



**Njoroge v Capital Markets Authority & 5 others (Petition 001 of 2021)  
[2022] KEHC 13518 (KLR) (Civ) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13518 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
PETITION 001 OF 2021  
A MSHILA, J  
SEPTEMBER 23, 2022  
IN THE MATTER OF ARTICLE 21(1) AND RULES 4 (1) AND 10 (1)  
AND (2) OF THE CONSTITUTION OF KENYA (PROTECTION OF  
RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND  
PROCEDURE RULES, 2013  
AND  
IN THE MATTER OF UPHOLDING NATIONAL VALUES AND  
PRINCIPLES OF GOVERNANCE UNDER ARTICLE 10 (2) (A), (B), (C) OF  
THE CONSTITUTION OF KENYA, 2010  
AND  
IN THE MATTER OF IMPLEMENTATION OF RIGHTS AND  
FREEDOMS AND DUTY TO CARE FOR NEEDS OF MINORITY,  
MARGINALIZED AND VULNERABLE COMMUNITIES AND  
GROUPS UNDER ARTICLE 21 (3)  
AND  
IN THE MATTER OF THE ALLEGED VIOLATION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS UNDER ARTICLE 27 (1), (2), (6), 47 (1)  
AND 56 (A), (B) OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN  
LUCY MUTHONI NJOROGE ..... PETITIONER  
AND**



CAPITAL MARKETS AUTHORITY .....	1 <sup>ST</sup> RESPONDENT
BOC HOLDING .....	2 <sup>ND</sup> RESPONDENT
BOC KEENYA PLC .....	3 <sup>RD</sup> RESPONDENT
CARBACID INVESTMENT PLC .....	4 <sup>TH</sup> RESPONDENT
AKSAYA INVESTMENT LLP .....	5 <sup>TH</sup> RESPONDENT
COMPETITION AUTHORITY KENYA .....	6 <sup>TH</sup> RESPONDENT

## JUDGMENT

1. The petitioner filed the petition dated March 24, 2021 and invoked the provisions of articles 22(1) rules 4(1) and 10(1) and (2), article 10(2)(a)(b)(c), article 27(1)(2)(6), 47(1) and 56(a)(b) of the constitution of Kenya seeking the following prayers;
  - a. A declaration that the proposed take over by Carbacid Investment PLC and Aksaya Investment LLP to acquire up to 100% of the issued ordinary shares of BOC Kenya PLC contravenes articles 10(2)(a)(b) and (c), 21(3) and 56(a)(b) of the constitution and is as such null and void ab initio.
  - b. A declaration that the terms of the proposed takeover offer by Carbacid Investments PLC and Aksaya investments Limited including the irrevocable undertaking dated November 25, 2020 issued by BOC Holdings to Carbacid Investments PL and Aksaya Investments LLP contravene the Petitioners fundamental freedoms under article 21(3), 27(6), 47(1) and 56(a) and (b) of the constitution
  - c. An order of certiorari to bring into this Honourable Court for purpose of being quashed the decision of the capital markets authority the 1<sup>st</sup> respondent herein, its agents, employees and/ or servants granting approval of the offer document in respect of the proposed take over by Carbacid Investment PLC and Aksaya Investment LLP to acquire up to 100% of the issued ordinary shares of BOC Kenya PLC contained in a letter dated December 28, 2020
  - d. A permanent injunction restraining Carbacid Investment PLC Aksaya Investment LLP, BOC Kenya PLC and BOC Holdings by themselves, their agents, servants and/or employees from taking any steps, actions and/or measures to progress, actualize and/or complete the proposed Takeover offer by Carbacid Investments PLC and Aksaya Investment LLP to acquire up to 100% of the issued ordinary shares of BOC Kenya PLC.
  - e. An order restraining the Competition Authority of Kenya either by itself, its agents servants and/or employees from deliberating assessing, determining and/or granting any approvals in respect of the proposed takeover offer by Carbacid Investments PLC and Aksaya Investment LLP to acquire up to 100% of the issued ordinary shares of BOC Kenya PLC without first conducting an inquiry and investigating the aforesaid takeover Offer.
  - f. An order for costs as warrants a constitutional matter and any other appropriate relief which this honourable court shall deem fit and just to grant.



