**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Odunga, J)**

**CIVIL SUIT NO.67 OF 2011**

**JOSEPH MUTUKU MWANTHI.....1ST PLAINTIFF**

**JAMES MWANTHI MUTUKU.....2ND PLAINTIFF**

**JOSEPH MUINDE MUTUKU.....3RD PLAINTIFF**

**ELIZABETH MUTUKU.....4TH PLAINTIFF**

**DAVID KIOKO MUTUKU.....5TH PLAINTIFF**

**NZIOKA MUTUKU.....6TH PLAINTIFF**

**ESTHER MUKULU MUTUKU.....7TH PLAINTIFF**

**VERSUS**

**AIMI MA KILUNGU COMPANY LIMITED.....DEFENDANT**

**JUDGEMENT**

**The Plaintiffs' Case**

1. The Plaintiffs herein seek the following orders in this suit:

> **(i) A permanent injunction to restrain the Defendant whether acting by itself, its directors, agents of servants from expelling, deregistering, revoking, transferring or in any other way howsoever interfering with the Plaintiff's shareholding in the Defendant or stripping the Plaintiffs of the benefits conferred by their membership in the Defendant including the parcels of land allocated to the Plaintiffs on account of being shareholders in the Defendant.**
>
> **(ii) A permanent injunction to restrain the Defendant whether acting by itself, its directors, agents or servants from transferring, repossessing, or in any other way howsoever dispossessing the Plaintiffs of the agricultural and commercial plots allotted to them on account of their membership in the Defendant.**
>
> **(iii) General damages for distress caused to the Plaintiffs by the Defendant's actions.**
>
> **(iv) Costs of this suit and interest on (c) above at court's rates.**

2. According to the plaint, the plaintiffs were at all material times lawful members of the Defendant having acquired shares therein. It was pleaded that each of the members of the Defendant built up their respective shareholding in the Defendant to 25 shares each which was the maximum permissible number of shares any member could hold. In 2004 the members of the Defendant resolved to subdivide the agricultural and commercial lands of the Defendant amongst themselves with only those members having 25 shares being eligible for balloting for allocation of the said plots. As all the Plaintiffs complied with this requirement they were admitted for balloting. However, by letters dated 25th April, 2005, the board of the Defendant issued separate letters to all the Plaintiffs questioning their shareholding in the Defendant and summoned the Plaintiffs to appear before the Board to substantiate their shareholding. On 9th May, 2006, the Plaintiffs

through their advocates confirmed that the Plaintiffs had lawfully, procedurally and regularly acquired their shares in the Defendant. The 1st Plaintiff also appeared before the Board personally and handed over documents proving the Plaintiffs' shareholding and the Board expressed satisfaction with the explanation offered and acknowledged that all the Plaintiffs were bona fide members of the Defendant and they were consequently allowed to enjoy their rights as such. Following the balloting process, on 21st October, 2006, the Defendant allocated each Plaintiff a parcel of agricultural land and a commercial plot land.

3. It was however pleaded that on 1st November, 2007 the Defendant notified the 2nd to the 7th Plaintiffs of their expulsion from the Defendant Company. It was the Plaintiffs' case that prior to this notification there were no indications whatsoever that the Board intended to take such drastic action against them. Though the said threat was not enforced by the Board, during the Defendant's Annual General Meeting held on 6th January, 2011, the Defendant adopted the resolution de-registering the Plaintiffs as members and repossessed their plots, an action which the Plaintiff averred was unreasonable and actuated by malice.

4. PW1, **Joseph Mutuku Mwanthi**, testified the 2nd to 6th plaintiffs were his children, whereas the 7th plaintiff was his wife. According to him, he joined the Defendant as a member in 1974 and paid membership fee of 100/= and bought a share of 1000/=. He adopted his witness statement in which he stated that he became a member of the Defendant after its incorporation in 1975. Initially he held 8 ordinary shares but on 4th July, 1992, he bought an additional 8 shares. On 1st September, 1989, he purchased on behalf of the 2nd to 6th Defendants 4 shares each.

5. He stated that between 1987 and 1992 he was a director of the Defendant company and on 30th March, 1996 be purchased an additional 9 shares increasing his shareholding in the Defendant to 25 shares and on 31st December, 1997, he was re-issued with a share certificate No. 1625 confirming the same. On 31st December, 1997, the 7th Plaintiff was also re-issued with a share certificate no.1625 for 16.

6. According to PW1, some time in 2004 the members of the Defendant resolved to subdivide the Defendant's agricultural and commercial lands amongst themselves and that any member with 25 shares was eligible for the said allocation hence the need to increase the shareholding accordingly. In early 2005, the new board of directors of the Defendant was constituted and on 25th April, 2005, the board of the Defendant issued separate letters to all the Plaintiffs demanding their appearance before it to explain their shareholding in the Defendant Company, the said letters casting doubts about their proprietary status as such shareholders. On 9th May, 2006, PW1 instructed an advocate to write to the Defendant confirming that his shares and those of the other plaintiffs had been acquired properly, regularly and procedurally which letter was duly received by the Defendant. PW1 subsequently appeared personally before the Board and handed over documents proving that all the Plaintiffs acquired shares in the Defendant after complying with the rules and the regulations laid down by the Defendant Company and the Board was satisfied with his explanations and verbally acknowledged them as bona fide members of the Defendant and subsequently gave them the go ahead to continue taking part of the Defendant's activities as such members.

