REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 7 OF 2020

IN THE MATTER OF ARTICLES 10, 21, 23, 25, 27, 40, 47, 50,

73, 159(2) AND 232 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE COMPANIES ACT, 2015

AND

IN THE MATTER OF THE MEMORANDUM AND ARTICLES OF

ASSOCIATION, KENYA SEED COMPANY LIMITED

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS

AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2014.

BETWEEN

SOET KENYA LIMITED.....1ST PETITIONER/APPLICANT

DR. NATHANIEL K. TUM.....2ND PETITIONER/APPLICANT

AND

THE CABINET SECRETARY, MINISTRY OF AGRICULTURE,

LIVESTOCK AND FISHERIES & CO-OPERATIVES.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

KENYA SEED COMPANY LIMITED.....3RD RESPONDENT

SAMSON CHELULE(DR).....4TH RESPONDENT

ELSBETH NAEKU TOLU.....5TH RESPONDENT

MUCHOHI RUIRU GIKONYO.....6TH RESPONDENT

JUDGEMENT

A. INTRODUCTION

1. The 1st petitioner is a limited liability company duly incorporated in accordance with the provisions of the Companies Act (CAP 486 Laws of Kenya). It is involved inter alia in Farming, Agricultural Services and business activities.

2. The 2nd petitioner is a male adult residing in Kitale and Nairobi and also serves as the chairman of the 1st petitioner herein.

3. The 1st respondent is the Cabinet Secretary in charge of Agriculture, Livestock, Fisheries and Co-operatives while the 2nd respondent is a Constitutional Office established under Article 156 of the Constitution of Kenya 2010 and the Principal Legal Adviser to the government.

4. The 3rd respondent is a body corporate established under the Companies Act (CAP 486 Laws of Kenya (repealed)). It is involved in the production and marketing of top-quality seeds for the country's farming community with an overall objective of adding value to the farming business and contributing to food sufficiency in Kenya and beyond.

5. The 4th-6th respondents are adults appointed by the 1st respondent vide gazette notice No. 3374 published on the 4th of May 2020 as members of the 3rd respondents which appointment is the subject of this petition.

6. The Petitioners filed this petition dated the 14th of May 2020 on the 15th of May 2020 supported by the affidavit of one Dr. Nathaniel K. Tum, the 2nd petitioner herein sworn on the 13th of May 2020. Contemporaneously, the Petitioners filed a Notice of Motion dated 14th May, 2020 seeking temporary injunction orders pending the hearing and determination of the application as well as the Petition restraining the appointed Directors Samson Chelule(Dr), Elsbeth Naeku Tolu and Muchohi Ruiru Gikonyo (4th -6th respondents) from assuming office and or carrying themselves as directors of the 3rd respondent.

7. The application also sought a stay of the 1st Respondent's decision contained in the letter dated 17th April, 2020 and the Gazette Notice No. 3374 dated 4th May, 2020 appointing the 4th – 6th respondents as members of the Board of Directors of Kenya Seed Company Limited for a period of three years with effect from 4th May, 2020 pursuant to the publication in the Kenya Gazette No. 3374 dated 4th May,2020.

8. In a ruling delivered on the 10th of December 2020, the court granted the injunctive orders sought pending the hearing and determination of this petition.

9. The court further directed parties to file their responses to the petition within 7 days. The 1st respondent filed his replying affidavit on the 30th of September 2020 while the 3rd respondent did file its response on the 8th of June 2020.

10. The 2nd, 4th, 5th and 6th respondents did not file any replies to the petition.

B. BACKGROUND

11. The circumstances leading to the present case are that the directors elected at the Annual General Meeting (AGM) of the 3rd respondent were not appointed by the 1st respondent by gazette notice as is the practice despite the fact that the said names had been forwarded to the 1st respondent for appointment.

12. On the contrary, the 1st respondent via a letter issued dated the 17th of April 2020, declared the AGM held on the 3rd of April 2020 illegal and went ahead to issue a gazette Notice No 3374 published on the 4th of May 2020 appointing the 4th – 6th respondents as directors of the 3rd respondent for a period of 3 years with effect from the 4th of May 2020.

