all the affairs of that company had been completely wound up. From the plain reading of the above provision, the Court's role was not just merely administrative. No. The Court discharged a judicial duty by satisfying itself that all the affairs of a company had been completely wound up before making the final order dissolving the company.
45. It, therefore, goes without any peradventure, that a Court may then have declined a liquidator's application under Section 269(1) of the repealed Companies Act to dissolve a Company if it was not satisfied that all the affairs of a company had been completely wound up.
46. One of the duties of the Court under a Court-supervised winding up cause under the repealed law was to formally release a liquidator. Section 247 of the repealed Companies Act provided as much. Sub-section 1 stated as follows: -

When the liquidator of a company which is being wound up by the court has realized all the property of the company, or so much thereof as can, in his opinion, be realized without needlessly protracting the liquidation, and has distributed a final dividend, if any, to the creditors, and adjusted the rights of the contributories among themselves, and made a final return, if any, to the contributories, or has resigned, or has been removed from his office, the court shall, on his application, cause a report on his accounts to be prepared, and, on his



complying with all the requirements of the court, shall take into consideration the report and any objection which may be urged by any creditor or contributory or person interested against the release of the liquidator, and shall either grant or withhold the release accordingly.

47. There were instances where a Court would have declined to release a liquidator if the above provisions were not fully complied with. In such instances, the Court would charge a liquidator with the consequences of any act or default which he/she/it may have done or made contrary to his/her/its duty.
48. In cases where a liquidator was finally released by the Court, the release, under sub-section 3 thereof, discharged the liquidator from all liability in respect of any act done or default made by him/her/it's in the administration of the affairs of the company or otherwise in relation to his/her/its conduct as a liquidator. However, any such order was still open for revocation on proof that it was obtained by fraud or by suppression or concealment of any material fact.
49. This discussion, therefore, affirms the position that a final order of the Court dissolving a Company can only be made when the Court is satisfied that all what requires to be done, is so done. In this case, the liquidator was under a duty to inter alia realize all the property of the company, to distribute a final dividend and to adjust the rights of the contributories among themselves and to formally, by way of a report, inform the Court of the affairs of the Company. That was the report which the Court was to consider towards making the final order dissolving the company.
50. A reading of the Amended Complaint reveals that Tawai Limited had acquired properties including land. Without a report of the liquidator on the property, it definitely becomes a tall order for a Court to dissolve the company. There was also a Notice No. 7330 in the Kenya Gazette of 24th November, 1995 where the Liquidator planned to pay the first and final dividend to creditors on 4th December, 1995. Still, it is not known whether such a meeting was held, and if so, whether it was successful.
51. This Court's attention was further drawn to minutes of a meeting held on 6th January, 1986 between the Official Receivers of the Company and the Creditors which included some of the Plaintiffs. The Plaintiffs' interests were also captured by the Company Directors in April 1985 when the Directors filed the Company's Statement of Affairs with the 4th Defendant.
52. The fact that the Company was not wound up, but still remained operational was acknowledged by the 4th Defendant in its letter dated 31st March, 2022 (which letter was produced by DW1 as Exhibit 7) when it was considering a Linking application lodged by one Linos Masika Moli. The 4th Defendant noted as follows: -

..... Please note that the company has been filing annual returns indicating the company is in operation.
53. This Court is now satisfied, and so hold, that a Court cannot make an order dissolving a Company without being fully satisfied that all the affairs of that company have been completely wound up and there are no pending matters relating to that company. Further, that final order dissolving the company must be made in the Winding up proceedings.
54. As there is no evidence as to whether the winding up process of Tawai Limited was successfully completed including the liquidator realizing the property of the company, distributing a final dividend, adjusting the rights of the contributories among themselves and filing a report to Court, this Court declines the invitation by the Plaintiffs to deem Tawai Limited as having been dissolved.
55. Consequently, this Court finds and hold that Tawai Limited was not wound up and dissolved. It is still a going concern.