7. Pursuant to the said resolution, on 3rd August, 2006, PW1 purchased additional shares on behalf of the Plaintiffs and was issued with receipts and the Defendant issued share certificates of 25 shares each to each of the Plaintiffs save **Elizabeth Mutuku** on 8th August, 2006. Based on the foregoing, PW1 participated in the balloting process on his own behalf and on behalf of the other plaintiffs and on 21st October, 2006 all the plaintiffs received allotment letters from the Defendant Company confirming their ownership of the plots.

8. However, on 29th October, 2006, the Board of the Defendant made a complaint to the police and PW1 with 2 other persons were arrested on charges of stealing properties belonging to the Defendant and were charged in Kilungu SRM's Court Criminal Case No. 457 of 2006. By a ruling delivered on 18th March, 2009 that Court found that they had no case to answer and that the prosecution was malicious. According to PW1, having failed to achieve their desires results, the Board on 21st June, 2007 recommended to the members of the Defendant in an Annual General Meeting that his wife and children ought to be expelled from the Defendant on the basis that in 1996 PW1's membership was transferred to create 8 more new members, the 2nd to 7th Plaintiffs.

9. According to PW1, on 1st November, 2007, all the plaintiffs except himself received separate letters written by the Chairman of the Board of Directors of the Defendant Company expelling them from the Defendant Company and in the said letters, it was sought to dispossess the said Plaintiff of their allotted agricultural and commercial plots.

10. In cross-examination, PW1 stated that though he had the original membership card, he did not have it in court but stated that his membership no. was 98 but at the time of the trial he was member No. 1625. By the time he applied for 8 shares in 1992, he was member 98 and was then a director of the defendant. His membership later changed from member No. 98 to 1625 in a manner he did not know as he was not a director having retired in 1996. According to him his children were members No. 1626 -1632 and they got their membership in 1989 and the additional shares were given in 2006.

11. It was his evidence that membership numbers were given by the office. While admitting that originally, he had 8 shares, he denied that he split his share so that the defendants got shares each. He admitted that he was present at the AGM held on 21st June, 2017 in which the chairman's report talked of his shares and others. He agreed that it was about former directors splitting shares to cater for their families and it was resolved to expel illegal members though he was never expelled from the defendant and had no personal claim against the defendant. He explained that in 1989, when he bought shares for his children he was 53 years old. According to him, the 2nd plaintiff was born in 1965; the 3rd plaintiff was born in 1966; the 4th plaintiff was born in 1968; the 5th plaintiff was born in 1969; the 6th plaintiff was born in 1976; and the 7h plaintiff was born in 1946. While he disclosed that the 6th defendant was at the time aged 13 years, he stated that he did not know that minors cannot hold shares.

12. In his evidence, when he purchased the shares in 1989, he was a director of the defendant and it was not prohibited to buy shares for minors. It was his evidence that he represented his co-plaintiffs when applying for their membership and he was unaware that splitting a share as a member of a company is wrong or not. According to him, they allocated and each member got 10 acres totalling 80 acres of land though he could not tell its value. He denied that they were defrauding the company.

13. In re-examination, PW1 stated that his wife joined the defendant in 1980 and denied that he split his shares among his co-plaintiffs. It was his evidence that there was no indication in the minutes that the decision to have seven new members' names deleted was adopted. It was his case that as a director his responsibility was to sit as a board member. There was however a management committee of the defendant of which he was a member and it was that committee that used to run the company on day to day basis. He disclosed that in total they have 80 acres and denied that he was the only member with excess of 80 acres. He insisted that there was evidence to show that the shares were legitimate and that he attended the board meeting and presented documents in support of the plaintiffs' shares.

14. PW2, **Joseph Muinde Muluka**, in his statement which he adopted as evidence stated that PW1 was his father while the 7th Plaintiff was his mother and the other Plaintiffs his siblings. According to him, on 1st September, 1989, PW1 purchased on his behalf 4 shares from the Defendant hence earning him membership in the Defendant company. He reiterated the testimony of PW1 in respect of the other aspects of shareholding.

15. In cross-examination PW2 explained that he became a member of the defendant on 1st September, 1989 being member No. 1628. He however received his first membership document in the early 90s and was given a dividend cheque. In 2006 his shares were topped up by his father from the original 4 shares so that they could ballot and the payments were made by their father. According to him, their membership follows each other. He stated that he was born in 1966 while the 6th plaintiff was born in 1976 and became a member in 1986 by which time he was below the age of 18. Since the said shares were purchased by his father, he came to know of the purchase in 1990. According to him, he did not ask his father to either buy the said shares or to make additional payments. He was however aware that they were expelled on the ground that their membership was illegal but their father is still a member. It was his evidence that he had a share certificate proving membership and he got 10 acres and a commercial plot. Though he did not attend the AGM, he attended sometimes but was represented at the meeting by his father.

16. According to PW2, no action was taken against his father for purchase of the shares. Since his father was handling everything, they were not active in the matter.

**The Defendant's Case**

17. In its Defence, the Defendant denied that the Plaintiffs and in particular the 2nd to 7th Plaintiffs were members of the Defendant. According the allegations of their lawfully shareholding in the Defendant was denied as well as the alleged acknowledgement of their membership by the Defendant. While admitting that the Defendant resolved to expel the Plaintiffs as pleaded in the Plaint, the Defendant pleaded that the Plaintiffs were duly notified that their shareholding was in question since 2005 and were aware of all the Annual General Meetings held by the Defendant thereafter and the resolutions passed. The Defendant therefore denied the allegations of malice.

18. In support of the defence case, the Defendant called its chairman, **David Muthoka Mutangili** who testified as DW1. According to him, PW1 used to be a director with the defendant from 1996 to 2002 and he became the chairman in May 2003. According to his statement which he relied upon, PW1 was member no. 98 holding 16 shares. However, in 1996, PW1's membership was mischievously transferred to create 8 more new members who were his family members which was unprocedural. On 4th June, 2005, a Special Annual General Meeting was held at which the members mandated the Board to investigate and report on the issue of irregular registration of members.