13. The 1st respondent further stopped the implementation of the resolutions made at the AGM particularly with regard to payment of dividends which the petitioners contend violates their right to property under Article 40 of the Constitution.

The Petitioners Case

14. The petitioners averred that that Kenya Seed Company Limited, the 3rd Respondent herein, was incorporated on the 2nd of July, 1956 as a private limited liability company by shares. Further, they averred that by a special resolution (No. 13/60) dated 1st October, 1960 the company was converted from private Limited Liability Company to a Public Limited Liability but the Company's Memorandum and Articles of Association 1960 were never changed and have remained in force to date.

15. The petitioners also averred that after conversion of the 3rd Respondent into a Public Limited Liability Company, the 1st petitioner/Applicant acquired shares in the 3rd Respondent Company from private persons and/or individuals on a willing seller willing buyer basis and that by the year 2000, the 1st petitioner/applicant held share Certificate No. 563 and 564 for 466,248 and 1,033,752 shares respectively totaling to 1,500,000/= shares which translated to 13.91% ownership of the company.

16. The petitioners further averred that the 2nd petitioner/applicant similarly purchased shares in the 3rd respondents from private persons and/or individuals on a willing buyer willing seller basis and as of today, the 2nd petitioner/applicant holds 419,131 shares which translates to 3.89% in the shareholding of the 3rd respondent.

17. It was further averred that upon acquiring the shares in the company, the petitioners/applicants right to property and their protection under the constitution of Kenya crystalized and as such the petitioners/applicants enjoyed the rights and privileges accorded to the shareholder.

18. The petitioners also deponed that the 3rd respondent is required by law to hold an annual general meeting. However, between the year 2003-2013, no meeting was held until the court made an order that an annual general to be convened within 60 days. It was their averment that after the 49th annual general meeting was finalized on 28th of September 2016, the Agricultural Development Corporation (ADC) and the Government, have wrongfully resisted, frustrated and scuttled any attempts by shareholders, including the petitioners/applicants, of holding any general meetings of the 3rd respondent. They gave examples of how scheduled meetings in diverse dates never took place including on the 22nd of December 2017, the 18th of December 2018 and the 21st of January 2019.

19. The petitioners averred further that given that 4 years had lapsed and no meeting had been held, they wrote to the 3rd respondent notifying it of the fact that in the event it failed to convene an AGM before the 10th of March 2020, the private shareholders, including the petitioners herein, would proceed and requisition for one under Section 279 of the Companies Act 2015. They averred that the 3rd respondent failed to convene an AGM and in turn, they issued a notice to all shareholders inviting them to an AGM meeting on the 3rd of April 2020.

20. The petitioners in this regard averred that having received no objection, the 3rd respondent shareholders went ahead and held an AGM virtually on the 3/4/2020 where inter-alia 7 resolutions were passed. The resolution passed included:

a. A resolution authorizing the payment of shareholders first and final dividend to date at Kshs 7 per share.

b. A resolution approving the Director's renumeration at Kshs 500,000 per annum

c. A resolution re-electing two retiring directors namely Lawrence Njiru and William Kundu

d. A resolution that the auditors for the year 2014 to date be ratified and re-appointed for the next financial year.

21. It was their submission that they notified the 1st respondent of the resolution passed in the AGM via a letter dated 3rd April 2019. They further deponed that it was their expectation that the 1st respondent would appoint by way of gazette notice the directors re-elected at the AGM as was tradition.

22. However, the petitioners averred that to their surprise, the 1st respondent via a letter dated the 17th of April 2020 declared the said AGM illegal and went on to issue a gazette notice no. 3374 appointing the 4th – 6th respondents as directors of the 3rd respondent for a period of 3 years with effect from 4th May, 2020 pursuant to Section 6(1) (e) of the State Corporations Act, CAP 446, Laws of Kenya.

23. It is the petitioners' contention that the 1st respondent's decision to unilaterally appoint directors of the 3rd Respondent's Board of Management was ultra vires and in contravention of Article 47 of the Constitution of Kenya.