## Petitioner's Case

2. It is the petitioner's case that she is minority shareholder of BOCK Kenya holding 790000 ordinary shares. By a notice of intention dated November 25, 2020 Carbacid Investment and Aksaya Investment announced their intention to make a cash offer to acquire up to 100% of the issued ordinary shares of BOCK at an offer price of Kshs 63.50 per share which meant that the offer value of 100% of the share capital was Kshs 1,239,865,821. As per the accounting documents of BOCK at the end of 2019, showed that its total share value totalled at Kshs 3,855,913,000 which far exceeds the offer value.
3. On November 25, 2020, BOCH the controlling shareholder in BOCK issued an irrevocable undertaking to Carbacid Investment and Akseya investments accepting their offer in respect of its 65.38% shareholding as well as any other shares that BOCH may become the registered or beneficial owner at the offer price of Kshs 63.50 per share. The notice of intention expresses the intention of Carbacid Investments and Aksaya Investments to delist BOCK from the Nairobi Securities Exchange to the detriment of not only the minority shareholder but also the country and contravened the petitioner's constitutional rights.
4. She indicated that the board of directors of BOCK in a shareholders circular dated February 15, 2021 unanimously agreed that the price of Kshs 63.50 did not reflect a fair value of the company and that CMA in granting approval of the offer document are in contravention of article 10(2) and 47(1) of the constitution as the terms were oppressive and unfair to the petitioner as a minority shareholder. They therefore failed to fulfil their objective of protecting the investor interest as is set out in section 11(1) (d) of the Capital Markets Act.
5. The petitioner added that the potential delisting of BOCK from the Nairobi stock exchange should the proposed takeover be successfully completed denies the petitioner future opportunities and will have significant economic impact on the country's gas industry as it will create a monopoly which is contrary to the promotion of a fair and competitive market thus in contravention of the Competition Act.

## Respondents' Case

6. The 4<sup>th</sup> and 5<sup>th</sup> respondents opposed the petition *vide* Mukesh K.R Shahs replying affidavit dated June 14, 2021. In it he indicated that the issues raised in the petition herein are with regard to the proposed take over by the 4<sup>th</sup> and 5<sup>th</sup> respondent and are accordingly subject to the provisions of section 592(10) of the Companies Act and section 35A of the Capital Markets Act which provide for a dispute resolution mechanism. It was argued that a takeover in a public listed company process is guided by statute and is by law required to be undertaken as such.
7. That the petitioner having been a non-executive director of the 3<sup>rd</sup> respondent and an active participant in the Nairobi Securities Exchange cannot claim that she is marginalised and vulnerable.
8. On the petitioners analysis of the financial statement for the year ended December 2019, it was contended that the board approved the audited accounts duly audited in accordance with international accounting standards and determined the value of movable and immovable assets as Kshs 1,439,125,000 which is the correct valuation and not Kshs 3,855,913,000 as purported by the petitioner.
9. The price shares which were traded on the Nairobi Securities Exchange were directly determined by the market forces of demand and supply when taken in conjunction with the interplay of willing buyer willing seller. The current value of the 3<sup>rd</sup> respondents shares on the Nairobi Securities Exchange is



Kshs 68 per share inclusive of a proposed dividend of Kshs 4.50 per share for the year ended December 31, 2020. The value after adjusting for the dividend works out Kshs 63.50 which is the same value as the Takeover.

10. On delisting or continuing of operations in the Nairobi Securities Exchange he argued that it is an option granted to the share holder of a public company through a special resolution by the Capital Markets Authority and cannot be taken away by a court order.
11. Additionally, the Competition Act provides for a dispute resolution Mechanism through the Competition Tribunal which is charged with determining any dispute arising from a determination by the Competition Authority. That in the circumstances this court has no jurisdiction to determine issues in connection with competition except by way of an appeal from the tribunal. Ultimately and in light of the above the petitioner has not established any violation or breach of her constitutional rights.
12. All the other respondents in their replying affidavits have opposed the petition and reiterated the sentiment of the 4<sup>th</sup> and 5<sup>th</sup> respondents save for the 3<sup>rd</sup> respondent who indicated that they remain as a neutral party as they have no direct interest in the issues in contention and no knowledge of the same.

### Issues For Determination

13. Having carefully considered the petition herein and the rival submissions and the issues framed for determination that have arisen are as follows;
  - a. Whether this court has jurisdiction to determine the petition herein?
  - b. whether this petition meets the threshold of a Constitutional petition?
  - c. If the answer for (b) is in the affirmative, what remedies is the 1<sup>st</sup> petitioner entitled to?
  - d. Who between the parties should meet the costs of the petition?

### Analysis

Whether this court has jurisdiction to determine the petition herein;

14. On jurisdiction it was the 6<sup>th</sup> respondent submission that the petitioner has approached this court before exhausting the redress mechanisms and therefore premature. In support it cited Okinya Omtatah Okoiti & another v Kenya Power and Lighting Company Limited (KPLC) & 4 others [2020] eKLR where the court held;

“....From the above I agree with the 1st Respondent, on the power of Competition Authority to receive Complaints from legal or natural person or consumer bodies and to exercise the power to investigate restrictive trade practices. I am satisfied that in cases under Competition Act, the relevant body that is mandated to deal with complaints and investigate restrictive trade practices is the Competition Authority of Kenya. It is a port of first instance for complaints of breaches of its provisions.....

