



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC PETITION NO. E010 OF 2021

PETER CHEMUIGUT.....PETITIONER

AND

KENYA SEED CO. LTD (K).....1ST RESPONDENT

AGRICULTURAL DEV. CORPORATION (ADC).....2ND RESPONDENT

FRED OLOIBE.....3RD RESPONDENT

MOHAMMED BULLE.....4TH RESPONDENT

ELIUD MATHU.....5TH RESPONDENT

EDNA ATISA.....6TH RESPONDENT

PETER MUNYA.....7TH RESPONDENT

HON. ATTORNEY GENERAL.....8TH RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTION.....1ST INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION....2ND INTERESTED PARTY

RULING

1. The petitioner herein filed a petition dated 23rd September 2021 against the actions of the 3rd to 7th respondents who he alleges frustrated the private shareholders of the 1st respondent and occasioned irregular misappropriation and corrupt practices in the 1st & 2nd Respondent companies. He averred that the 2nd to 7th respondent had mismanaged and micromanaged the activities of the 1st respondent by frustrating the efforts by the 1st respondent's shareholders to hold a fair Annual General Meeting (AGM). He also averred that the 3rd to 6th respondents disregarded procurement provisions in the appointment of Kimamo Kuria & Co. Advocates; irregularly awarded Manpower Services Limited the tender to recruit the 1st respondent's Managing Director and, the procurement of fertilizer from Lamo Company Limited. He further averred that the 3rd, 4th and 7th respondents had conspired to defraud the 1st Respondent Company through the purchase of M/s Emitiot Farm for about Kshs. 200 million. The Petitioner avers that on 14th April, 2020 the 7th Respondent, an agent of the 2nd Respondent un-procedurally appointed the 3rd Respondent as the acting Managing Director of the 1st Respondent which appointment was later ratified by the 1st Respondent's board that is not even fully constituted and without doing due diligence. He asserts that the 3rd Respondent has outstanding integrity issues and that he (the petitioner) reported the matter but no action was taken.

2. The petitioner further avers that investigations by the Directorate of Criminal Investigations (DCI) have unearthed fake seeds rackets involving the 1st Respondent's employees and that on 3rd March, 2021 the company lost seeds worth Kshs. 100 million at its stores in Narok and nearly Kshs. 7 million in its seed shop in Kitale. He contends that the emergence of fake seeds which has in turn affected this country's

food security can only be attributed to the micromanaging of the company by the 3rd to 6th Respondents.

3. The petitioner asserts that the actions of the Respondents have violated the 1st respondent's shareholders' rights under **Articles 21, 27, 35, 40, 47, 48 and 78** of the **Constitution** and so he seeks orders that:-

“a) A permanent injunction be issued against the 2nd respondent restraining either by itself, its employees, agents or servants or any other person acting through them or in their name from conducting the affairs of the 1st respondent in an oppressive manner or in a manner prejudicial to the private shareholders of the 1st respondent.

a. A declaratory order against the 1st respondent board that the award of tenders to Manpower Services Limited was irregular and the subsequent contracts were void ab initio therefore, conduct afresh the tender for hiring of the 1st respondent managing director.

b. A declaratory order against the 3rd respondent, 4th respondent, 5th respondent and 6th respondent for their wilful failure to comply with the law relating to the procurement of Manpower Services Limited contrary to Section 45(2) (b) as read together with Section 48 of the Anti-Corruption and Economic Crimes Act.

c. A declaratory order against the 1st respondent board that the appointment for advocate Kimamo Kuria was irregular and the subsequent contracts were null and void ab initio.

d. A declaratory order against the 3rd respondent, 4th respondent, 5th respondent and 6th respondent for disregarding the provisions of Section 103(2)(a)(b)(c)(d)(e) as read together with Section 44(2)(a)(b) of the Public Procurement and Disposal Act 2015 for the appointment of advocate Kimamo Kuria.

e. A declaratory order against the 3rd respondent, 4th respondent and 7th respondent conspiracy to defraud contrary to Section 327 of the Penal Code on the purchase of M/S Emitiot Farm in Endebess.