24. Furthermore, the petitioners averred that the provisions of the State Corporations Act which the 1st respondent purportedly relied on, erode the minority shareholders' fundamental rights in instances where a government entity acquires majority shareholding in a company established under the Companies Act because it denies minority shareholders the right to participate in the affairs of the 3rd respondent thus contravening the principles of good governance.

25. In this regard, the petitioners contended that the State Corporations Act and in particular Sections 2 (b) (v), 2 (c) and 2 (d), fall short of the constitutional requirements to the extent that it allows for the whimsical and capricious appointment of directors of state corporation and by notice in the gazette without being guided by the principles of inclusiveness and non-discrimination and, secondly, without subjecting the appointees to any recruitment or vetting process. Consequently, it was their averment that the provisions of the State Corporation Act contravene the provisions of Articles 10, 25, 27, 40, 47, 50, 73 and 159 of the Constitution of Kenya.

26. Banking on the foregoing grounds, the petitioners prayed for the following orders:

a. A declaration that the Petitioners Rights under the Constitution of Kenya 2010 have been infringed and or violated.

b. A declaration that Section 2(b) (v), 2 (c) and 2(d) of the State Corporations Act, CAP 446, Laws of Kenya violates the Petitioners rights under Articles 10, 40 and 73 of the Constitution of Kenya 2010 and should thus be declared unconstitutional.

c. A declaration that the Petitioners right to fair administrative action under Article 47 of the Constitution of Kenya 2010 has been violated.

d. A declaration that the decision contained in the letter dated the 17th April 2020 by the 1st respondent and the appointment of the 4th – 6th respondents as members of the Board of Directors of the 3rd respondent vide gazette notice No.

3374 published on 4th May 2020 is illegal, unprocedural, oppressive and unconstitutional.

e. An order of certiorari do issue to remove into this Honorable Court and quash the decision by the 1st respondent contained in the letter dated 17th April 2020 and Notice No.3374 published in the Kenya Gazette of 4th May 2020 appointing the 4th -6th respondents as members of the Board of Directors of the 3rd respondent.

f. An order of prohibition do issue to prohibit interference and meddling in the management of the 3rd respondent by the 1st respondent either by himself, his servants, agents or persons acting under his instructions except in accordance with the provisions of the Articles of Association of the 3rd respondent and other laws permitting their lawful participation in the affairs of the 3rd respondent.

g. A declaration that the Petitioners Constitutional Rights under Articles 10,27,40,47,50,73 and 159 of the Constitution of Kenya 2010 have been violated.

h. An order for compensation by way of general damages be awarded to the petitioners for violation of their Constitutional Rights.

i. **There be a declaration and an order that the AGM held on the 3rd April 2020 was legal and the resolutions passed at the said AGM meeting be implemented**.

j. In the alternative to prayer (i) above, there be an order for an AGM to be convened within 60 days.

k. **Costs and interest of the Petition be borne by the respondents**.

The 1st Respondent's Case

27. As stated, the 1st respondent case was presented through an affidavit sworn by Peter Gatirau Munya, the 1st respondent, on the 30th of September 2020. It was his case that his actions to appoint the 4th – 6th respondents do not in any way contravene the Constitution since the 3rd respondent is a State Corporation and is thus governed by the State Corporations Act. He thus averred that the State Corporations Act and in particular Section 6 (1) (e) confers on him the power to make such appointments and thus his actions do not in any way contravene the Constitution.

28. Secondly, the 1st respondent averred that it is not the duty of the petitioners to call for an AGM. In fact, the 1st respondent admitted that vide a letter dated the 25th of March 2020 and referenced as MOA/ADM/1/24/VOL.V, he directed that the purported meeting scheduled on 3rd April 2020 should not be held as it was among the non-essential meetings suspended as part of management of Government Business during the management of the Corona (Covid-19) pandemic.

29. Consequently, the 1st respondent contended that the purported AGM was unprocedural, null and void for the fact that:

i. It is not the duty of the petitioners to call for an AGM

ii. The 1st respondent had issued a directive that the purported meeting should not be held due to Covid

iii. The purported virtual meeting was contrary to the memorandum and articles of the 3rd respondent

iv. There was no formal notice of change of venue of the meeting from the notice specified to virtual.

