



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTION & HUMAN RIGHTS DIVISION**

**PETITION NO. 215 OF 2019**

**EVANS ASETO.....1<sup>ST</sup> PETITIONER**

**JOHN KIPTOO.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**NATIONAL BANK OF KENYA (NBK).....1<sup>ST</sup> RESPONDENT**

**KENYA COMMERCIAL BANK (KCB).....2<sup>ND</sup> RESPONDENT**

**AND**

**CENTRAL BANK OF KENYA.....1<sup>ST</sup> INTERESTED PARTY**

**COMPETITION AUTHORITY OF KENYA.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGEMENT**

1. The petitioners, Evans Aseto and John Kiptoo, vide an amended petition dated 6<sup>th</sup> June, 2019 and supported by the affidavit of Evans Aseto are challenging a share swap transaction that will see the 2<sup>nd</sup> Respondent, Kenya Commercial Bank (KCB), fully acquire the 1<sup>st</sup> Respondent, National Bank of Kenya (NBK). The petitioners aver that the planned share swap follows the offer made by KCB on 18<sup>th</sup> April, 2019 to acquire all the shares of NBK by way of a share swap of 10 ordinary shares of NBK for every 1 ordinary share of KCB.

2. It is further their averment that the share swap and/or transfer is irregular on the basis that the same has been conducted in contravention of the basic tenets of the Constitution in that, the National Treasury, the National Social Security Fund (the NSSF) and the Kenya Reinsurance Corporation Limited (Kenya Re) have a combined stake of up to 71.98% at the 1<sup>st</sup> Respondent making it a public entity and thus the public ought to have been involved by way of a comprehensive public participation process. It is their contention that public participation in a transaction of this nature is couched in mandatory terms in the Constitution and in its absence, the share swap and/or acquisition is null and void *ab initio*. They also aver that the respondents have not obtained an authorizing order from the 2<sup>nd</sup> Interested Party, the Competition Authority of Kenya (CAK), which is the entity mandated to oversee such transactions and subsequently grant and/or deny approval to such transactions after careful consideration of how the deal will affect competition in the market.

3. It is the petitioners' contention that the application for approval by CAK would entail submission of an extensive report on the effects of the intended acquisition such as details on the fate of the employees of NBK once the acquisition is completed. Further, given that the respondents are listed companies trading on the Nairobi Stock Exchange (NSE), KCB has since issued a notice of the intended acquisition to the Capital Markets Authority (CMA) in accordance with the Capital Markets Act, Cap 485A (CM Act), an indication that the respondents are hell-bent on pursuing the acquisition, the glaring irregularities notwithstanding.

4. The petitioners are therefore apprehensive that unless this court intervenes, there is an imminent risk that the acquisition of NBK by KCB will proceed unchecked and the same might lead to pilferage and loss of public funds. They also argue that NBK's books have not been audited by the Auditor-General to determine the true value for the intended share swap and various attempts by the Public Investments Committee to investigate the matter have been futile as several summons to the directors of NBK to appear before the aforesaid Committee have not been honoured.

5. It is the petitioners' position NBK is relying on the Gazette Notice No. 11 of 1986 which effectively exempted it from the provisions of the

State Corporations Act, Cap. 446 to avoid scrutiny and accountability. It is further their averment that the said Gazette Notice purports to support the claim that NBK is not a state corporation and therefore its books ought not be audited by the Auditor-General and seek to usurp the provisions of Article 226(a) of the Constitution yet as already established, the 1<sup>st</sup> Respondent is a public entity by the fact that the National Treasury and other government parastatals have a majority stake in it.

6. They further contend that the said Gazette Notice also curtails the powers of the Auditor-General as established under Article 229 of the Constitution and the petitioners are apprehensive that the acquisition of NBK by KCB will occasion loss of jobs to many Kenyans under the employ of the respondents as there is a high likelihood that various positions will be declared redundant and there is no mechanism in place to address the issue. Further, that the actions of the respondents are illegal and against public interest bearing in mind that the principles of inclusiveness and public participation are being contravened.