f. A declaratory order holding the 3rd respondent, 4th respondent, 5th respondent and 6th respondent liable for breach of their fiduciary duty for wasteful of corporate assets, failing to oversight through, monitoring of the company's compliance and oppressing the petitioner herein and the 1st respondent private shareholders.

g. A declaratory order against the 7th respondent for contravening Article 73 and Article 47 (1) of the Constitution therefore in breach of Article 153 of the Constitution that guides on the conduct of cabinet secretaries.

h. A declaratory order restraining the 2nd respondent agents; 4th respondent, 5th respondent, 6th respondent, 7th respondent and the 8th respondent from further violating the shareholders' rights and fundamental freedoms by denial of their rights to participate in the Annual General Meeting and to participate in the running of the affairs of the 1st respondent as per the provisions of the Companies Act 2015 and the Memorandum and Articles of Association of the 1st respondent company.

i. An order for costs and incidentals to this petition.”

4. Together with the Petition the Petitioner filed a Notice of Motion dated 23rd September 2021 which is expressed to be brought under **Article 22, 23(3), 50(1), 159(2)(d), 165 and 258 of the Constitution of Kenya, Sections 18, 19 & 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 23; Section 280 and 310 of the Companies Act 2015** which seeks the following orders:

“a) Spent

a. THAT pending inter parties hearing and determination of this application and petition, an order for injunction be issued suspending the 1st respondent and Manpower Services Limited from recruiting process of a managing director.

b. THAT pending inter parties hearing and determination of this application and petition, an order compelling the 1st respondent to provide the petitioner with the information sought in the letters dated September 13, 2021 and September 6, 2021 respectively within 4 days of the court order.

c. THAT pending hearing and determination of this application and petition, an order granting leave for the Petitioner to commence private prosecution against the 3rd respondent, 4th respondent, 5th respondent, 6th respondent and 7th respondent on the grounds that the petitioner had registered several complaints to the 2nd interested party and has notified the 1st interested party of his intention to prosecute the respondents for malpractices at the 1st respondent company related to irregular tendering and or approvals on the following: Manpower Services Limited, Lamo Company Limited, Kimamo Kuria Advocate and purchase of M/S Emitiot Farm in Endebess.

d. THAT pending hearing and determination of this application and petition, an order for injunction be issued suspending the 1st respondent from the process of purchasing of 170 acres from M/S Emitiot Farm in Endebess.

e. THAT pending hearing and determination of this application and petition, an order to compel the 1st respondent to conduct an Annual General Meeting within 14 days for all registered shareholder as per its Articles of Association and in compliance to Companies Act 2015 and the Constitution of Kenya 2010.

f. THAT costs of this application be provided for.”

5. The application is premised on the grounds on its face and is supported by the affidavit of the Petitioner, sworn on the 23rd September 2021. The gist of the application is *inter alia* that the Respondents have blatantly refused, ignored or neglected to call and hold an Annual General Meeting, that the Respondents have violated the rights of the shareholders to property, have illegally appointed Board members for the company in breach of the 1st Respondent’s Memorandum and Articles of Association, have generally not followed the procedures of running a company and have brought the asserts of the company to waste.

6. In response, the 1st, 3rd, 4th, 5th and 6th respondents filed a replying affidavit sworn by Fred Oloibe, the 3rd respondent and acting Managing Director of the 1st respondent in which they disputed all the averments by the Petitioner. The 3rd to 6th Respondents also filed a Notice of Preliminary Objection dated 15th November 2021 premised on the following grounds:

“a) The petition and application herein are defective in so far as the said respondents(as well as the 7th respondent) who have no personal interest in the subject matter of the dispute and who are merely “agents of disclosed principals” have been wrongly joined in their respective personal capacities as respondents which misjoinder unreasonably exposes them to the unnecessary burden of having to incur legal expenses and the risk of having to obey court orders even if they happen to leave the office during the pendency of this matter.