19. Pursuant to the foregoing, he forwarded the said report and the Board's findings during the AGM held on 21st June, 2007 by which the Board found that the said transfer led to illegal creation of membership numbers that led to unfair enrichment. A recommendation was thereby made that the said irregular members be deleted and the ballots nullified and repossessed and a resolution was passed to that effect in the AGM held on 6th January, 2011 by which the said resolution was adopted. The effect of the said resolution was that the 2nd to 7th plaintiffs have never been members of the Defendant Company as the irregular entries were struck out and their ballots nullified and repossessed forthwith. The said resolution, it was contended, also nullified similar irregular registrations made where members 603 with 25 shares created 3 members as well as member number 1831 who had no documents in support of the entry in the register.

20. According to DW1, the 1st Plaintiff used his position at the defendant company to create phony numbers by the purported purchase of shares by himself on behalf of the 2nd to 6th Plaintiffs vide the purported cheque number 064430 and at the time they were minors.

21. DW1 therefore was of the view that the Defendant company acted lawfully and regularly to protect the company and maintain proper records since the 1st Plaintiff's membership was not interfered with and the company only expunged the names of those irregularly registered and that action was taken without malice whatsoever.

22. DW1 referred to the list of documents filed by the defendant including the chairman's report at the Special Annual General Meeting held on 4-6-2005, the chairman's message in the AGM held on 21-6-2007, the minutes of AGM of 6-1-2001, a copy of the members list in which Member No. 98 is reflected as 1st plaintiff though in the current register, he is number 1625. According to DW1, it is not possible for a member to have two memberships in the register and that a member retains the original membership.

23. In cross-examination, DW1 stated that he joined the defendant as a member in 1998 and that to become a member one has to apply and pay application fee of 100/=, a process which the 1st plaintiff went through. However, the 7th plaintiff did not go through the process legally. According to him, since Members register was closed in 1977 the 7th plaintiff could not have become a member on 9th October, 1981. It was his evidence though they had attained the membership required of 1530, the 1st plaintiff split his shares in 1996 to create 8 new shares including his then shared it among his family members, each ending up with 2 shares. He insisted that the 1st plaintiff colluded with his family to obtain shares illegally and that the receipts issued to the plaintiffs were forgeries as they were issued by the former chairman of the defendant the late **Abraham Ngoleli** who had in similar fashion brought on board three members. Documents also showed that the 1st plaintiff applied for additional shares which was successful. He admitted that it was the duty of the board to admit new members and disclosed that the defendant secretary was Delloite and Touche.

24. In his evidence, it was only the deceased chairman who was admitting members and he was running the company as personal property. It was his testimony that though there was a letter from company secretary inviting the plaintiffs to a meeting to verify their status, they did not appear. He disclosed that on 1st August, 2006 the plaintiff saw him and wanted to top up the shares for his immediate family but since they had not concluded the investigation they allowed him to top up in order to participate in the balloting on 26th July, 2006 for agricultural plots. He admitted that he signed the share certificates pending investigations and their money was accepted as they had yet to conclude their investigations.

25. DW1 admitted that the 1st plaintiff was charged in SPM's Court at Kilungu following their complaint made in 2006. However, the 1st Plaintiff was acquitted. While he reported to the members that the case was waiting the ruling, by then the case had actually been concluded but their lawyer had not informed them about the outcome of the case.

26. DW1 however, denied that he had anything personal against the plaintiffs. He confirmed that the defendant expelled the plaintiffs vide letters dated 1-11-2007 which decision was ratified in June 2011 and he decision affected nine people. Following the court decision, the letters were withdrawn which withdrawal was communicated to them formally. He however insisted that the mastermind of the collusion was the 1st plaintiff and disclosed that apart from expelling members of his family, they retained the 1st plaintiff as member No. 1625. The reason for not reporting the case to the police, according to him, was because they were stopped in the AGM. It was his evidence that membership of the defendant is open to any adult member but admitted that in 1989, he was not yet a member of the defendant.

27. In re-examination DW1 explained that the 1st plaintiff applied for 8 additional shares on 4-7-1992 as a member No. 98. However, by an application dated 30-3-1996, the 1st Plaintiff applied as member No.1625 for 9 shares. He clarified that the complaint in the criminal case was that the 1st plaintiff and others had stolen water pipes belonging to the defendant and that the case was not linked to their investigations with the plaintiff's membership. In his evidence, it is the board that decides whether or not to prosecute a member by the AGM and that he had no personal vendetta against the 1st plaintiff.

**Plaintiffs' Submissions**

28. On behalf of the Plaintiffs, it was submitted that the basis of this dispute is that the Defendant's resolution no. 9.4 contained in the minutes for the AGM held on 6th January, 2011 purporting to deregister the 2nd to 7th Plaintiffs among others as recommended in the Chairman's report of 2007. The resolution also required the repossession of the plots allocated to these members. The Plaintiffs case is that having lawfully and procedurally acquired shares in the Defendant Company, it had no right in law to deregister them as members or repossess their plots. It is not in dispute that the Plaintiffs are recorded in the Defendant's register of members and are also in possession of share certificates duly issued by the Defendant. Accordingly, the Plaintiffs submit that they are members of the Defendant as a matter of fact as entry in the register of members and possession of share certificates is *prima facie* evidence that the Plaintiffs are members of the Defendant, as provided for under sections 28 (2) and 83 of the ***Companies Act*** (Cap. 486).