56. Having found as much, a consideration of the next issue follows.

b.The Directorship of Tawai Limited:

57. This issue elicited strenuous objection from the Defendants. They contended that the issue was not part of the pleadings before Court, hence, it was not capable of determination. Several decisions were referred to buttress the position in law.

58. This Court has, on a number of cases, associated itself with the Defendants position as espoused in Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR. Of course, there is the general rule in an adversarial system of litigation that any evidence which does not support the pleadings is for rejection.

59. As a general rule, there are exceptions thereto. Such have been considered judicially. The Court of Appeal for Eastern Africa in Vyas Industries v Diocese of Meru [1976] eKLR stated as follows: -

..... The circumstances in which an unpleaded issue can become an issue in a suit is a question which was considered in Odd Jobs v Mubia [1970] EA 476 in which it was held that: -

- a. a Court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to the Court for decision;
- b) on the facts the issue had been left for decision by the court as the Advocate for the Appellant led evidence and addressed the Court on it.

60. In Pacific Frontier Seas Ltd v Kyengo & another [2022] KECA 396 (KLR), the Court of Appeal at Malindi in Civil Appeal No. 32 of 2018 held as follows: -

As regards unpleaded issues, the principle is well settled that a court, even when it has jurisdiction, will not base its decision on unpleaded issues because the issues determined by the court must flow from pleadings. It is the pleadings which guide the litigation and succinctly inform the parties and the court what is in dispute. However, where the parties lead evidence and address the unpleaded issues and from the cause adopted at trial it appears that the unpleaded issues have been left for the decision of the court, the court will validly determine the unpleaded issues. (See Captain Harry Gandy v. Caspar Air Charters Ltd [1956] 23 EACA 139; Odd Jobs v. Mubea [1970] EA 476, D.E.N. v. P.N.N. (supra), Baber Alibhai Mawji v. Sultan Hashim Lalji & Another, CA No 296 of 2001; and Mapis Investment (K) Ltd v. Kenya Railways Corporation (2005) 2 KLR 410). Nevertheless, we should add that parties cannot validly leave unpleaded issues over which the court has no jurisdiction for it to decide, simply because parties cannot by consent, confer jurisdiction to a court which in law it does not have.

61. The above position had been affirmed in Justice Kalpana H. Rawal v Judicial Service Commission & 3 others [2016] eKLR by the very Court of Appeal in Civil Appeal No. 1 of 2016 at Nairobi. The Court expressed itself thus: -

The principles of law on unpleaded issues, as stated by the appellant, are correct and not in dispute. A court will not determine or base its decision on unpleaded issues. Where however, evidence is led and it appears from the cause followed at trial that an unpleaded issue has



been left to the court to decide, the trial court can validly determine the unpleaded issue. Accordingly, we need not belabour or restate the principles here in detail, save to mention but some decisions, which have crystallized those principles. These include Captain Harry Gandy v. Caspar Air Charters Ltd [1956] 23 EACA 139; Odd Jobs v. Mubea [1970] 476, D.E.N. v. P.N.N. (supra), Baber Alibhai Mawji v. Sultan Hashim Lalji & Another, CA No 296 of 2001; and Mapis Investment (K) Ltd v. Kenya Railways Corporation (2005) 2 KLR 410.