7. It is the petitioners' contention that the respondents have violated various constitutional provisions in relation to consumer protection, economic and social rights, control of public funds and public participation and unless this court intervenes, the impending acquisition will set a dangerous precedent against the principles elucidated by the Constitution. The petitioners therefore seek the following orders:-

**“a) A declaration that the impending acquisition is not procedural, inclusive and offends fundamental constitutional provisions and thus null and void.**

**b) A declaration that the impending acquisition infringes on the public consumer rights espoused under Article 46 of the Constitution of Kenya.**

**c) A declaration that the Gazette Notice No. 11 of 1986 published on the 27<sup>th</sup> day of February 1987 is unconstitutional and therefore null and void.**

**d) A declaration that the impending acquisition offends Sections 42 and 43 of the Competition Act No. 12 of 2010.**

**e) A permanent order to issue, staying the impending share swap and/or takeover of the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent unless in strict compliance with the constitution and adequate measures taken to secure public interest.**

**f) Such other or further orders as this Honourable Court may deem just and expedient.**

**g) The costs of and incidental to this petition be awarded to the Petitioner.”**

8. NBK's in response filed a replying affidavit sworn by Habil A. Waswani on 13<sup>th</sup> June, 2019. It was his averment that contrary to the petitioners' assertion that KCB breached sections 42(2)(a) and 43(1) of the Competition Act, 2010 they actually served the Notice of Intention to Acquire on CAK and the necessity for approval of the proposed merger has not arisen as the takeover offer is not yet approved or served pursuant to the Capital Markets (Take-over and Merger) Regulations, 2002 (the Regulations).

9. It was further his averment that NBK is not a public entity first because it is listed on the NSE and pursuant to the provisions of the CM Act and the Companies Act, all shares rank *pari passu* in all respects and therefore the shares of the Government cannot rank in priority to those of the other shareholders. Secondly, he averred that the largest shareholder in NBK, the NSSF holding 48.05% of the issued shares of NBK, is established under the National Social Services Fund Act, Cap. 258, which pursuant to Section 3, is not an entity funded from public funds as prescribed by Article 229(5) of the Constitution. Accordingly, he averred that NBK's accounts are subject to scrutiny as provided by the Banking Act, Cap. 488 which by Section 22 requires it to annually appoint an auditor qualified under the Companies Act, 2015 to audit and make a report upon the annual balance sheet.

10. It was also his averment that NBK is further required under the Companies Act and CM Act to appoint a qualified auditor to audit its accounts annually and have the same presented to its shareholders at an annual general meeting. It is therefore not subject to the audit by the Auditor-General but by an auditor appointed by its members subject to regulatory oversight by the 1<sup>st</sup> Interested Party (Central Bank of Kenya (CBK)), Capital Markets Authority (CMA) and the NSE. Further, it is averred that Gazette Notice No. 11 of 1986 made pursuant to Section 5A of the State Corporations Act was intended to secure the rights of the shareholders of NBK as a public company listed in the NSE.

11. Further, it is contended that the Regulations provide a statutory framework through which every step taken, beginning with the notice of intention to acquire, is not only published to the general public but is notified to or approved by the CMA and the right of any person to place a competing bid is preserved by Regulation 13. In any event, he averred that the petitioners have failed to specify the grounds upon which they seek the reliefs in their amended petition neither have they expressed any interest which grants them the right to file the matter.

12. In response to the petition, KCB filed a replying affidavit sworn by Joseph Kamau Kania on 12<sup>th</sup> June, 2019. He deposed that the amended petition is devoid of merit and is based on a lack of understanding of the detailed and structured legal framework in which the process of acquisition of shares of a publicly listed company is enshrined. It was further his disposition that the said legal framework ensures full transparency, objectivity and independent evaluation of the transaction and protection of the public interest and KCB has strictly complied with the law. Further, he averred that the framework has a dispute resolution mechanism that is intended to deal with the issues raised by the petitioners and that the petitioners have not exhausted this alternative dispute resolution mechanism before invoking this court's jurisdiction.

13. It was further his disposition that NBK is a bank licensed and regulated by CBK under the Banking Act and is also listed on the NSE therefore any dealings with its shares is regulated by the legal framework under the CM Act. He averred that on 18<sup>th</sup> April, 2019, KCB

served NBK with a Notice of Intention to Acquire 100% of the ordinary shares of NBK pursuant to Regulation 4(1) and which acquisition ought to be in strict adherence to the Regulations. It is also his averment that the said notice was also served on the CMA, NSE, CAK and CBK. That upon serving the said notice to acquire, KCB advertised the Notice of Intention to Acquire in two dailies with national circulation and the said notice contained all the information of the intention to acquire the NBK shares as is prescribed by law. Further, that the CMA approved the publication of the said notice.