29. It was submitted that the Plaintiffs have attached to their Plaint 102-page Bundle of Documents evidencing how and when each of the Plaintiffs became a member of the Defendant and how the shares were allocated. The Bundle shows that the Defendants allocated shares to the Plaintiffs, receipts for application of shares, share certificates and correspondence between the Plaintiffs and the Defendant. The Defendant has not adduced any evidence to discount the legitimacy of the documents. It was submitted that there was no evidence in support of the Defendant's allegations that there was a clear collusion to defraud the Company. According to the Plaintiffs, even if the Defendant had called evidence to support this position, it would not be allowed to rely on it as fraud and any alleged conspiracy to defraud must not only be specifically pleaded but must also be particularized, yet the Defence does not as much even mention it. In this regard, the Plaintiffs relied on Order 2 Rules 4 & 10 of the ***Civil Procedure Rules, 2010*** which require that any allegation of fraud must be specifically pleaded and particularized and the case of **John Didi Omulo vs. Small Enterprises Finance Co. Ltd [2005] eKLR**, where **Warsame, J** (as he then was) relied on Civil Appeal No. 215/96 - **Central Bank of Documents vs. Trust Bank Limited.**

30. In the Plaintiffs' submissions the mere allegation that the 1st Plaintiff's number was transferred from 98 to 1625, without more, cannot be said to be evidence of any wrong doing since the 1st Plaintiff was not involved in the day to day running of the Company and was not involved in the registration and issue of membership numbers.

31. It was submitted that based on section 83 aforesaid, the Defendant Company is estopped from denying the particulars contained in the certificate or the payment for the shares. The doctrine of estoppel would only fail to operate if the certificates were proved to be forgeries or were issued by a person without apparent authority. In support of this submission, the Plaintiffs relied on ***Smith & Keenan's Company Law, 13th Edition at pages 223 and 224.***

32. It was submitted that though the Defendant contends that these documents are forgeries or in the alternative were issued irregularly by the former chairman of the Defendant Company, no effort was made to prove the serious allegation of fraud. If the certificates were issued by the Chairman, then he had apparent authority to issue the certificates and the Company is, therefore, estopped from denying their authenticity.

33. According to the Plaintiffs, having produced prima facie evidence to confirm that they are legitimate members of the Defendant, the burden of proof then shifted to the Defendant Company to prove that they acquired membership status irregularly or fraudulently. Fraud and forgery being criminal offences, the standard of proof is that beyond reasonable. Accordingly, the Defendant in this case bears the burden of proving beyond reasonable doubt that the Plaintiffs became members of the Defendant through fraud or any other irregularity whatsoever. It was however submitted that the Defendant has failed to establish that the Plaintiffs acquired shareholding in the Defendant fraudulently. The Defendant's allegation that the 1st Plaintiff sneaked in the 2nd to 6th Plaintiffs into the Defendant while he was Director is contradictory because by the time these Plaintiffs acquired their shareholding and membership in the Defendant Plaintiff had ceased being a Director in the Defendant. Further the assertion that the 1st Plaintiff used his position to create phony numbers in 1996 through a cheque no. 064430 is not only contradictory but also lacks any basis. The cheque was for Kshs. 135,000 and was issued in 2006 to top up the shares of the 2nd to 6th Plaintiffs (21 shares each (21*6=126) and nine (9) shares for the 7th Plaintiff thus totalling to 135 shares. Each share was offered at a price of Kshs. 1,000 multiplied by the total shares required for the top up which comes to Kshs. 135,000. Accordingly, the Plaintiffs submit that the

Defendant is moved by ill-will and malice in seeking the expulsion of the Plaintiffs from the Defendant, and seek protection from this Court from the illegality of Defendant's purported expulsion of the Plaintiffs from the Defendant.

34. It was further submitted that the powers of a company's Board of Directors and/or Annual General Meeting are donated and governed by the Articles of Association. The powers to expel a shareholder from the company membership and the manner in which this would be done must be clearly and expressly stated in the Articles of Association. Consequently, a Board/Annual General Meeting resolution to expel a shareholder from the company will be null and void if the Articles of Association have not conferred upon the Board/Annual General Meeting the power to expel a shareholder from the company. It was further submitted that the power to expel a shareholder from the company is a draconian power which should only be exercised in the clearest of circumstances specified in the Articles of Association. A plain reading of the Articles of Association of the Defendant Company (pages 82-91 of the Plaintiffs' bundle of documents) shows that there is no provision for expulsion of members.

35. In the Plaintiffs' view, where the Articles are silent on shareholder expulsion/deregistration, that power should then be exercised by the court because the expulsion will lead to automatic rectification of the register of members, which is a power reserved for the court under section 118 of the ***Companies Act*** (Cap 486).

36. According to the Plaintiffs, the law regulating shareholder expulsion in Kenya is section 118 of the ***Companies Act*** which provides that an aggrieved party being either the Company can move to court to seek that a shareholder be removed from the register of members where his/her name was entered in the register without "sufficient cause". Alternatively, where a Member's name is omitted from the register 'without sufficient cause', then the member would move the court for rectification of the register by inclusion of his name. This, the Plaintiffs submit, is the alternative to be followed in the absence of a shareholder expulsion procedure under the Articles of Association of the Company.

37. It was however submitted that the Plaintiffs could not avail themselves of the procedure under this section as their "have not been, without sufficient cause omitted from the register" but the company could because it purports that the Plaintiffs names were without sufficient cause entered in the register.