62. Applying the above exceptions to the case at hand, it comes to the fore that the issue of the directorship of Tawai Limited was not only raised at the trial, but documents were filed by the Plaintiffs to that end. A perusal of the List of Documents dated 15th August, 2016 filed by the Plaintiffs confirms as much. Parties further tendered evidence (including documentary evidence) and filed written submissions on it.
63. It is this Court's position that the issue of the directorship of Tawai Limited, although not plainly pleaded in the pleadings, has all along stood at the centre of, and is inseparable from, the discussion on the legal status of Tawai Limited. In fact, the issue of directorship of a company defines the legal status of that company. That issue has, since inception of this suit been in the mind of the Plaintiffs and that is why they filed documents and called witnesses to testify on the issue.
64. It is, therefore, this Court's finding that even though the issue of the directorship of Tawai Limited was not formally pleaded, evidence was led at trial and the issue was left to this Court to render itself on it. As such, this Court has the requisite jurisdiction to, and shall hereby, consider and determine the issue. This Court so proceeds.
65. Returning to the matter at hand, and as held above, there is only one legally registered Tawai Limited. It bears registration No. C 12,746. It was incorporated on 15th June, 1974 and had 2 subscribers and who were its Directors.
66. The subscribers and Directors were Zakayo Richard Chesoni and Mary Aherwa Chesoni. Each held 50 shares of the 100 shares of the company. There were, therefore, no unissued shares.
67. According to DW1, all went on well with the Company until 1985 when there was an attempt to wind up the Company. However, as held above, the process was not completed, hence, the Company is still current to date. Going forward, the Company still carried its business until on 21st February, 2005 when a Notification of Change of Directors was filed with the 4th Defendant allegedly in a temporary file as the original file was reportedly missing.
68. DW1 described the lodging of the Notification of Change of Directors as utterly irregular and stated as follows: -

..... A Notification of Change of Directors was filed on 21/02/2005. Such must be accompanied with minutes, resignation letters, share transfer and affidavits confirming resignation of the directors and Acceptance letters of the incoming directors. None of these documents were filed in the registry. The Registrar of Companies ought to have demanded that these documents be availed. Without the accompanying documents the validity of the Notification of the Directors is in the hands of the Registrar..... There is no evidence between the original Directors and the current Directors. There is a total disconnect....



69. When DW1 was cross-examined on the possibility of fraudsters taking over other people's companies, he responded as follows: -
- It is true people can take advantage of other people's companies and own them if the appropriate documents are not lodged....
70. The above response seemed to shade some light on what really happened in this matter as appertains the change of directorship of the Company. It seemed to have been a well-choreographed process which would have easily passed the test of genuinity had it not been the input of DW1 and the Plaintiffs and their witness.
71. It all started in October 2004 when 9 persons approached PW1 and instructed him to prepare a Memorandum and Articles of Association for a private limited liability company in the name of Tawai Limited. The company had a share capital of Kshs. 100,000/= divided into 100,000 shares of Kshs. 1/= each. The 9 persons were the subscribers and each was allotted 1 share.
72. The instructions were that limited. PW1 received and discharged the instructions. The persons then duly signed the Memorandum and Articles of Association, collected the documents and left. They did not request PW1 for any other legal service and they never returned.
73. Around three months later, the original file for Tawai Limited at the Companies Registry could not be traced. It was reportedly misplaced. A temporary file was, hence, opened. It was affirmed that the temporary file had nothing in it except the Notification of Change of Directors which was filed on 21st February, 2005 not even the documents prepared by PW1 or any other accompanying documents.
74. Then, the 4th Respondent went ahead and accepted the sole document in the name of the Notification of Change of Directors and effected the changes on the company directorship accordingly. Thereafter, it seems the Company underwent subsequent changes in the directorship and by the 4th Defendant's letter dated 25th June, 2019 addressed to the Deputy Registrar of this Court, the Company had 9 directors some of whom were those who were brought on board vide the impugned Notification of Change of Directors in 2005.
75. The irregularity of the questioned Notification of Change of Directorship of the Company was further raised by the 4th Defendant in its letter dated 31st March, 2022 when it was considering a Linking application lodged by one Linos Masika Moli. According to the 4th Defendant's letter dated 25th June, 2019 addressed to the Deputy Registrar of this Court, the said Linos Masika Moli was named as one of the then Directors of the Company.
76. In the said letter, the 4th Defendant observed as follows: -
- Thereafter, the records indicate a gap in the records until 2004 when a group of directors were newly appointed, but there is no mention of how the original members left or transferred their shares or the resolution of the liquidation process. Please note that the company has been filing annual returns indicating the company is in operation.
77. Therefore, vide its letter dated 31st March, 2022 and through the evidence by DW1, it was apparent the 4th Defendant was satisfied that the alleged change of directorship of Tawai Limited was heavily wanting and did not meet the expectations of the law. At the hearing of this matter, DW1 was still perplexed on how the change of directorship from the original subscribers was effected in 2005.
78. The 4th Defendant further noted other anomalies in the affairs of the Company by the subsequent directors including the irregular conversion of the Company from private to public. Again, no records



for the alleged conversion were in place. That was also captured in the 4th Defendant's letter dated 31st March, 2022.