30. Finally, the 1st respondent averred that his powers are not discriminatory to the minority shareholders as alleged by the petitioner but rather that the appointment of the 4th – 6th respondent was to enable the 3rd respondent execute its mandate and functions and ultimately benefit the public and majority shareholders. On the converse, the 1st respondent averred that the petitioners are only looking out for their private interests as opposed to what is good for the public.

The 3rd respondent's Case

31. The 3rd respondent responded to the petition vide an affidavit in answer to the petition sworn on the 8th of June 2020 by its Acting Managing Director Fred Oloibe. It was the 3rd respondent's view that the failure to hold an AGM affected all shareholders equally and not just the minority shareholders. Furthermore, it was its averment that the petitioners went ahead to issue notice of AGM despite the fact that the government has suspended all non-essential meetings as a result of the Covid-19 pandemic.

32. Consequently, the 3rd respondent averred that the purported meeting was irregular for the reasons that:

i. There was no formal notice of change of venue of the meeting from the venue specified in the Notice to virtual meeting.

ii. There is no evidence that all members received notification of the change of venue and hence the integrity of the meeting

is questionable.

iii. The articles and memorandum of association of the 3rd respondent does not provide for how AGM are held under special circumstances such as covid-19 pandemic.

iv. Verification and recording of the members present during the alleged virtual meeting has not been provided by the petitioners

v. The virtual meeting was done contrary to the provisions of the memorandum and articles of association requiring AGM to be done in the headquarters of the 3rd respondent.

33. The 3rd respondent further averred that the petitioners have not demonstrated how the impugned provisions of the State Corporations Act are inconsistent with the stated constitutional provisions. In this regard, the 3rd respondent was of the view that the 1st respondent in exercise of his powers under the State Corporations Act did not discriminate against the minority shareholders.

34. Finally, the 3rd respondent observed that there is need to have the proceedings and the resolutions of the alleged meeting declared illegal in order to pave way for the convening of a proper AGM in accordance with the 3rd respondents Memorandum and Articles of Association.

Petitioners Submissions

35. The petitioners through submissions dated the 27th of April 2021 framed four issues for determination, namely;

i. Whether the minority shareholders have a right and entitlement to participate and/or give their views and input in the running of the 3rd Respondent Company

ii. Whether the 1st Respondent's actions breached/contravened the minority shareholders right to property and whether such right is protected

iii. Whether the 1st respondent's actions contravened the memorandum and Articles of Association of Kenya Seed Company Limited and whether such action by the Respondent ought to be quashed and lastly,

iv. **Whether a virtual AGM held on the 3rd of April 2020 was validly held for purposes of passing valid resolutions**.

36. On the first issue, it was the petitioners submission that the provisions of Sections 780 (1) and 782 of the Companies Act, 2015 protects all members of a company, including minority shareholders, against oppressive conduct and unfair prejudice. In this regard, the petitioners submitted that the actions of the 1st respondent constitute oppressive, unfair and prejudicial conduct, that affect the interests of the company members generally and minority shareholders in particular. They thus urged court to intervene and direct the company and other directors to cease from acting in a manner that is oppressive to the petitioners. The petitioners relied on the authority in ***Re Al Marshidy Enterprises Limited [2019] eKLR*** and invited court to intervene and make appropriate orders to ensure that the affairs of the 3rd respondent company, are conducted in a fair manner.

37. Secondly, the petitioners were of the view that the conduct of the 1st respondent constitutes an affront to Article 47 of the Constitution on fair administrative action. It was their submission that the 1st respondent did not give any reasons in writing, as to the reasons he unilaterally declared the resolutions passed at the AGM of 3rd April 2020, illegal. It was thus their position that this action, offend all the principles of natural justice and is thus at cross-purpose with the provisions of the Fair Administrative Action Act and ultimately Article 47 of the Constitution. The petitioners relied on the cases of ***Judicial Service Commission of Kenya vs Mbalu Mutava and Another [2015] eKLR and Nancy Makokha Baraza vs Judicial Service Commission of Kenya and 9 Others [2012] eKLR***, submitting that the decisions of the 1st respondent to exclude and or rubbish them by declaring the AGM of 3rd April 2020 illegal and appointing directors arbitrarily, ought to be removed by this court and quashed.