38. As regards what happens to the Plaintiffs' shares in the Defendant Company upon expulsion, it was submitted that Article 35 of the Articles of Association provide for the forfeiture of shares where a member fails to pay the whole or any part of any call on or before the day appointed. This is the only ground recognized in the articles upon which a shareholder would lose title to his shares. Accordingly, the Articles of Association of the Defendant do not confer upon the Defendant's Board of Directors and Annual General Meeting the power to expel shareholders from the Defendant. Neither does the forfeiture of shares clause in the Defendant's Articles of Association provide for the forfeiture of shares upon expulsion of a shareholder from the Defendant. The only ground provided therein is failure to pay the whole or any part of any call of shares on or before the day appointed for payment. Reliance was placed on ***Smith & Keenan's Company Law***, 13th Edition at page 229 and 230 where the issue of forfeiture of shares is discussed and noted that shares may be forfeited by a resolution of the board of directors if and only if an express power to forfeit is given in the Articles and that such power must be strictly followed otherwise the forfeiture may be annulled. They also relied on **Madhava Ramachandra Kamath vs. The Canara Banking Corporation (1940) 2 MLJ 721**, where, according to the Plaintiffs, the Madras High Court in India had an opportunity to deal with a case brought under section 38 (1) of the ***Company Act*** (the equivalent of our section 118 of Cap 486). Briefly, the Defendant Company had at a general meeting purported to act under Article 17 and expelled the Petitioner from membership. The article provided that if a shareholder unlawfully or unjustly had recourse to the law against the corporation then he would render himself liable to expulsion. The grounds for the expulsion were that the Petitioner had preferred a complaint in court seeking a sanction to prosecute directors of the company. The complaint was found to be unfounded. A resolution was subsequently passed at a general meeting purporting to expel him on the basis of his complaint to the courts. The articles did not give the company the power to deal with shares held by a person who had been expelled. The court found for the petitioner and noted as follows:

**"as the powers of the company at the date when the petitioner was purported to be expelled did not empower them to deprive him of his share and while he remained a shareholder he must remain a member, it must follow that the resolution has no effect."**

39. (iv) Accordingly, the Plaintiff submitted that the Defendant's Annual General Meeting Resolution Number 9.4 purporting to expel the Plaintiffs from the Defendant and repossession of the expelled Plaintiffs' plots is *ultra vires* the Defendant's Articles of Association and is a shortcut to section 118 of the ***Companies Act*** and is, therefore, null and void. Even if the Company had the power to expel the Plaintiffs, without a provision in the articles to the effect that the shares held by the expelled member would be forfeited, the resolution would have no effect if the company is not empowered to deprive the Plaintiffs of their shares as is the case here.

40. According to the Plaintiffs, the actions of the Defendant amount to an illegality which puts to serious jeopardy the integrity of the share as a form of property and this Court ought to step in and permanently stop the intended illegality from taking place.

41. Regarding the capacity of the 2nd to 6th Plaintiffs to become shareholders in the Company while minors, it was submitted that only the 6th Plaintiff was a minor as at the time of acquisition of their first shares in the Defendant Company, being thirteen (13) years in 1989. According to the Defendant, the 2nd to 7th Plaintiffs became members in 1996 at which time the 6th Plaintiff, the youngest among them must have been 20 years old. Be that as it may, it was the Plaintiffs submission that there is nothing in the ***Companies Act*** or in the Defendant's Articles of Association that bars minors from becoming members of the Defendant Company. It is a settled legal principle that a minor can become a member of a company provided that the Articles of Association of the company do not expressly prohibit the same. Accordingly, the Defendant's claim that the 2nd to 6th Plaintiffs became members when still minors not only lacks factual basis (as only the 6th Plaintiff was a minor then) but has no legal force because even if they became members of the company while still minors, which is denied, there is nothing in the Articles that prohibits minors from becoming shareholders in the Defendant.

42. On the claim for general damages for distress caused by the Defendant Company's actions, it was submitted that the Plaintiffs have suffered mental agony and distress as a result of the Defendant's actions. The Plaintiff's membership of the Defendant Company is intrinsically tied in with their ownership of their agricultural and commercial plots as allotted to them by the Defendant in 2006. Land is a

special resource and the very thought of losing it illegally would be more than distressing. The Defendants actions in purporting and threatening to deregister the Plaintiffs even after they defended their status through the 1st Plaintiff when they were called upon to do so and the Defendant gave them an oral green light to continue participating in the affairs of the Company have thoroughly harassed the Plaintiffs and they now look up to the Courts to vindicate their position and order the Defendants to pay them damages for the distress so caused. These actions warrant the award of damages as envisaged under Section 118 of the Companies Act. It was proposed that each of the Plaintiffs be awarded Kshs. 700,000.00 under this head as compensation for distress suffered.

43. It was further submitted that the purported expulsion of the Plaintiffs from the Defendant is actuated by malice. The 1st Plaintiff was charged with the offence of theft in Kilungu Law Courts at the behest of the Company. At the close of the prosecution case, the court found that the Prosecution had not established a prima facie case to warrant his being put on his defence. According to the Plaintiffs, this case and the investigations and purported expulsion of the Plaintiffs are part of the grand scheme to victimize former directors of the Company without cause and especially the 1st Plaintiff who together with the other Plaintiffs in this suit were allocated a total of 80 acres of agricultural land. The Plaintiffs, therefore, urged this Court to find that they have proved their case on a balance of probabilities and allow the suit as prayed with costs and general damages for distress as against the Defendant.

**Defendant's Submissions**

44. On behalf of the Defendant it was submitted that from various pleadings and testimonies of the parties and their witnesses, the following facts remain undisputed:

1. That the 1st plaintiff is a *bona fide* shareholder of the defendant with no complaint of himself against the defendant.

2. That the 1st plaintiff was originally member no.98 which later changed to member no.1625.

3. That the 1st plaintiff made applications to increase shares for himself and his children and made payments to the defendant which it accepted.