14. That on 3<sup>rd</sup> May, 2019, KCB served on NBK the Offeror's statement of the Take-over Scheme containing specific information set out in law and it complied with the disclosure requirements thereof and NBK pursuant to Regulation 6 is required to notify the CMA and the NSE and upon getting the CMA's approval, advertise the take-over offer in two dailies of national circulations and include all material information contained in the Offeror's statement in the press notice. It is further averred that pursuant to Regulation 7, KCB submitted the take-over offer to the CMA however, the instant petition was filed and served before the CMA approval had been granted. He avers that the offer cannot be disclosed before the CMA approval is granted. He also avers that the once CMA approves the take-over, KCB would be required to serve the same on NBK. It is his averment that upon receipt of the offer statement, NBK is required to appoint an independent advisor under Regulation 10 whose statutory duty is to evaluate the offer and prepare an independent opinion on the offer by way of circular which shall be sent to the board of NBK, the CMA and ultimately to the shareholders of NBK.

15. On the issue of jurisdiction, he states that the petition raises issues that are required to have been ventilated before the CMA and the Capital Markets Tribunal (the Tribunal) and therefore this court has no jurisdiction to entertain the petition. It was further his deposition that the share swap is being undertaken under a constitutional and mandatory legal framework that applies to publicly listed companies and the statutory process is structured, time-bound and contains a robust framework for the protection of the interests of the shareholders as well as the general public interest. Further, that the strict and mandatory process of making offers for listed companies does not provide for and indeed precludes any disclosures of the offer and discussions of the same outside of the stipulated framework to avoid the dissemination of price sensitive information in a manner that would undermine the fair trading of shares on the securities exchange. He further averred that the take-over process provides detailed, structured and sequential disclosures of information of the transaction enabling any person aggrieved with the process to petition the regulators namely the CMA, NSE, CBK and CAK.

16. It was also his averment that by issuing the Notice and Offeror's Statement, the CAK was notified of the transaction. However, the application for approval to the CAK comes at a later stage once the take-over offer has been served and the approvals of the shareholders of both banks obtained. In any event, the instant petition was filed while KCB was awaiting approval of the take-over offer by the CMA. Regarding employees, he averred that according to the Regulations, the information required to be provided includes handling of employees.

17. He further deposes that NBK is a licensed bank and a listed company and under the Banking Act and the Regulations, it is required to publish its audited accounts quarterly and annually by advertisement in dailies of national circulation. Its financial position is therefore in the public domain. In addition, all banks and all listed companies file periodic returns to the CBK and the CMA that constantly monitor their financial position. In conclusion therefore, he avers that the petition is speculative, premature and founded on a misunderstanding of the take-over framework of a listed company and lacks merit and ought to be dismissed with costs.

18. CBK filed Grounds of Opposition dated 24<sup>th</sup> June, 2019 together with a replying affidavit sworn by Kennedy K. Abuga on 26<sup>th</sup> June, 2019 in response to the petition. Kennedy K. Abuga deposes that the principal objects for which CBK is constituted is to formulate and implement monetary policy and foster the liquidity, solvency and proper functioning of a stable market-based financial system, license and supervise banks and implement policies to promote and establish efficient payment, clearing and settlement systems. It further exercises its power of regulation and supervision with a view of promoting the soundness of the financial institutions to protect integrity of the banking system and the interest of the depositors whilst ensuring an effective and efficient banking system that finances economic growth. It is averred that there is no breach of regulations, laws or the Constitution as alleged by the petitioners and the shares of the 1<sup>st</sup> Respondent are supposed to be dealt with in accordance with the CM Act and the Regulations.

19. It is also averred that KCB informed CBK of its intention to acquire all the ordinary shares of NBK by way of share swap of one (1) ordinary share of KCB for every ten (10) ordinary shares of NBK. However, KCB is yet to lodge an application for CBK's review and consideration. His averment is that Section 9(4) of the Banking Act states that approval of CBK must be sought and obtained before any transfer of 5% or more of the shares of an institution can be effected and CBK's Prudential Guidelines on Acquisition, Mergers, Amalgamations, Transfer of Assets and Liabilities (the Prudential Guidelines) provide the conditions that institutions must meet when seeking approval for acquisition, merger or transfer of shares.

20. It was further deposed that once CBK receives the documents required, it will review them against the provisions of the Banking Act and the Prudential Guidelines and upon being satisfied that the documents are compliant, it will seek approval from the Cabinet Secretary in charge of the National Treasury pursuant to sections 13(1) and 53 and submit a draft gazette notice to the Attorney General's Office for gazette of the Cabinet Secretary's approval for KCB to acquire more than 25% shares of NBK. It was, however, averred that at the time of swearing the affidavit, no document had been received by CBK for its approval and therefore the present petition is premature because the requisite documents for processing the application for approval have not been submitted. In conclusion, he avers that since the respondents are listed companies, matters relating to transfer of their shares are governed by the CM Act which is outside CBK's regulatory purview.