38. On the second issue, the petitioners submitted that the 1st respondent's action has affected their right to property enshrined under Article 40 of the Constitution. In particular, the petitioners observed that the conduct of the 1st respondent freezing the payment of dividends due to them is outright unconstitutional and must be vacated by court. Furthermore, it was their view that the suspension of the registration or implementation of the resolutions passed at the 3rd AGM by the 1st respondent, denies them their rights to property since dividends constitute property envisaged under Article 40 of the Constitution.

39. On the third issue, the petitioners submitted that the Memorandum and Articles of Association of the 3rd respondent are still in place. It was their submission that the 3rd respondent was incorporated as a private company on 2nd July 1956 and only converted to a public limited company on the 12th October 1960 by a special resolution. Noteworthy, the petitioners observed that the memorandum and articles of association have never changed since 1960 and as such the same remain in force to date. It was their submission that even though the government through the Agricultural Development Corporation is the majority shareholder, the memorandum and articles of the company take precedence by dint of Section 6 (1) of the State Corporations Act.

40. In this regard, it was the petitioners submission that the 1st respondent's actions in declaring the AGM held on 3rd April 2020 illegal was inconsistent with the company's Memorandum and Articles of Association. According to the petitioners, Section 6 of the State Corporations Act can only be used in making appointments where there is no other law defining the mode of appointment, that is, where for example the

company's articles lack regulation on constituting the board. They observed that since Clause 75 of the Memorandum and Articles of Association of the 3rd respondent governs the election/appointment of directors, Section 6 of the State Corporation Act is inapplicable and thus the 1st respondent's action of appointing directors was illegal and ultra vires.

41. Finally, on the last issue, the petitioners submitted that the AGM held on 3rd April 2020 was statutorily protected by the companies' law pursuant to Section 275 of the Companies Act 2015. In this regard, the petitioner submitted that the law empowers shareholders to convene an AGM at the expense of the company in line with Section 279(1) of the Companies Act and the decision in ***Radio Frequency Systems (E.A) Limited and Another vs Simon Horner and 2 Others (2020) eKLR***. It was therefore their view that the actions of the 1st respondent declaring the meeting illegal and not properly convened, are unfounded and without any basis. In any case, they argued that the AGM was conducted in strict adherence to Ministry of Health Covid-19 protocols and was thus proper and legal. They relied on the case of ***In Re Application for leave to hold the postponed Law Society of Kenya AGM meeting virtually [2020] eKLR*** submitting that the AGM held virtually on the 3rd of April 2020 was validly held and constituted and passed binding resolutions that must be implemented.

3rd Respondent Submissions

42. The 3rd respondent through its submissions dated the 11th of June 2021 identified four issues for determination namely;

i. Whether the 1st respondent actions of appointing the 4th - 6th respondents were legal, just and does not contravene any legal provisions thus should be upheld

ii. Whether the court can grant the orders of prohibition and certiorari

iii. Whether the virtual AGM held on the 3rd April 2020 was validly held and if the resolutions can be binding

iv. ***Whether the petitioners constitutional rights were infringed and whether the provisions of Sections 2 (k) (v) and 2 (d) of the State Corporations Act CAP 446 are unconstitutional.***

43. On the first issue, the 3rd respondent noted that it is a State Corporation since the government through ADC owns majority shares. Consequently, the 3rd respondent viewed the relevant law governing it being the State Corporations Act. In this regard, the 3rd respondent submitted that the said Act empowers the minister to appoint directors in order to ensure the smooth running of the company. It was their position that the 1st respondent had to appoint the 4th - 6th respondent herein to carry out supervisory powers over the company since the company was/is undergoing extraneous factors beyond its control. Further, the 3rd respondent submitted that some of the impediments preventing it from calling or having an AGM include a pending court case, Milimani HCC. No 575 of 2004 and the current petition. Finally, the 3rd respondent relied on Article 153 of the Constitution submitting that the 1st respondent has a duty to appoint the directors and there is therefore nothing wrong in the actions of the 1st respondent appointing the 4th - 6th respondents since the same were done within the provisions of the Constitution and the State Corporations Act.