a. The 3rd, 4th 5th and 6th respondents will seek to have their names struck out of the entire petition and application with costs, to compensate them for both the legal expenses that have so far incurred and for the unnecessary nuisance of litigation that they have to bear with.

b. The said Preliminary Objection is based on the following matters of fact and law:

a. Besides being the acting managing director for the time being, and therefore a board member of the 1st respondent, the 3rd respondent has no personal or individual interest in or concerning the 1st respondent or the dispute herein.

b. Besides being the managing director for the time being, of the Agricultural Development Corporation (ADC), the majority shareholder in the 1st respondent, the 4th respondent has no personal or individual interest in or concerning the 1st respondent or the dispute herein.

c. Besides being the alternate director for the time being, representing the Principal Secretary to the treasury under section 6(1)(d) of the State Corporations Act and therefore a Board member of the 1st respondent, the 6th respondent has no personal or individual interest in or concerning the 1st respondent or the dispute herein.

d. Besides being the Cabinet Secretary for the time being, in the Ministry of Agriculture, Livestock, Fisheries & Co-operative which is the parent Ministry of the 1st respondent, the 7th respondent has no personal individual interest in or concerning the 1st respondent or the dispute herein.

c. The 3rd, 4th, 5th and 6th respondent (and indeed, the 7th respondent as well), being agents of “Disclosed Principal” namely, the 1st respondent, 2nd respondent and the said parent Ministry of Agriculture, Livestock, Fisheries & Co-operative, it is legally untenable to sue them personally instead of suing their respective principals. “

7. The 7th and 8th respondents filed Grounds of Opposition dated 11th November 2021 and a Preliminary Objection dated 11th November 2011 to the effect that: -

“a) THAT by dint of Articles 162 (2) (a) and 165 (5) (b) of the Constitution as read with section 12 of the Employment & Labour Relations Court Act Cap. 234B of the Laws of Kenya, this Honourable Court is not vested with the requisite jurisdiction to hear and determine both the application and the petition.

a. THAT by dint Articles 162 (2) (b) and 165 (5) (b) of the Constitution as read with section of the Environmental and Land Court Act No. 19 of 2011 of the Laws of Kenya, this Honourable Court is not vested with the requisite jurisdiction to hear and determine both the application and petition.

b. THAT both the application and petition be struck off with no orders as to costs.”

8. On 16th November 2021, this court gave directions that the preliminary objections would be the first to be heard and directed parties to file

written submissions. The 3rd to 6th Respondents filed submissions which are dated 14th November 2021. Those of the Petitioner to the Preliminary Objection of the 3rd to 6th Respondents are dated 29th November 2021 while those in answer to the Preliminary Objection of the 7th and 8th Respondent are dated 3rd December 2021. The 7th & 8th Respondents did not file written submissions but gave oral submission at the hearing.

SUBMISSIONS

The 3rd to 6th Preliminary Objection dated 15th November 2021

3rd to 6th respondents' submissions

9. Mr. Mmbogori learned counsel for the 3rd to 6th respondent submitted that the gist of their Preliminary Objection was that the names of the 3rd to 6th respondent should be struck out of these proceedings for misjoinder. He submitted that the respondents are directors of the board of the 1st respondent and had no personal interest in the 1st respondent or the dispute herein. Further, he stated that the individual directors constitute the board which is an organ of the company and therefore the board and its individual members are agents of the company. He contended that the 3rd to 6th respondents being members of the board of the 1st respondent were agents of a disclosed principal and that it is trite law that one cannot sue the agent of a disclosed principal but the principal itself. He relied on the case of **City Council of Nairobi vs Wilson Githua T/A Githua Associates [2016] eKLR**. Mr. Mmbogori further submitted that neither the petition nor the notice of motion disclosed a reasonable cause of action against the 3rd to 6th respondents individually and that the petitioner had failed to demonstrate that they were necessary parties in the proceedings without whose joinder there would be a miscarriage of justice. He cited the case of **Jackson Sagligram Baburam & 4 Others vs Scereca East Africa Limited & Another [2020] eKLR** where the court citing Delvin J in **Pizza Harvest Limited v Felix Midigo [2013] eKLR** cited with approval in the case of **Amon v Raphael Tuck & Sons Ltd (1956) 1 All ER 273** held:-

“What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.”