21. CAK did not file any response to the amended petition.

22. The 1<sup>st</sup> Petitioner swore a supplementary affidavit on 21<sup>st</sup> June, 2019 in reply to the respondents' responses to the amended petition. Through the said affidavit, the petitioners' averment is that Article 22 of the Constitution allows any person acting in the public interest to institute proceedings claiming violation, infringement or threat to fundamental rights or freedoms. They therefore state that they do not have to be shareholders or account holders with any of the respondents in order to institute these proceedings.

23. The petitioners further state that Article 165(3)(b) of the Constitution mandates this court to determine the question as to whether a right or fundamental freedom under the Constitution has been denied, violated, infringed or threatened. The petitioners' position is that their petition raises serious cardinal constitutional issues and questions whose interpretation is the sole preserve of this court and not a quasi-

judicial body or any other forum. They also aver that Section 35A(4) of the CM Act confers appellate jurisdiction upon the Tribunal on the decisions made by the CMA and what is being challenged through this petition is not the decision of the CMA but the underhand manner in which NBK, a public asset, is being disposed and the constitutionality of Gazette Notice No. 11 of 1986.

24. The petitioners stress that NBK is a public entity as defined by the Public Procurement and Asset Disposal Act, 2015 and the State Corporations Act owing to its majority ownership being by the National Treasury and NSSF.

25. It is the petitioners' case that the 1<sup>st</sup> Respondent has indeed confirmed that the take-over process is underway and the respondents' averment that the petition is premature is therefore without any basis.

26. It is also the petitioners' averment that public participation is a must in the process and the CMA's role which is limited in the take-over process cannot take care of the public interest. Further, that the statutory provisions cited by the respondents in support of their positions cannot supersede constitutional provisions and in particular Article 35 on access to information and Article 229(5) which mandates the Auditor-General to audit and report on the accounts of any entity that is funded from public funds.

27. The petitioners conclude that by dint of Article 2(4) of the Constitution, the provisions of a statute cannot surpass constitutional edicts especially in matters of public participation, inclusivity and accountability. They therefore urge the court to allow their petition.

28. Mr. Okach appearing for the petitioners highlighted their written submissions dated 21<sup>st</sup> June, 2019. He submitted that by dint of Article 22 as read with Article 258 of the Constitution, any person can institute proceedings under the Bill of Rights in the public interest and as such, the petitioners had the *locus standi* to institute the proceedings herein. Further, he submitted that though CMA has the supervisory role as provided by statute, a closer look at the Regulations, more particularly Regulation 7(3), the CMA treats a take-over submitted to it for approval as an agreement/contract between two parties and it really does not interfere with the terms as far as the value of the acquisition is concerned. As such, it does not look at the merits of the bid and compliance with issues such as public participation, accountability, inclusiveness and transparency.

29. On jurisdiction, counsel while relying on Article 165(3)(b) of the Constitution cited the case of **Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others [2018] eKLR** which elaborated the High Court's jurisdiction in interpretation of the Constitution. He further submitted that Section 35A(4) of the CM Act confers appellate jurisdiction upon the Tribunal on decisions made by CMA. However, the instant matter is not an appeal but rather a constitutional petition raising serious issues touching on the contravention of the Constitution and seeking the quashing of Gazette Notice No. 11 of 1986 for being unconstitutional and this court therefore has jurisdiction to deal with the matter.

30. On whether NBK is a public entity, counsel submitted that Section 2(f) of the Public Procurement and Asset Disposal Act, 2015 defines a 'public entity' to include a state corporation within the meaning of the State Corporations Act which at Section 2(c) defines a 'state corporation' to include a bank or a financial institution licensed under the Banking Act or a company incorporated under the Companies Act, the whole or the controlling majority shares or stock of which is owned by the Government or by another state corporation. He therefore submitted that the fact that NBK is a bank licensed under the Banking Act qualifies it as a public entity. Further, that Section 2 of the Public Procurement and Disposal Regulations, 2006 defines 'public entity' as "**any body in which the Government has a controlling interest.**" As such, counsel submitted that NBK's operations are licensed and governed under the Banking Act and the controlling stake (over 70%) is owned by the Government thereby making it a public entity.

31. On whether the intended acquisition contravenes the fundamental rights and freedoms of the petitioners, counsel submitted that the same is being conducted with no information to the public and thus in violation of Article 35 of the Constitution as read with Section 4 of the Access to Information Act, 2016. Counsel also cited Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) in support of the petition stating that the said provisions are laws of Kenya pursuant to Article 2(6) of the Constitution. To buttress his argument he relied on the South African case of **Brummer v Minister for Social Development (II) BCLR 1075 (CC)** for the proposition that access to information is fundamental to the realization of the rights guaranteed in the Bill of Rights.