79. Further, the alleged new Directors of Tawai Limited opted not to testify before this Court on how they became the directors of the company despite adverse evidence by DW1 and the Plaintiffs which, to a large extent, did not reflect so well on them. This Court can only, and reasonably so, make an inference that they avoided being examined on the manner they were appointed as Directors and carried their activities in the company for the obvious fear of further exposure of the malpractices committed to the Company.
80. Article 11(c) of the Company's Articles of Association stated that the quorum in any general meeting was to be two Directors who would personally attend or would attend through proxies. There is no evidence that any such meeting of the original subscribers who were the directors ever took place. As pointed earlier, the illegal take over of the directorship of Tawai Limited by the alleged new directors is an anomaly which the 4th Defendant has perpetually raised.
81. It is a settled principle in law that the affairs of a duly registered company must be carried out in accordance with the constituting documents. In this case, there is ample evidence that the alleged change of directorship of Tawai Limited from the original Directors fell short of the law. As stated by DW1, no any other document was lodged with the 4th Defendant in support of the change in the directorship except the Notification of Change of Directorship. In his words, DW1 remarked that any change in the directorship of a company must be accompanied with '... minutes, resignation letters, share transfer and affidavits confirming resignation of the directors and Acceptance letters of the incoming directors...'
82. Having found as much, this Court, therefore, finds no difficulty in holding that the change of directorship in Tawai Limited from the original directors who were Zakayo Richard Chesoni and Mary Aherwa Chesoni to the alleged subsequent ones was irregular and contrary to law. As such, all transactions and dealings undertaken by the subsequent directors to date have no force of law. They remain null and void ab initio.
83. Consequently, the correct legal position in respect of the current directorship of Tawai Limited is that the company has two directors namely Zakayo Richard Chesoni and Mary Aherwa Chesoni. There has been no valid change in the directorship since the company was incorporated in 1974. In the event that any of or both directors are deceased, the law does not fall short of what happens thereafter.
84. As this Court comes to the end of this issue, it has to consider an argument raised by Counsel for the 1st to 4th Defendant on the role of 4th Defendant. It was vehemently argued that the role of the 4th Defendant was merely to receive documents relating to companies and to keep them in safety in its registry and not otherwise.
85. Section 832 of the *Companies Act*, 2015 provides for the functions of the Registrar of Companies. The main function is to keep the Register which comprises of the information relating to companies that is contained in documents lodged or filed with or delivered to, certificates of incorporation issued by the Registrar and certificates of registration of company security rights.
86. The above section further provides for the manner in which the Registrar is to keep the register and the documents lodged or filed with or delivered to the Registrar.
87. Article 260 of *the Constitution* defines a public officer to mean a State officer or any other person who holds office in the national government, a county government or the public service, if the remuneration



and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament.