44. On the second issue, the 3rd respondent noted that the court has power to quash the decision of the 1st respondent but that it was the duty of the petitioners to prove that the 1st respondent actions were ultra vires. In this regard, the 3rd respondent submitted that the petitioners failed to prove the same and further noted that the 1st respondent acted within the provisions of the law by appointing the 4th - 6th respondents. They thus relied on the cases of ***KNEC ex-parte G.G Njoroge and Others CA No.266 of 1996, Republic vs The Chief Magistrate, Milimani and 2 Others Ex. Parte Tusker Mattresses Ltd and 3 Others HC Misc. Civil Application No. 179 of 2012 and Republic vs Attorney General and 15 Others ex-parte Kenya Seed Company and 5 Others [2010] eKLR*** and submitted that the court should not set aside the decision of the 1st respondent for the same was made in the best interest of the 3rd respondent and all shareholders.

45. On the third issue, it was the 3rd respondent position that the petitioners had an irregular general meeting for the reason that the same did not comply with the provisions of the 3rd respondents Memorandum and Articles of Association. In particular, the 3rd respondent observed that the meeting fell short of the required provision for the reasons that there was no formal notice of change of venue of the meeting from the specified in the notice to virtual; there is no evidence that all members received notifications of the change of venue; the memorandum and articles of association does not provide for how AGM can be held under special circumstances such as the current Covid-19 pandemic; and lastly that there is no verification and recording of members present at the alleged virtual meeting.

46. Consequently, the 3rd respondent was of the view that the alleged meeting failed the test and any resolution passes therein; is invalid and illegal by dint of Section 275 of the Companies Act. In any case, the 3rd respondent submitted that Section 257 of the Companies Act require that a valid resolution must involve the majority shareholder, in this case the government, which they submitted was not involved in the alleged AGM of 3rd April 2020. Reliance was placed on the case of ***Agricultural Development Corporations of Kenya vs Nathaniel K Tum and Another [2014] eKLR*** where the court noted the petitioners made it difficult for the 3rd respondent to hold AGM due to their filing of court cases seeking to stop the AGM of the 3rd respondent.

47. On the last issue, the 3rd respondent submitted that Article 132 (4) (a) of the Constitution envisages additional authority being conferred to the President to perform executive functions such as appointments to State Corporations. This function, according to the 3rd respondent, can be granted by the Constitution or national legislation. It was their position that this function is designed to enable government function effectively and the exercise of the authority conferred by the statutes neither renders the statutes nor the exercise of the powers conferred unconstitutional. Accordingly, the 3rd respondent noted that the corollary of this is that the appointments made by the 1st respondent were regular and legal. The 3rd respondent thus submitted that the intention of the government, through the 1st respondent, was to ensure that the 3rd respondent is running effectively to the best interests of the Kenyan people. They relied on the decisions in ***FIDA vs Attorney General***

and Another [2018] eKLR, Katiba Institute & Another vs Attorney General and Another, Julius Waweru Karangi & 128 Others (interested parties) [2021] eKLR and Tom Luusa Munyasya & Another vs Governor, Makueni County and Another [2014] eKLR submitting that the 3rd respondent is guided by the code of governance MWONGOZO that requires the management of State Corporation be aligned with the provisions of Articles 10, 73 and 232 of the Constitution as well as the principles set out in Chapter 6 of the Constitution.

48. Finally, the 3rd respondent submitted that the petitioners have failed to prove, to the requisite degree or precision, how their rights under Articles 10, 27, 40, 47, 50, 73 and 159 of the Constitution, have been violated or infringed, and urged court to dismiss the petition with costs.

Determination

49. After carefully perusing the petition, the pleadings, submissions and annextures presented by parties, I find that 5 issues arise for determination. These are;

*a. **Whether the Petition meets the threshold for Constitutional Petitions***

*b. **Whether the virtual meeting held on the 3rd of April 2020 was validly held making its resolutions binding?***

*c. **Whether the 1st respondent's appointment of the 4th -6th respondents as directors of the 3rd respondent was legal?***

*d. **Whether the Petitioners Constitutional Rights were infringed?***

*e. **Whether the provisions of Sections 2 (k) (v) and 2 (d) of the State Corporations Act CAP 446 are unconstitutional?***

a. Whether the petition meets the threshold for Constitutional Petitions

50. It is indisputable that for a constitutional petition to be sustainable as such, it must at a minimum satisfy a basic threshold. That is, the court must address whether or not there is a competent constitutional petition before it. In doing so, the court must consider, whether the petition satisfies the threshold of what constitutes a constitutional petition.