32. Counsel further submitted that public procurement laws in Kenya dictate that any transaction involving procurement or disposal of public assets should ostensibly be done by way of competitive bidding. He asserted that the intended acquisition seems like a private treaty between two parties from which the public is isolated.

33. Counsel also submitted that the right to consumer protection under Article 46 of the Constitution as read with Section 4 of the Consumer Protection Act No. 46 of 2012 and Section 7, 42(2)(a) and 43(1) of the Competition Act No. 12 of 2010 has been contravened by the actions of the respondents.

34. On whether the intended acquisition ought to be subjected to public participation, counsel cited the case of **Republic v Independent Electoral and Boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** where the Court extensively elaborated on public participation vis-à-vis public interest. He further submitted that the intended acquisition affects the public and as such, public participation is a mandatory facet towards it and cited Ngcobo J in **Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** on what amounts to public participation. He further cited G.V Odunga J in **Republic v County Government of Kiambu ex-parte Robert Gakuru & another [2016] eKLR** for the proposition that public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the constitutional dictates. Majanja, J in the case of **Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others [2013] eKLR** is cited for the proposition that for public participation to meet the tenets of the Constitution it must be clear that a reasonable level of participation has been afforded to the public. He therefore submitted that the respondents having failed to demonstrate that the requirements of Article 10 were complied with, a grave violation of a constitutional dictate has been established by the petitioners.

35. On whether Gazette Notice No. 11 of 1986 offends Articles 226 and 229 of the Constitution, counsel submitted that the Auditor-General has unrestricted access to the accounts of all public entities pursuant to Section 9(1)(e) of the Public Audit Act as read with Article 226(a) of the Constitution and the subsistence of Gazette Notice No. 11 of 1986 published under Section 2 of the State Corporations Act has been used by NBK to avert scrutiny of its books of accounts by the Auditor-General. Counsel stressed that a gazette notice cannot overthrow constitutional provisions. In conclusion, he submitted that having established that NBK is a public entity and more than half of its shareholding is owned by the Government of Kenya and NSSF, the subsistence of the said Gazette Notice is inconsistent with the provisions of the Constitution. He therefore urged the court to allow the petition.

36. Mr. Oraro appearing for NBK highlighted his written submission dated 25<sup>th</sup> June, 2019 and submitted that the acquisition herein is in the nature of a take-over offer of the shares of NBK which shares are held by the shareholders. He also submitted that NBK is a listed company in the NSE and was exempted by Gazette Notice No. 11 of 1986 so that it could be listed. As such, it stopped being a state corporation and became a public company under the regulatory supervision of the CMA and is thus governed by laws governing listed companies.

37. It was further senior counsel's submission that the shareholders have property in their shares which property is protected by Article 40 of the Constitution and it would therefore be unconstitutional for any party to come to court and prejudice the interests of the shareholders. It was his contention that KCB made the offer and at every stage of the process the public participates. He nevertheless stressed that NBK is not a public entity and that the petition does not raise any constitutional issues. He also submitted that the take-over is approved by the CMA and any issues raised thereto goes to the Tribunal. He further submitted that a notice of the transaction has been served on the CAK which would in exercise of its mandate make its decision on the matter.

38. He further contended that the issue of auditing of accounts does not arise at the take-over process as the Auditor-General has no role in a company listed in the NSE and the Public Procurement & Asset Disposal Act does not apply. He urged that Section 37 of the CM Act provides that the Act prevails in the event of a conflict with other laws and the process of take-over can only be questioned in accordance with the said law. He therefore called upon the court to dismiss the petition with costs.

39. Mr. Musyoka for KCB highlighted the written submissions dated 25<sup>th</sup> June, 2019. Counsel submitted that KCB and NBK being public listed companies are subject to stringent supervision by the CMA in the take-over process as prescribed by the CM Act and the Regulations made thereunder. It was therefore urged that this court has no jurisdiction to hear and determine the petition because NBK being listed on the NSE, any dealings in its shares is regulated by the legal framework under the CM Act. To buttress this argument, counsel cited Section 35A of the CM Act establishing the Tribunal and Section 35A(2) of the Act which vests appellate jurisdiction on this court to deal with appeals preferred by an aggrieved party against the decision of the Tribunal.