10. Mr. Mmbogori argued that the actions complained of by the Petitioner were actions taken by the 3rd to 6th respondents as directors of the board of the 1st respondent and that their joinder to these proceedings unnecessarily subjects them to court orders even when they had left the board. Mr. Mmbogori put reliance on the case of **Amos Tum Kiptoo & 2 others vs P. M. Wandabwa & 9 Others [2007] eKLR** and **Litein Tea Factory Company limited & Another vs Davis kiplangat Mutai & 5 Others [2015] eKLR**.

11. By way of rejoinder to the petitioner's submissions, Mr. Mmbogori for the 3rd to 6th respondents submitted that derivative actions are brought by a minority shareholder for and on behalf of the company and that the present suit was not a derivative suit as it was brought on the petitioner's own behalf. He urged this court to uphold the Preliminary Objection of the 3rd to 6th Respondents and strike out the petition and application and award them costs.

The 7th & 8th respondents Preliminary Objection dated 11th November 2021

12. Ms. Wamuyu, learned counsel for the 7th & 8th respondents, submitted that by dint of **Article 162(2)(a)** and **165(5)(b)** as read with **Section 12 of the Employment and Labour Relations Act** and; **Section 13 of the Environment and Land Act** this court has no jurisdiction to hear and determine this petition. She contended that at prayer (b) of the application, the petitioner sought an order of injunction to restrain the 1st respondent and Manpower Services from recruiting a managing director. She submitted that the issue of the recruitment process could only be litigated in the **Employment and Labour Relations Court** and cited the case of **USIU vs Attorney General and 2 Others [2012] eKLR** where the court concluded that the **Employment and Labour Relations Court** is a court of equal jurisdiction to the High Court and can interpret the Constitution. Counsel further submitted that in prayer (d) the petitioner sought an injunction to restrain the 1st and 2nd respondents from purchasing a 500 acre farm in Endebess. She argued that whereas the issue of purchase was not expressly referred to in the Land Act, it could only be dealt with by the Environment & Land Court. She cited the case of **Susan Achieng Butler & Others vs Redwill Heights Investment Limited & Another [2016] eKLR** where the court used the predominant test to determine the issue of jurisdiction.

Petitioner's submissions

13. In regard to the Preliminary Objection of the 3rd to 6th Defendants/Respondents the Petitioner, who is self-represented, submitted that in his petition and supporting affidavit he had disclosed probable causes of action against the 3rd to 6th respondent individually and collectively. He contended that the 3rd to 6th respondents had a significant role in the running of the 1st respondent's affairs and that by signing documents they were liable. He submitted that **Section 780 of the Companies Act** gave shareholders of a company the right to come to court and seek protection where the company's affairs are being or have been conducted in a manner that is oppressive or unfairly prejudicial to the interest of the members. He stated that his fundamental rights had been violated and infringed by the Respondents' failure to abide by the Memorandum and Articles of Association. He asserted that that the 3rd to 6th Defendants/Respondents had been properly sued in these proceedings as a derivative suit for commissions or omissions of their actions. He cited the case of **Isaac Kinyanjui Muitherero v Jonathan Craig Buffey & 2 others**, the case of **Wild Eye Limited (Affected Party) [2020] eKLR** and the case of **Ghelani Metals Limited & 3 Others vs Elesh Ghelani Natwarlal & Another [2017] eKLR** where the court held that:-

“37. Derivative actions are the pillars of corporate litigation. As I understand it, a derivative action is a mechanism which allows shareholder(s) to litigate on behalf of the corporation often against an insider (whether a director, majority shareholder or other officer) or a third party, whose action has allegedly injured the corporation. The action is designed as a tool of accountability to ensure redress is obtained against all wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the corporation: see *Wallersteiner v Moir* (No.2) [1975] 1 All ER 849.