From the aforesaid findings herein above it is clear that there exists an alternative remedy that is sufficient, effective, expedient and economical to resolve the issues raised by the Petitioners, herein which, the Petitioners have by passed and rushed to this Court. The Petitioners cannot be allowed to overlook a clearly laid out procedures and processes, that exists for resolution of disputes. Such processes must be exhausted first, before a party approaches a court. The mere fact that the constitutional provisions are cited or the constitution is invoked is not sufficient reason to elevate the matter to a constitutional status,



and confer jurisdiction to the High Court, to inquire, arbitrate, determine or in any manner deal with issues which are required to be dealt with through a clearly prescribed dispute resolution mechanism, that is provided for in a specific statute.”

15. This court notes that this was addressed by this court in its ruling dated May 13, 2021 where it highlighted Senior Counsel Mr Oraro’s argument whereby he had indicated that indeed section 35A(4) of the Capital Markets Act provides for the establishment of a Tribunal which can determine any issues arising out of the conduct of the Capital Markets Authority. However, the Tribunal had not yet been constituted owing to a decision of the High Court that found that the Treasury had no power to do so and that the decision is subject of an appeal in the Court of Appeal. The petitioner therefore invoked section 4(1) of the Fair Administrative Actions Act for relief.
16. On jurisdiction this court is empowered by Article 165 to hear and determine Constitution Petitions which article provides;  
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.
17. At the risk of sounding redundant and in light of the above authority this court stands by its decision that it does indeed have jurisdiction in a commercial dispute to pronounce itself on any violation of a constitutional right of a minority shareholder as is the case in this instant petition.

**Whether this petition meets the threshold of a constitutional petition;**

18. On the second issue of whether this petition meets the threshold of a constitutional petition, it was the 4<sup>th</sup> and 5<sup>th</sup> respondents submission that the petitioner has not pleaded the alleged contravention of the constitutional right with precision.
19. The ingredients of a Constitutional Petition was clearly formulated in the case of Anarita Karimi Njeru vs Republic (1979) eKLR where it was partly stated as follows:-

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
20. Similarly in the case of Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR the Court stated that:-

“(42) However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also



a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. 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, MR 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.”

(43) 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.

(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 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.”

21. The requirements for a successful Constitutional Petition are simple and are thus:- the Petitioner should set out the Constitutional provisions, which she believes have been violated or threatened, and the manner in which the respondent(s) have violated those provisions. It is not enough for the Petitioner to just list the Constitutional Provisions without demonstrating how they were infringed upon.

22. The petitioner relied on article 21(3), 10, 56 of the constitution to plead the matter herein. Article 21 provides as follows;

“All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities,



children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.”

23. Article 10 of the [constitution](#) provides as follows;

National values and principles of governance

1. The national values and principles of governance in this article bind all State organs, State officers, public officers and all persons whenever any of them—
  - a. applies or interprets this Constitution;
  - b. enacts, applies or interprets any law; or
  - c. makes or implements public policy decisions.
2. The national values and principles of governance include—
  - a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
  - b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
  - c. good governance, integrity, transparency and accountability; and
  - d. sustainable development.

24. Article 56(a) and (b) of the [constitution](#) provides as follows;

Minorities and marginalised groups

The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—

- (a) participate and are represented in governance and other spheres of life;
- (b) are provided special opportunities in educational and economic fields;

25. The petitioner herein failed to mention how she fits the description of vulnerable and marginalised. A mere apprehension of such a possibility does not suffice and it was upon her to prove this with precision in a commercial transaction for economic benefit. Article 10 of the [constitution](#) sets out the national values and principles of good governance; Again, this court reiterates that it was incumbent upon the petitioner, to go beyond the face value of these principles and demonstrate how the 2<sup>nd</sup> respondent breached or infringed upon her rights under article 10 and 56 of the [constitution](#):

26. On perusal of the petition, the petitioner has raised various issues that are commercial in nature and failed to define and plead with precision how her constitutional rights have been infringed. The Petition is in essence a commercial dispute under the guise of a constitutional petition and as such it must fail.

**If the answer for (b) is in the affirmative, what remedies are the petitioners entitled to**

27. The answer to (b) being in the negative it therefore follows that the petitioner is not entitled to the declarations and remedies sought in the petition.



**Who between the parties should meet the costs of the petition;**

28. The petitioner has not demonstrated to this court that the grounds in this petition are in the interest of the public and in the circumstances the petitioner shall bear the costs.

**Findings and Determination**

29. In light of the above, the petition dated March 24, 2021 is without merit and is consequently dismissed with costs with the petitioner bearing the costs.

**DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2022.**

**HON. A. MSHILA**

**JUDGE**

In the presence of;

Pravin Bowry- SC for the Petitioner

Githendu for the 1<sup>st</sup> Respondent (CMA)

Miss Okuta holding brief for Msago for the 2<sup>nd</sup> Respondent

Githua for the 3<sup>rd</sup> Respondent

Okoth holding brief for Oraro-SC for the 4<sup>th</sup> and 5<sup>th</sup> Respondents

Okong'o for the 6<sup>th</sup> Respondent (Competition Authority of Kenya)

Lucy-----Court Assistant