51. The threshold of what constitutes a constitutional petition was established in ***Anarita Karimi Njeru vs The Republic [1979] eKLR*** which principle was later restated by the Court of Appeal in ***Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.*** The principle established in the ***Anarita Karimi Njeru case (supra)*** is that a Constitutional petition *should set out with a degree of precision the petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed.* The Mumo Matemo case (supra) reaffirmed the principle in the Anarita Karimi case when the Court at paragraph 44 of the judgment stated: -

> ***"(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these short comings, it was not enough for the superior Court below to lament that the petition before it was not the "epitome of precise, comprehensive or elegant drafting , without remedy by the 1st respondent"***

52. The court further stated: -

> ***"It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of the constitution of Kenya and the Ethics and Anti-corruption Commission Act, 2011, accordingly the petition did not meet the standard enunciated in the Anarita Karimi Njeru case."***

53. From the foregoing, it is indisputable that for a constitutional petition to be sustainable, it must at a minimum satisfy a basic threshold. That is, it must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation. It is not sufficient to merely quote constitutional provisions. There has to be some particulars of the alleged infringements to enable the respondents to be able to respond to and/or answer to the allegations or complaints.

54. Thus, a petitioner who claims that their right(s) has been threatened, violated or infringed must precisely enumerate the Articles of the Constitution which entitles rights to that Petitioner and the claim pleaded to demonstrate such violation. The violations must also be particularized in a precise manner. Furthermore, the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings.

55. The Court of Appeal in ***Mumo Matemu (Supra)*** provided the standard of proof in Constitutional Petitions in the following words: -

> ***"…The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:***

> ***"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules…was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."***

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.

We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (Supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting," without requiring remedy by the 1st respondent…"

56. Lenaola J. (as he was then) while referring to the ***Anarita Karimi and Mumo Matemu*** cases in ***Dr. Rev. Timothy Njoya vs The Hon. Attorney General and Kenya Review Authority HC Constitutional and Human Rights Division Petition No. 479 of 2013*** stated: -

> ***"The Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which the Constitution has been violated by whom and even state the Article of the Constitution that has been violated and the manner in which it has been violated."***

57. In the instant petition before court, what is clear is that this is a dispute about control of the 3rd respondent. On the one hand, the petitioners want control of the 3rd respondent while on the other hand, the government as the majority shareholder, seeks control of the 3rd respondent, a State Corporation. Furthermore, it is clear from the pleadings and the submission of the petitioners that the main issues are actually about the appointment of the directors by the 1st respondent, the nullification by the 1st respondent of the alleged meeting of the 3rd April 2020 and its resolutions and the payment of dividends. The rest are but corollaries to these issues. The framing of the prayers and the submissions of the petitioners, clearly supports the above position, that the main issue that the petitioners are seeking, is to invalidate/quash the decision of the 1st respondent to appoint the 4th -6th respondents and to have their alleged meeting of 3rd April 2020 and its resolutions upheld by this court. The question thus becomes, how does this become a Constitutional matter?

58. In addition, whereas the petitioners allege the infringement of their rights under Articles 10, 21,23,25,27,40,47, 50, 73, 159(2) and 232 of the Constitution, they have not in any way showed how their rights therein have been infringed. The factual background to the petition has not been set out properly/clearly to highlight how the decision of the 1st respondent to appoint the 4th -6th respondents, contravened and or infringed the rights of the petitioners. It is trite that the facts of the case should form the bedrock of the petition, and without them, the legal arguments would hang in the air. What is alleged to be a narration of that factual background of the case is not sufficient and does not set out specifically how the cited provisions of the Constitution were violated or contravened by the respondents.