38. Until 2015, in Kenya, the common law guided derivative actions in Kenya. Ordinarily under common law, one had to fall under the exceptions to the rule in *Foss –v- Harbottle* [1843] 2 Hare 461 that “a company is a separate legal personality and the company alone is the proper Plaintiff to sue on a wrong suffered by it” :see also *Hawes v Oakland* 104 U.S 450 [1881]. The exceptions to the rule in *Foss v Harbottle* were mainly where there was fraud on a minority caused by majority shareholder(s). The action to be commenced had also to be in the best interest of the company and without any ulterior motive: see *Nurcombe v Nurcombe* [1985] 1 All ER 65.

39. The rule in *Foss v Harbottle* along with its exceptions held sway locally as well: see *Rai & Others v Rai & Others* [2002] 2 EA 537. A party seeking to ‘by-pass’ the company had, in limine, to show that he fell within the exceptions to the rule: see *Murii v Murii & Another* [1999] 1 EA 212.

40. With the advent of the Act, the law fundamentally changed. The requirement to fall under the exceptions to the rule in *Foss v Harbottle* was replaced with judicial discretion to grant permission to continue a derivative action. Judicial approval of the action is what now counts and such approval is based on broad judicial discretion and sound judgment without limit but with statutory guidance.”

14. The Petitioner argued that the application and petition had been properly brought against the 3rd to 6th Defendants/Respondents and as they had already responded to various malpractices in their affidavits this court should dismiss their Preliminary Objection.

15. In regard to the Preliminary Objection of the 7th and 8th Respondents, Mr. Chemuigut submitted that application and petition did not relate to employment nor environment and land but that the 2nd respondent oppressed him and other private shareholders of the 1st respondent hence occasioning corrupt malpractice. He contended that the issues are criminal and relate to corruption and economic crime. He asserted that this court has unlimited jurisdiction under **Article 165(5)(b)** and further **Gazette Notice No. 10263** dated 9th December 2016 empowered the Anti-Corruption and Economic Crimes Division to deal with matters of infringement or threatened infringement of the constitutional rights relating to corruption and/or economic crimes and that this court ought therefore to hear his petition.

Analysis and Determination

16. I have considered the pleadings herein, the Preliminary Objections raised and the rival submissions. The issues that arise for determination are: -

“a. Whether the issues raised by Counsel for the 3rd to 6th Respondents and Counsel for the 7th & 8th Respondents properly amount to a preliminary objection.

b. Whether arising from those preliminary objections this court has jurisdiction to entertain the application and petition herein.”

17. The principles that govern a Preliminary Objection were settled in the celebrated case of ***Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969]EA 696** where Law JA as he then was stated:-

a. “....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

18. Applying the above test to this case and noting that an issue of jurisdiction has been raised I am satisfied that the issues raised by Counsel for the 3rd to 6th Respondents and the 7th & 8th Respondents amount to a Preliminary Objection in that they are capable of disposing this petition.

19. Turning to the issue of jurisdiction it is now trite law that jurisdiction is a fundamental issue which if raised should be disposed of at the earliest stage of the proceedings and where a court is convinced that it has no jurisdiction to entertain any matter before it that court has no alternative but to down its tools. This is as was stated by Nyarangi JA in the case of ***Owners of the Motor Vessel ‘Lillian S’ versus Caltex Oil (Kenya) Ltd* [1989] KLR 1** that: -

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

20. Similarly in the case of ***Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others*, [2012] eKLR**, the Supreme Court pronounced itself thus:-

“(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...where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

21. The jurisdiction of the High Court stems from **Article 165 of the Constitution** which provides: -

“165.

(3) Subject to clause (5), the High Court shall have—

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c) ...
- (d) ...
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.”