40. Counsel cited the case of **Vania Investments Pool Limited v Capital Markets Authority, Misc. Civil Application No. 139 of 2014** where the Court stated that the Tribunal ought to be the first port of call, which decision was affirmed by the Court of Appeal in **Vania Investments Pool Limited v Capital Markets Authority & 8 others, Civil Appeal No. 92 of 2014** when it stated that the appellant failed to demonstrate that the circumstances of its case warranted a hearing by way of judicial review before the statutory procedure had been exhausted. He also cited the case of **Secretary, County Public Service Board & another v Hulbhai Gedi Abdille, Civil Appeal No. 202 of 2015; [2017] eKLR** for the proposition that where there exists sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process. It was also submitted that the CMA and the Tribunal which have the necessary competence and expertise to hear and determine such disputes should be left to hear them instead of resorting to the courts.

41. Counsel for KCB also relied on the case of **Kenya Squash Racquets Association v Sports Disputes Tribunal & another [2018] eKLR** where Odunga, J while relying on the case of **Maharashtra State Board of Secondary and Higher Education & another v Kurmasheth and others (1985) CLR 1083** stated that the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in preference to those formulated by professional men possessing technical expertise and rich experience. Also cited was the case of **Republic v National Environmental Management Authority [2011] eKLR** where the Court of Appeal stated that it is only in exceptional circumstances that an order for judicial review would be granted where there is an alternative dispute resolution mechanism, and in determining whether an exception should be made, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case. While relying on sections 5(4) and 35A of the CM Act, counsel submitted that both CMA and the Tribunal are in the hands of experts who understand the industry and the petitioners must demonstrate that there are exceptional circumstances warranting exemption from the obligation of exhausting remedies available under the CM Act.

42. Relying on the case of **Resolution Insurance Ltd v HIV & AIDS Tribunal & 3 others [2018] eKLR** and the Supreme Court decision in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, counsel submitted that jurisdiction is everything. He therefore urged this court to dismiss the petition for want of jurisdiction.

43. On whether the public should participate in the take-over process, the case of **Githunguri Dairy Farmers Co-operative Society v Attorney General & 2 others [2016] eKLR** was cited as defining a public entity as “...**simply not a body which draws support for both its operations and capital expenditure from the public exchequer but additionally, its purpose ought to be amongst other things, to render public service whether delegated or otherwise.**” In view of the stated definition, counsel contended that NBK is not a public entity because it is exempted from the provisions of the State Corporations Act vide Legal Notice No. 59 of 1986. Further, that NSSF being the largest shareholder with 48.05% holding is funded by contributions by employees and not from the exchequer.

44. On the petitioners' claim that there was no public participation, counsel submitted that public participation is only appropriate when government or public institutions are developing policy or enacting legislation and the intended acquisition is not one that requires public participation.

45. On whether Gazette Notice No. 11 of 1986 is unconstitutional for allegedly violating Articles 226(a) and 229 of the Constitution, counsel asserted that the petitioners' position is erroneous as NBK is not a public entity but a public company listed on the NSE and is therefore regulated by the CMA under the CM Act. He further pointed out that NBK is also licensed and regulated by the CBK under the Banking Act. That pursuant to the Banking Act and the Prudential Guidelines enacted by CBK, NBK is required to submit to CBK an audited balance

sheet showing its assets and liabilities in Kenya, an audited profit and loss account three months after the end of its financial year and therefore CBK inspects its books of accounts and audit the financial records, among other checks. As such, it was stated that the exemption of NBK from the State Corporations Act is reasonable and justifiable as it is regulated as a licensed bank by the CBK.

46. On whether NBK and KCB have violated the petitioners' rights, counsel contended that KCB has in strict compliance with the law, published all information legally required for the proposed takeover. The court is persuaded to acknowledge that all the information required to be disclosed to the general public has so far been disclosed in adherence of all applicable laws and regulations. It was further stated that the right to information is not absolute and must be read together with Article 24 of the Constitution and Section 6(1) of the Access to Information Act, 2016 which provides for limitations on access to information and permitted non-disclosure by public entities. To buttress this argument, counsel relied on the case of **Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company Limited & 2 others [2013] eKLR** in which the limits to the right to access information were highlighted.

47. On consumer rights, counsel submitted that the actual offer to NBK by KCB is yet to be made and it is this offer that would expressly stipulate KCB's intentions for business continuity and profitability and until such information is actually approved by the CMA as required and subsequently publicized, the petitioners would be making unsubstantiated claims on the matter. It was also asserted that CAK has developed the Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act (the Merger Guidelines) to facilitate its consideration of transactions such as the proposed takeover. Consequently, counsel submitted that the role of taking care of public interests has wisely been entrusted to the more-than-capable multiple regulators such as CBK, CAK and the CMA to ensure fair, efficient and predictable operations of Kenya's capital markets. It was therefore concluded on behalf of KCB that the allegations herein are premature and speculative. The court was therefore urged to dismiss the petition.