59. Furthermore, the petitioners contend that the provisions of the State Corporations Act and in particular Section 2 (b) (v), 2 (c) and 2 (d) are unconstitutional as they contravene articles 10, 27 and 40 of the Constitution of Kenya. However, the petitioners have not set out precisely how these provisions of the State Corporations Act that deal with the definition of what a State Corporation is, offends or infringe or contravene the cited provisions of the Constitution. In any case, the Court of Appeal has affirmed that the 3rd respondent is indeed a State Corporation. See ***Republic vs Attorney General & 15 Others Ex-Parte Kenya Seed Company Limited & 5 Others [2010] eKLR.***

60. Even assuming that this petition was competent, it is my opinion that it would still not pass the test of the burden of proof. It is trite law that he who alleges must prove his claim. The claim must be propounded on an evidentiary foundation. In saying so, I rely on the case ***Leonard Otieno vs Airtel Kenya Limited [2018] eKLR*** where Mativo J. held that: -

> ***"It is fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses."***

61. In the instant petition, the petitioner alleges that there was a virtual meeting held on the 3rd of April 2020 that appointed directors to the 3rd respondent and made a number of other resolutions that the petitioners want court to upheld and have them implemented. They thus contended that the decision of the 1st respondent declaring the said meeting illegal, violated their rights under the Constitution and in particular Article 40, on the right to property. However, there is absolutely no indication that the said meeting took place other than minutes of the alleged meeting. That is, there is no record of the meeting in terms of authenticated and or verified receipts of the meeting, who participated in it and which platform was used. No recordings have been produced to show that indeed the meeting ever took place. It is thus difficult to ascertain to a legal certainty, that the meeting took place. Consequently, it would be difficult for this court to uphold the AGM as legal and have its resolutions upheld and implemented, when there is doubt as to the occurrence of the AGM.

62. Secondly, there is no indication from the pleadings of the petitioners that the 1st respondent in appointing the 4th -6th respondent acted ultra vires to warrant the court to quash the 1st respondent's decision. That is, the petitioners have not showed which provisions the 1st respondent breached in appointing the 4th -6th respondents or that the said decision was tainted with illegality, irrationality and procedural impropriety. They have also not indicated/showed whether the 1st respondent went above and beyond any powers conferred upon him by the Constitution or the statute.

63. Lastly, I take note that since 2016, the 3rd respondent has not held any AGM. This raises key concerns about accountability since an AGM serves in essence as a mechanism for accountability to shareholders and the shaping of the business of the company. An AGM is mandatory since it also serves as an act of compliance with the law. See ***Agricultural Development Corporation of Kenya vs Nathaniel K. Tum & Another [2014] eKLR.***

64. It is also clear that there has been a litany of cases over the control and ownership of the 3rd respondent that threatens to destroy an important institution in this country. Unfortunately, these power struggles are not for public benefit but largely for private reasons and interests. The government should therefore act appropriately and cure the trouble in the 3rd respondent by holding an Annual General Meeting as soon as possible, where appropriate resolutions will be made and the returns filed with the Registrar of Companies in accordance with the Companies Act.

65. Having said that, I find that the petition does not raise any Constitutional issues that warrant adjudication by the Court. The Petition may very well constitute an abuse of the due process of the court. As noted by Mutungi J in ***Grays Jepkemoi Kiplagat vs Zakayo Chepkoga Cheruiyot [2021] eKLR,*** parties are increasingly filing matters that are essentially civil matters and christening the same as Constitutional Petitions which is not proper. Where there is the alternative remedy of filing a suit in the ordinary Civil Courts, a party ought not to invoke the jurisdiction of the Constitutional Court.

66. The above position was reiterated in ***Godfrey Paul Okutoyi & others vs Habil Olaka & Another (2018) eKLR*** where Chacha , J on the issue of there being an alternative remedy in lieu of constitutional remedies at paragraph 65 stated:-

> ***"65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure."***

67. In the foregoing, I it is my view that this petition has not been pleaded with a reasonable degree of precision and that the alleged violations have not been proved.

68. The upshot therefore is that this petition lacks merit and is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF JANUARY 2022.

E. O. OGOLA

JUDGE