4. That the defendant further allotted land to the plaintiffs on the basis of their shareholding and issued share certificates to them.

5. That the defendant later expelled the 2nd- 7th plaintiffs on allegations that their membership was unlawful and that they were not *bona fide* members.

6. That the expulsion of the 2nd -7th plaintiffs was as a result of the adoption of the board of directors' recommendation through the annual general meeting.

45. From the foregoing undisputed facts, it was submitted that what remains in issue for this court to determine is therefore:-

a) Whether or not the 2nd -7th plaintiffs are *bona fide* members of the defendant.

b) Whether the company had power to expel the said plaintiffs.

c) Whether the 1st plaintiff is a proper party to this suit.

d) Whether the plaintiffs are entitled to the reliefs sought

46. According to the Defendant, the plaintiffs in their testimony availed documents alleging their membership and shareholding in the defendant including receipts of payments of shares as well as share certificates. It was however submitted that under Section 28 (2) and 83 of the ***Companies Act***, Cap 486, a share certificate under the common seal of the company specifying any share held by any member is prima facie, but not conclusive evidence of the title of the member to the share. In this respect the Defendant relied on ***Smith & Keenan's Company Law***, 13th edition page 223 where at page 224, the author makes it clear that:

> "***The mere fact that some time the company issued to X a share certificate stating that he is the holder of, say, 100 shares does not prevent the company from denying that X is the holder at some future date. The certificate is only prima facie evidence that X was entitled to shares at the date of issue of the certificate."***

47. Therefore, the doctrine of estoppels does not therefore come into play and the defendant cannot be said to have been estopped by issuance of share certificates to the plaintiffs, from denying such title. In the instant case, the plaintiff produced evidence of purchase of shares and certificates of shares issued by the defendant. But this only remains prima facie and not conclusive. The defendant has on the contrary produced evidence that shares that belong to the 2nd -7th plaintiffs were illegally obtained. The defendant asserted and the 1st plaintiff confirmed that he was initially member no.98 holding 16 shares. He later changed membership to 1625 and alleges that he did not participate in that change since he was no longer a director of the company. However, by his own testimony under oath, the 1st plaintiff stated that he was still a director at the time he was buying shares for the minors, that is, the 6th plaintiff who is member number 1626.

48. As would be evident, the plaintiffs are now members no. 1625, 1626, 1627, 1629, 1630, 1631 and 1632 respectively. Member no 1629 is now deceased. From how their share numbers were issued, it is clear that they were obtained at the same time and that is of course during the 1st plaintiff's tenure as director.

49. It was submitted that the defendant's witness while on oath testified that it was not procedural for a member to hold two membership numbers and or change from one number to another. Indeed, he testified the reason as to why the defendant could not pin point what had transpired when the 1st plaintiff's membership was illegally split to create the memberships of the 2nd – 7th plaintiffs is the fraud that had accompanied the activity. Looking at the 1st plaintiff's membership details, one would be left to conclude that there was fraud involved. First, the member's register as at 22.12.1977 when the company closed its register indicated that the first plaintiff was member number 98 with 6 shares. Later on 4/7/1992, he made an application to add 8 more shares indicating that he already held 8 instead of 6. This would therefore mean that he had a total of 14 shares after the purchase. In 1996 (30.3.96) the 1st plaintiff made an application for 16 additional now as member number 1625. The 1st plaintiff avers that he does not know how he changed from member number 98 to member no.1625 albeit being involved in the daily activities of the company as a director. Be that as it may, he now had a total of 20 shares yet he was issued with a share certificate of 25 shares. One would wonder why!

50. Again, it was submitted, the 7th plaintiff was on 31/12/1997 issued with a share certificate showing that she had 16 shares in the defendant. She is seen to be purchasing additional 21 shares valued at Kshs, 21, 000/= to top her shares to 25 as was required by the company. This would therefore mean that she held 4 shares as seen in page 5 of the list of documents and not 16. The only logical conclusion therefore is that the transactions and dealings of the plaintiff between 1996 and 1997 cannot be explained and are only fraudulent and clandestine.

51. It was submitted that as a matter of law, the relationship created between a company and its members by virtue of its Articles of Association is contractual in nature. This relationship can be broken on grounds of misrepresentation, fraud or any other ground that would warrant the setting aside of a contract. The foregoing analysis of the 1st plaintiff's membership is an indicator that there existed grounds that would warrant setting aside of the pre-existing contract between the defendant and the 2nd- 7th plaintiffs hence it cannot be said that they are *bona fide* members of the defendant.

52. It was submitted that before any drastic action could be taken by the defendant, it invited the plaintiffs to a meeting to clear their membership issue. By their own evidence, they did not attend the same but opted to write a letter. The plaintiffs would of course have done better than that, the defendant already being aware of the contents of the letter was not satisfied. By the plaintiffs' failure to attend the meeting gave mandate to the board of directors to investigate the matter and make recommendations which led to the plaintiffs' expulsion. The failure to attend the meeting with full knowledge of what was at stake speaks volumes and one would be right to conclude that there was something sinister to be hidden.

53. According to the Defendant, the company does its business through resolutions. A resolution was passed at the annual general meeting that the phony members be expelled. The plaintiffs did not explain their silence during this AGM and thus the resolution bound the company. They instead alleged that the company had maliciously deregistered them and tied this to criminal proceedings. As would be seen, the 1st plaintiff criminal were not the only accused person in the criminal proceedings. Again the 2nd -7th plaintiffs were not the only ones who were deregistered. The Court was therefore urged your lordship to find that the 2nd -7th plaintiffs are not members of the society and therefore not amenable to the relief sought.