48. On its part, CBK filed written submissions dated 26<sup>th</sup> June, 2019. It was submitted by the firm of Amolo and Gacoka Advocates appearing for CBK that CBK has not acted in breach of the Constitution and is yet to receive the requisite documentation from the respondents for approval. As such, it was asserted that the petition is premature and the court was urged to dismiss the petition with costs.

49. CAK did not file any submissions.

50. Upon perusal of the pleadings and submissions, I identify the issues for determination as follows:-

- a) Whether the court has jurisdiction to hear and determine the petition;
- b) If the answer to (a) is in the affirmative, whether NBK is a public entity;
- c) If NBK is a public entity, whether the petitioners have met the threshold for grant of the reliefs sought;
- d) What reliefs, if any, should be granted to the petitioners; and
- e) The issue of costs.

51. I need to make some clarifications before proceeding to tackle the identified issues. The 2<sup>nd</sup> Respondent insisted from the word go that its legal name is KCB Group and denied being aware of the existence of an entity known as KCB. Even though the petitioners were alerted about this fact prior to the amendment of their petition, they nevertheless proceeded to cite the 2<sup>nd</sup> Respondent as Kenya Commercial Bank (KCB). KCB Group has been magnanimous enough to defend these proceedings as they are and I will therefore proceed as if the petitioners named the 2<sup>nd</sup> Respondent as KCB Group.

52. The second issue that needs clarification at this point is the continued reference by all the parties to the gazette notice that exempted NBK from the provisions of the State Corporations Act as Gazette Notice No. 11 of 1986. A perusal of the pleadings and in particular the attachments to the affidavit sworn on 7<sup>th</sup> June, 2019 by the 1<sup>st</sup> Petitioner in support of the amended petition shows that the notice issued by President D. T. Moi pursuant to Section 2 of the State Corporations Act exempting KCB, NBK, Kenya National Assurance Company Limited and Kenya Re from the provisions of the State Corporations Act is Legal Notice No. 59 of 1987 issued through Kenya Gazette Supplement No. 12 of 27<sup>th</sup> February, 2017. I suspect this is the legal notice the petitioners want declared unconstitutional through these proceedings.

53. The petitioners herein are challenging a take-over process in which KCB intends to acquire NBK. The respondents (NBK and KCB) posit that this court has no jurisdiction to entertain the petition for the reason that there is an alternative avenue for addressing the issues raised therein and that this court can only exercise appellate jurisdiction over the decisions of the Tribunal.

54. It is now a matter of legal notoriety that a court without jurisdiction has no authority to referee a dispute with a view to providing a remedy to the disputants. My statement is backed by several authorities. In the celebrated case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**, Nyarangi, JA stated that:-

**"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

55. Similarly, the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**

had this to say on jurisdiction:-

**“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”**

56. Another aspect of jurisdiction is that where an alternative dispute resolution mechanism is provided by statute, the court should be hesitant to handle the matter unless it is clearly demonstrated that the alternative procedure is inadequate for resolution of the matter.

57. The Court of Appeal explained the said principle in the case of **Republic v National Environmental Management Authority [2011] eKLR; Civil Appeal No. 84 of 2010** in the following words:-

**“We agree with Mr. Ngatia that the issue raised in the Appellant’s notice of motion were in the domain of public law. But we do not accept that once a matter falls within the public law domain, judicial review is the only way to litigate upon it or it must be through the judicial review process. As we pointed out earlier, Mr. Ngatia did not contend that the matter fell outside the jurisdiction of the Tribunal specifically created to deal with disputes concerning the environment. The Tribunal itself is a public body created by statute to administer the appeal process under the Act; it cannot deal with matters concerning private law for instance. The learned Judge was merely weighing the issue of whether the High Court was in a better position to deal with the matter than the Tribunal. She dealt with the speed or pace at which the Tribunal would be able to resolve the matter and compared that with the speed or pace which would be adopted by the busier courts. She dealt with the expertise available in the Tribunal as against the High Court and such like matters and having taken all those considerations into account, she concluded that the matter ought to have been dealt with by way of an appeal rather than by way of judicial review. The Judge backed up her decision with authorities such R V. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD [1993] 1 ALL E.R 530. HORSHAM DISTRICT COMMISSION, ex parte WENHAM [1955] 1 WLR 680; HARLEY DEVT INC V. COMMISSION OF INLAND REVENUE [1996] 1 WLR 727; R V. WANDSWORTH COUNTY COURT [2003] 1 WLR 475 and the local case of JAMES NJENGA KARUME V. CR, 192/1992.**

**The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it – see for example R V. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD. Case. The learned trial Judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect, we agree with the Judge.”**

58. I need not cite any other decision in support of the principle enunciated in the cited case which requires that where there is a sufficient and adequate avenue or forum to resolve a dispute, a party ought to utilize that avenue or forum and not resort to the court process in the first instant. However, the doctrine which requires exhaustion of alternative remedies is only applicable where the alternative forum is accessible, affordable, timely and effective.