22. The Anti-Corruption and Economic Crimes Division is a Division of the High Court established by the Hon. The Chief Justice pursuant to **Section 11 (1)(h) of the High Court (Organization and Administration) Act No. 27 of 2015** through **Kenya Gazette Notice No. 10263** dated 6th December 2016. Paragraph 5 of the Gazette Notice provides the mandate of the court as follows: -

“5. The following matters shall be heard by the Anti-corruption and Economic Crimes Division of the High Court—

- (a) petitions and Judicial Review applications on claims of infringement or the threatened infringement of constitutional rights relating to corruption and/or economic crimes related matters;
- (b) all proceedings relating to corruption and economic crimes over which the Magistrates’ Anti-Corruption Court has no jurisdiction;
- (c) all criminal reviews, revisions, appeals and any other applications arising from decisions of the special Magistrates appointed under Section 3 of the Anti-Corruption and Economic Crimes Act, 2003;
- (d) cases relating to corruption and economic crimes filed under the following Acts:
 - (i) Anti-Corruption and Economic Crimes Act, Cap. 65.
 - (ii) Proceeds of Crime and Anti-Money Laundering Act, Cap. 59B’.
 - (iii) Anti-Counterfeit Act, Cap. 130A
 - (iv) Leadership and Integrity Act, Cap. 182.
 - (v) Public Procurement and Asset Disposal Act, No. 33 of 2015.
 - (vi) Public Officers Ethics Act, Cap. 183.
 - (vii) Public Finance Management Act, No. 18 of 2012.
 - (viii) Extradition (Contiguous and Foreign Countries) Act. Cap. 76.
 - (ix) Extradition (Commonwealth Countries) Act, Cap. 77.
 - (x) Prevention of Organized Crimes, Cap. 59.
 - (xi) Mutual Legal Assistance Act, Cap. 75A.
 - (xii) Regional and International Treaties and Conventions on Anti-Corruption.

(xiii) Or filed under any other enabling provisions of law.

(e) Disputes touching on or related to—

(i) offences or the recovery, or protection of public property, or

(ii) the tracing of, freezing of, or confiscation of proceeds of corruption or related to corruption and money laundering and

(iii) the payment of compensation of proceeds of corruption and economic crimes.”

23. It is evident from a close perusal of the Petitioner’s Notice of Motion and the Petition itself that the gravamen of the Petitioner’s complaint stems from the running and management of the affairs of the Agricultural Development Corporation (ADC) and the Kenya Seed Company (KSC) and the appointment of the 3rd Respondent as Managing Director of the Kenya Seed Company. The Petitioner contends that the shareholders of KSC (Kenya Seed Company) and ADC (Agricultural Development Corporation) are being oppressed and accuses the 3rd Respondent of micromanaging the affairs of Kenya Seed Company. He also alleges that there are corrupt practices at Kenya Seed Company which are a result of the micro-management of the company by the 3rd to 6th Respondents. More particularly he accused them of:

“6. a) Illegally appointing Board Members an exercise preserved for members of the 1st Respondent Company done at Annual General Meeting.

b. Illegally appointing and transferring staff an exercise preserved for board of the 1st Respondent company.

c. Not following procedures on running business of the 1st Respondent company

d. Ignoring legal framework and policies of running the company by using State Corporations Act (Cap 446) instead of Companies Act, 2015.

e. Frustrating holding of meaningful Annual General Meeting as stipulated by 1st Respondent & Companies Act 2015;

f. Denying 1st Respondent’s shareholders to be denied dividends;

g. Denying shareholders rights to participate in the affairs of the 1st Respondent by invoking the provisions of State Corporations Act.

h. Discriminating against the minority shareholders.”

24. The Petitioner contends that the rights of the shareholders have been grossly violated by the failure of the 3rd Respondent to call an Annual General Meeting and has therefore created an environment for corruption to thrive.

25. In my view all the above allegations pertain to the internal affairs and running of a company which ought to be adjudicated under the Companies Act whose jurisdiction is the preserve of the Commercial & Tax Division of the High Court but not this court. It is clear that the petition as a whole raises failure of the 3rd to 6th respondents to adhere to the provisions of the Companies Act and to the provisions of the 1st respondent’s Memorandum and Articles of Association. This is borne by paragraphs 1 – 6 of the application as well as paragraphs 14-18, 43-51, 56 and 57 of the Petition, which revolve around the failure of the respondents to call an AGM the alleged oppression of minority shareholders of the 1st respondent and the transfer of employees. Prayer (f) of the application and prayers (a), (h) and (j) of the petition deal with the running of the 1st respondent. As earlier highlighted, the mandate of this court as set out in the Gazette Notice is strictly to deal with corruption and economic crimes but does not extend to matters that strictly fall under the **Companies Act**. The jurisdiction to deal with issues pertaining to the affairs of companies lies elsewhere.