88. Therefore, the Registrar of Companies is a public officer since the office is one in the national government and further the Registrar receives remuneration and benefits of the office which are payable directly out of money provided by Parliament. As such, the Registrar has the obligation to respect, uphold and defend *the Constitution* pursuant to Article 3.
89. Further, under Article 10 of *the Constitution*, the Registrar is bound by the national values and principles of governance whenever applying or interpreting *the Constitution*, enacting, applying or interpreting any law or in making or implementing public policy decisions. Such include the rule of law, good governance, integrity, transparency and accountability.
90. The Registrar is, therefore, accountable to the people of Kenya in all dealings. He or she is also to abide by the rule of law and should also be transparent in all dealings. In discharging the duty to keep the register, the Registrar must, hence, ensure that all processes required to be undertaken in law are so properly undertaken, his/her actions and decisions are open and verifiable and he/she remains answerable to the people. That duty surpasses the simplistic requirement of the Registrar being reduced to a mere receiver and keeper of documents in the registry. The Registrar has a higher calling to ensure that the operations within the registry are within the law and he/she is always able to account for any state of affairs within the registry.
91. The Registrar cannot, therefore, ride under the rubric 'see no evil, hear no evil'. The Registrar is not a mere conveyor belt to receive all manner of documents and place them in the registry. No! The Registrar must be able to ensure that the registry is managed in a professional manner that accords to good governance and upholds the integrity of the office.
92. It is, hence, on that score that this Court differs with the Counsel for the 1st to 4th Defendants on the role the Registrar of Companies. For instance, in this case, the Registrar was to ensure that the original file for Tawai Limited was available. That is being accountable. The Registrar was also under a duty to decline to effect the Notification of Change of Directorship in the absence of all the requisite accompanying documents required in law. That is according respect for the rule of law. The Registrar was also not to continue entertaining any further transactions by the subsequent directors who were in office unlawfully. That is good governance and upholding the integrity of the office.
93. The manner in which the Registrar of Companies has and continues to deal with the affairs of Tawai Limited seriously goes against the grain of *the Constitution*.
94. The registry must be managed in a manner that commands public confidence lest it is transformed into a pathetic state like the Lands Registries in Kenya, which were aptly described by Hon. Munyao Sila, J in the Environment and Land Court at Kisii ELC Case No. 958 of 2016 Isaac Omwonga Mariera & Another vs. Abel Moranga Ongwancho & 2 Others (unreported) where the Learned Judge expressed himself thus: -
 41. I should pen off here, but what revealed itself in this case is deeply disturbing. We wouldn't be here if it were not for the much that has permeated our Land Registries. It is regretful that we are at an era where one can simply walk into a Lands Registry and walk out with a title after uprooting the genuine existing land records and planting his own that are non-authentic. It is extremely disheartening as the public has entrusted the Land Registries to be their custodian when it comes to records related to land. A Land Registry should be a hallowed place. It ought to be a repository whose records are absolutely tamper proof and beyond reproach. It goes without saying that the Land Registries ought only to be placed in the hands of persons of



absolute integrity. This is the office that the public has bestowed upon the responsibility of ensuring that the country's land records are properly kept and that they reflect the correct position regarding ownership of land.

42. We have every reason to demand that the Land Registries keep and maintain the proper and correct records of land ownership. Kenyans expect nothing less from the Land Registries and it is time for the land registries to either shape up or ship out. Land is probably the biggest factor of production in Kenya and we cannot afford to play around with this resource. If we fail to style up, banks will be afraid to lend credit on the security of land, and without that, you may fail to raise capital that is required for economic growth. People stand to lose very heavy investments, if not their entire livelihoods, by being defrauded of their land. People and companies are at a risk of being stripped bare of their hard earned assets and left to be paupers. The very land you think you own may very well be the target of the next land fraudster. Is that what we really want as a country? It is time that the public and the Government stood up to land fraudsters. We must make a statement that we cannot live in this fashion any more. It cannot, and it shouldn't be, business as usual in our Lands Registries. The Government must use its machinery and put all its energies and resources towards cleaning up the rot in our land administration system, our Land Registries, and our land records. We expect nothing less. I pray that this will be seriously taken into consideration by the powers that be.
95. Coming to the end on this issue, this Court's reiterates the finding that the correct legal position in respect of the current directorship of Tawai Limited is that the company has two directors namely Zakayo Richard Chesoni and Mary Aherwa Chesoni.