54. It was submitted that by the evidence of the 1st Plaintiff, he is still a member of the defendant with full benefits and with no complaint whatsoever against the defendant. Since the 1st Plaintiff has no cause of action against the Defendant, he is not a proper party to the suit and his case should be dismissed with costs.

55. As regards the reliefs sought, it was submitted that the prayers in the plaint have already been overtaken by events and in light of the fact that the Plaintiffs are not seeking an order that their expulsion and stripping of the benefits of the plaintiffs' illegal, null and void and reinstates them, the reliefs sought are incapable of being granted since the court is bound by the prayers sought in the plaint and Order 4 Rule 6 of the ***Civil Procedure Rules*** provides that *"every plaint shall state specifically the relief which the plaintiff claims, either specifically or in the alternative"*. It was submitted that as a matter of trite law, courts do not issue orders in vain.

56. In the Defendant's view, the 2nd – 7th plaintiffs already being illegal members are not amenable to the orders sought. The orders should only be sought by members and not phony ones like the said plaintiffs. The 1st plaintiff does not of course require the issuance of such orders.

57. The Court was therefore urged to find that the plaintiffs' suit is devoid and dismiss it with costs.

**Determinations**

58. I have considered the foregoing. I agree with the Defendant that from the pleadings and the evidence adduced, the issues that call for determination are as follows:

**1) Whether or not the 2nd -7th plaintiffs are *bona fide* members of the defendant.**

**2) Whether the company had power to expel the said plaintiffs.**

**3) Whether the 1st plaintiff is a proper party to this suit.**

**4) Whether the plaintiffs are entitled to the reliefs sought.**

59. From the evidence, it is admitted that the 1st Plaintiff acquired shares on behalf of the 2nd to 7th Plaintiffs and certificates of shares were

issued accordingly. DW1 admitted that the said payment was received and that the said share certificates were duly issued. He however contended that the same were issued during the pendency of the investigations which revealed the transmission of the shares to the 2nd to the 7th Plaintiffs was as a result of the collusion between the 1st Plaintiff and the then Chairman of the Board of Directors of the Defendant and that it was fraudulently done. Order 2 Rule 10(1)(a) of the ***Civil Procedure Rules*** provides that:

> ***Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing— (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies.***

60. Fraud has been the subject of judicial determination in this country. In **B E A Timber Co. vs. Inder Singh Gill [1959] EA 463,** the East Africa Court of Appeal held that:

> **"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. Fraud, however, is a conclusion of law and if the facts alleged in the pleading are such as to create a fraud it is not necessary to allege the fraudulent intent. The acts alleged to be fraudulent must be set out, and then it should be stated that these acts were done fraudulently; but from the acts fraudulent intent may be inferred…In common law courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts. It may not be necessary to use the word "fraud". An allegation that the defendant made to the plaintiff representations on which he intended the plaintiff to act, which representations were untrue, and known to the defendant to be untrue, is sufficient. The word "fraud" is not used, but two expressions are used pointing at the state of mind of the defendant – that he intended the representations to be acted upon, and that he knew them to be untrue. The plaintiff is bound to show distinctly that he means to allege fraud. If the facts are alleged from which fraud might be inferred, but are consistent with innocence, it is not to be presumed that they were done with a fraudulent intention."**

61. As regards the mode of pleading fraud, the rationale for doing so and the standard of proof, it was held by **Odoki, JSC** (as he then was) in **FAM International Ltd & Ahmed Farah vs. Mohamed El Fathi SCCA NO. 16 of 1993** that:

> **"There are courses open to a plaintiff when he is framing his plaint. He may specifically employ the word fraud and proceed to particularise the instances of fraud or alternatively, he may set down a catalogue of allegations, without using the word 'fraud', which clearly point to the defendant's state of mind…Fraud is a serious matter and the party against whom it is alleged should be afforded sufficient notice to enable him answer the allegations…The standard of proof applicable is the civil standard of balance of probability and not the criminal standard of proof beyond reasonable doubt, but the degree of probability to establish proof may vary according to the gravity of the allegation to be proved…Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."**

62. According to **Wycliffe Kiyingi vs. Augustine Kajuna Kampala HCCS NO. 81 of 1992:**

> **"Order 6 rule 2 of the Civil Procedure Rules requires that in all cases in which pleadings relies on fraud, the particulars of such fraud with dates should be stated in the pleadings. It is therefore a requirement of law that any charge of fraud must be pleaded with utmost particularity. The facts alleged to be fraudulent must be stated, otherwise no evidence in support of them will be received at the trial and the principle behind the rule is that it is only fair play between man and man that the plaintiff should know what is charged against him. If the "plaintiff" is read "defendant" the statement is a *fortiori* to the instant case. Since the particulars of the alleged fraud on which the pleading relies were not stated in the pleading, the plaintiff would therefore not be able, at the trial, to adduce evidence to prove the allegations of fraud. And without proof of the allegation of fraud, it is not possible to see how the plaintiff can succeed in his claim."**

63. It is not just enough to plead fraud, but as was held in **Kampala Bottlers Ltd vs. Damanico (U) Ltd [1990-1994] EA 141**:

> **"Normally where fraud is pleaded, particulars of the fraud must be given and fraud must be attributable to the transferee. It must be attributable either directly or by necessary implication and by this it is meant that the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act…It is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters…Fraud is a very serious allegation to make and it is always wise to abide by the Civil Procedure Rules, Order 6 rule 2 and plead fraud properly giving particulars of the fraud alleged…It is generally held that fraud must reside in the transferee…It is important that before someone's reputation is besmirched, he has had an opportunity to defend himself…It must be understood from the nature of the defence, that the unspecified fraud must be primarily directed against the party in the case, against whom the defence has been made. That is to say, primarily, the respondent's allegation of fraud must relate to the way in which the appellant gained registration, as the appellant was the only other party in the case."**

64. A perusal of the defence filed herein does not reveal the allegation of fraud or fraudulent action on the part of the Plaintiffs. What was pleaded was irregularity in the creation of memberships and acquisition of the shares and the fact that the Plaintiffs were notified that their shareholding was in question and were aware of the Annual General Meetings held after 2005 and the resolutions made. In my view such a plea does not meet the threshold of utmost particularity expected in such matters wherein not only the particulars of the fraud ought to be pleaded, but the dates should also be stated in the pleadings.