26. Further a glance at paragraph 7 (d) of the application, paragraph 40 of the supporting affidavit and paragraphs 27 and 55 of the Petition discloses that the petitioner is aggrieved that the purchase of land was not approved by the 1st Respondent’s shareholders. The petitioner further asserts that the respondents conspired to defraud the company contrary to **Section 327 of the Penal Code** as the purchase price was higher than the market value. From the foregoing it is clear that the petitioner seeks that the respondents are prosecuted for the alleged offence of conspiracy to defraud. However, Investigations of crimes falls under the ambit of the Director of Criminal Investigations but not this court. Further, in prayer (d) the Petitioner seeks leave to conduct private prosecution against the 3rd to 7th respondents which also is not within the jurisdiction of this court as such leave is granted by the magistrates’ courts as provided **in Section 88 of the Criminal Procedure Code** which states: -

“88. (1) A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Director of Public Prosecutions in this behalf shall be entitled to do so without permission.”

27. In the case of **Otieno Clifford Richard vs Republic High Court at Nairobi (Nairobi Law Courts) Misc Civil Suit No. 720 of 2005**, a three judge bench of the High court dealt with the circumstances under which a private person could be permitted to carry out a private

prosecution and stated that:-

“Section 85 to Section 88 of the Criminal Procedure Code deal with “Appointment of Public Prosecutors and conduct of prosecutions”. On the other hand, Section 89 to Section 90 of Criminal Procedure Code deal with the “Institution of proceedings and making of complaint”. We think that in the case of a private prosecution an application must first be made under Section 88(1) of the Criminal Procedure Code for the Magistrate trying the case to grant or refuse to grant permission to the Plaintiff to conduct a private prosecution. It is after permission has been granted for the private prosecution to be conducted that Section 89 and Section 90 of the Criminal Procedure Code can be brought into effect and the criminal proceedings instituted. We believe that the principles set out in the KAHARA CASE at page 89 are good law and provide guidance to a subordinate court when determining the question whether to allow a private prosecution since it spells out certain issues which must be addressed by the court when considering the application for permission to private prosecute before granting it.”

28. A similar finding was reached in the case of **Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka & 218 others [2013] eKLR** Mumbi Ngugi J, as she then was, held:-

“A private citizen can only institute private prosecutions in those cases where he or she satisfies the Magistrate’s Court before whom he or she wishes to carry out the prosecution that there has been a failure by the bodies charged with prosecution to carry out their mandate. To do so, the private citizen must meet the requirements enunciated in the Floriculture case which are set out above.”

Clearly therefore the Petitioner’s application to conduct a private prosecution against the Respondent is in so as it is made to this court misplaced as the jurisdiction to grant such leave lies elsewhere.

29. The next issue is whether there is a misjoinder of the 3rd to 6th respondents. The 3rd to 6th respondents have argued that they are agents of a disclosed principle and hence they are not properly sued. On the other hand, the petitioner argues that the 3rd to 6th respondents were key decision makers who signed documents and that this is a derivative suit brought under **Section 780 of the Companies Act 2015**. Having come to the conclusion that this court has no jurisdiction to deal with matters pertaining to the internal affairs of a company, the appointment of Directors, the Annual General meetings etc. I must down my tools and leave the issue of joinder to the court that shall ultimately hear the petition and the application.

30. In the upshot, it is my finding that the Preliminary Objection of the 3rd to 6th Respondent is merited. It is upheld with the result that the Petitioner’s application and petition are struck. However, given the nature of the proceedings there shall be no order for costs.

SIGNED, DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 27TH DAY OF JANUARY, 2022

E. N. MAINA

JUDGE