C. Reliefs:

96. Having found that the 4th Defendant has not managed the affairs of Tawai Limited within the constitutional expectations, the Plaintiff cannot be left without any remedy, otherwise the foregoing findings of this Court will be in vain.
97. Section 863 of the *Companies Act*, 2015 accords a Court the power to order the rectification of the register in two instances. First, to order the removal of any entry that derives from anything that the Court has declared to be invalid or ineffective, or to have been done without the authority of the company and second, the removal of any entry that the Court has declared to be factually inaccurate or to be derived from something that is factually inaccurate or is forged.
98. In this case, the irregular and unlawful change of the directorship of Tawai Limited was done without the authority of the company. It is only in the interest of justice that the affairs of the company should revert to as were before the filing of the notification of change of directorship.
99. In that case, all the parties will be placed on a level playing field and they will be able to articulate their interests, if any, going forward.

Conclusions:

100. The Plaintiffs have to a great extent managed to prove that their claim is valid. This Court now makes the following findings: -
- i. A Court cannot make an order dissolving a Company without being fully satisfied that all the affairs of that company have been completely wound up and there are no pending matters relating to that company.



- ii. Since incorporation in 1974, Tawai Limited has not been wound up and/or dissolved and is still a going concern to date.
- iii. The current Directors of Tawai Limited are Zakayo Richard Chesoni and Mary Aherwa Chesoni.
- iv. Any entry made by the Registrar of Companies registering any other person than Zakayo Richard Chesoni and Mary Aherwa Chesoni as a Director or Directors of Tawai Limited is unlawful, invalid, ineffective and void ab initio.
- v. The duty of the Registrar of Companies is not only to keep the register, but to also ensure that all the affairs of that office are carried out in a manner upholding the national values and principles of governance including the rule of law, good governance, integrity, transparency and accountability.
- vi. The Registrar of Companies failed in its duty to ensure that the affairs of Tawai Limited were conducted within the calling of *the Constitution* and the law by irregularly and illegally allowing the change of the directorship of the company from its original subscribers.

101. This Court shall, hence, render appropriate orders in line with the foregoing.

Disposition:

102. Deriving from the above discussion, this makes the following final orders: -

- a. A Declaration do hereby issue that there is only one company in the name of Tawai Limited [No. C. 12,746] which was incorporated on 15th June, 1974 and which company has two Directors being Zakayo Richard Chesoni and Mary Aherwa Chesoni.
 - b. A Declaration do hereby issue that the Notification of Change of Directors for Tawai Limited filed on 21st February, 2005 with the Registrar of Companies is a nullity, unlawful, ineffective and void ab initio. The same is hereby quashed forthwith.
 - c. A Declaration do hereby issue that any dealings, transactions, decisions, resolutions and actions allegedly by Tawai Limited made and/or undertaken by or under the directions or orders of any other Director(s) other than Zakayo Richard Chesoni and Mary Aherwa Chesoni are a nullity, unlawful, ineffective and void ab initio. The same is/are hereby quashed forthwith.
 - d. The Registrar of Companies is hereby ordered to rectify the register by removing any entry or entries, as the case may be, that altered or changed the directorship of Tawai Limited from the original subscribers.
 - e. The Registrar of Companies shall also remove from the register any other entry or entries, if any, that changed, altered or affected the shareholding and/or status of Tawai Limited prior to the 21st February, 2005.
 - f. This matter shall be transferred back to the Land and Environment Court for purposes of determining the rest of the prayers sought in the Amended Complaint dated 11th October, 2017.
 - g. Costs shall be in cause.
 - h. Leave to appeal against this ruling is hereby granted.
- Orders accordingly.



DELIVERED, DATED AND SIGNED AT KITALE THIS 23rd DAY OF NOVEMBER, 2023.

A. C. MRIMA

JUDGE

Ruling delivered in the presence of:

Mr. Kiarie, Counsel for the Plaintiffs.

Mr. Odongo, Counsel for the 1st to 4th Defendants.

Mr. Gemenet, Counsel for the 5th Defendant.

Chemosop/Duke – Court Assistants.