65. It is true that the powers of the directors of a company are prescribed under the Companies Act as supplemented by the Articles of Association. Any action taken outside these instruments cannot be justified. In this case, it is clear that the Plaintiffs were registered as shareholders of the Defendant Company. Therefore, the provisions of sections kicked in. he said provisions provide that:

***28(2) Every other person that agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company.***

***83. A certificate, under the common seal of the company, specifying any shares held by any member shall be prima facie evidence of the title of the member to the shares.***

66. Therefore, the Plaintiffs' names having been entered in the Defendant Company's register of members, they were deemed as such members and the certificates issued to them specifying their respective shares was prima facie evidence of their title to the said shares. However, as rightly submitted by the Defendant, the Defendant was not estopped from challenging the Plaintiffs' shareholding since their status based on their registration was not conclusive but could be challenged on the basis of having been procured by fraud. In this case, however, evidence of fraud cannot, based on the rules of pleadings be admitted and considered.

67. Nevertheless, even if the evidence of the alleged fraud was considered, the same was based on the fact that the subdivision of shares was unacceptable and that the 1st Plaintiff's number was altered. There is no concrete evidence apart from bare averment that such alteration was not permissible and even if it was what was the effect of such alteration. Similarly, the mere fcat that one of the Plaintiff's was a minor did not justify the action taken against the 2nd to the 7th Plaintiffs. In any case, no evidence was adduced that at the time of the said action, minors were prohibited from being shareholders of the Company. Fraud, if any, must be traced to the beneficiaries of the transaction which was not done in this case.

68. Having considered the evidence placed before me in this case, I find that there was no proof of fraud to the required standards. Therefore, the 2nd to 7th Plaintiffs' memberships in the Defendant Company could not be successfully assailed, assuming that the Defendant had the power to do so. Accordingly, it is nolonger necessary to determine the 2nd issue.

69. As regards the 3rd issue, I agree that the 1st Plaintiff had no cause of action against the Defendant and his name ought to have been struck out from these pleadings.

70. As regards the reliefs sought, it is true that the manner in which the pleadings were crafted does not inspire much confidence. The general rule as stated in Order 4 Rule 6 of the ***Civil Procedure Rules*** is that:

***"every plaint shall state specifically the relief which the plaintiff claims, either specifically or in the alternative".***

71. Therefore, as a general rule, the court can only grant a relief which has been sought by the parties in the pleading. There is however an exception where, as was held in **Odd Jobs vs. Mubia [1970] EA 476:**

**"As a rule relief not founded on the pleadings will not be given…In East Africa the position is that a court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision…In the present case although the advocate for the appellant objected to evidence being led relating to the unpleaded issue, he cross-examined the other side's witnesses and led his own witness on this very issue; and although in his final address he objected to the new issue being considered unless made the subject of an amendment to the plaint, he nevertheless made submissions on the unpleaded issue. In those circumstances, although with some hesitation, the court considers that the unpleaded issue was left to the Judge for decision. There is no doubt that the appellant was taken by surprise at the hearing, but although his advocate protested he did in fact, to some extent, participate in the consideration of this new cause of action, both by leading evidence and addressing the court with reference to it, and the court is not satisfied that the procedural irregularities in the court below have in fact led to a failure of justice necessitating intervention by the Court. In other words, it has not been shown to the Court's satisfaction that in the event the decision in the court below was wrong…This appeal might never have been brought if the true cause of action had been pleaded. Its omission from the plaint is reprehensible enough, but when it became clear in the course of the trial that the claim was in fact based on a contract, which was the opposite of what had been pleaded, then it became the respondent's duty to have his new cause of action embodied in an amendment to the plaint. The Court would express its disapproval of the conduct of the respondent's case in the court below by depriving him of the costs of this appeal, and order that the appeal be dismissed but without costs…There has been an irregularity in the pleadings but this court will not usually interfere with a judgement if it is satisfied that there had been no failure of justice or lack of jurisdiction. The Court is satisfied that the issue was before the Court and that the parties were heard on the issue and the main question here is whether or not the appellant suffered any prejudice or injustice by the course that the proceedings took which was not the case.''**

72. This being a Court of equity, it should not suffer a wrong without a remedy. Based on my findings above, the Plaintiffs ought to be granted a remedy that will act as a recompense for the injury done to them.

73. Therefore, while I have no basis for awarding them general Damages, I hereby declare that the decision made by the Defendant Company via its resolution on 6th January, 2011 nullifying the membership of the 2nd to the 7th Plaintiffs as members of the Defendant Company as well as their respective ballots and consequently repossessing their shares or plots was unlawful and is hereby set aside.

74. However, based on the unsatisfactory state of the pleadings, there will be no order as to costs.

75. That is the judgement of this court and it is so ordered.

**Judgement read, signed and delivered in open Court at Machakos this 24th day of February, 2021.**

**G. V. ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Mburu for Mr B. M. Musau for the Plaintiffs**

**CA Geoffrey**