59. The question therefore is whether the Tribunal was an appropriate alternative in the circumstances of this case. In order to answer this question one must look at the jurisdiction of the Tribunal considering that its jurisdiction is as conferred by the creating statute. Section 35(1) of the CM Act provides the jurisdiction of the Tribunal as follows:-

**“35 (1) Any person aggrieved by any direction given by the Authority or by the Investor Compensation Fund Board -**

**(a) refusing to grant a licence ;**

**(b) imposing limitations or restrictions on a licence ;**

**(c) suspending or revoking a licence ;**

**(cc) refusing to approve a public offer of securities;**

**(d) refusing to admit a security to the official list of a securities exchange;**

**(e) suspending trading of a security on a securities exchange;**

**(f) requiring the removal of a security from the official list of a securities exchange; or**

**(g) refusing to grant compensation to an investor who has suffered pecuniary loss resulting from failure of a licensed stockbroker or dealer, to meet his contractual obligations or pay unclaimed dividends to a beneficiary who resurfaces,**

**may appeal to the Capital Markets Tribunal against such directions, refusal, limitations or restrictions, cancellations,**

**suspension or removal as the case may be, within fifteen days from the date on which the decision was communicated to such person.”**

60. From the cited provision, it becomes apparent that the jurisdiction of the Tribunal is limited to circumstances where the CMA has made a decision on certain matters. A person appealing to the Tribunal ought to have moved the CMA for a decision and it is such a decision that can be challenged before the Tribunal. The respondents’ act of urging the petitioners to approach the Tribunal or the CMA is therefore untenable considering that the petitioners have no pecuniary interest in either NBK or KCB.

61. It is also important to note that the issues raised by the petitioners touch on the constitutionality of the transaction between NBK and KCB and such an issue is not one of the issues for which jurisdiction is granted to the Tribunal. In short, the petitioners have knocked on the right door since no other body is clothed with jurisdiction to address the issues they have raised. I therefore hold and find that this court has jurisdiction to hear and determine this petition.

62. The petitioners have flagged out Articles 10, 35, 43, 46, 226(a) and 229 of the Constitution as having been violated or threatened by the intended deal between NBK and KCB Group. Before I can address the alleged violations, I need to first determine whether NBK is a public entity. According to its preamble, the State Corporations Act, Cap. 446 is **“an Act of Parliament to make provision for the establishment of state corporations; for control and regulation of state corporations; and for connected purposes.”**

63. The petitioners argue that NBK is a public entity by dint of Section 2(f) of the Public Procurement and Asset Disposal Act, 2015 which defines a ‘public entity’ to include a state corporation within the meaning of the State Corporations Act, which Act at Section 2(c), defines a ‘state corporation’ to include a bank or a financial institution licensed under the Banking Act or a company incorporated under the Companies Act, the whole or the controlling majority shares or stock of which is owned by the Government or by another state corporation. The respondents’ reply to this argument is that NBK is a public listed company at the NSE and was exempted from the provisions of the State Corporations Act by Gazette Notice No. 11 of 1986 hence it is governed by the CMA.

64. The respondents are indeed correct that NBK was exempted from the provisions of the State Corporations Act by a publication in the Gazette on 27<sup>th</sup> February, 1987. The exemption did not however entirely remove NBK from the orbit of the law governing parastatals as can be deduced from Section 5A of the State Corporations Act which provides as follows:-

**“5A. Exemption**

**(1) Subject to subsection (2), the President may, by notice in the *Gazette*, exempt a state corporation, not being a state corporation established under section 3, from any of the provisions of this Act.**

**(2) Notwithstanding the provisions of subsection (1), an exemption granted under this section shall not be exempt a state corporation from the provisions of sections 5, 10A, 11, 13, 14, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, or 29.**

**(3) Any state corporation eligible for exemption under this section which, immediately before the commencement of this section, was not subject to the provisions of this Act by virtue of—**

**(a) the provisions of the written law under which such state corporation is established; or**

**(b) a declaration in that behalf under paragraph (b)(vii) of section 2 (now repealed), shall, subject to subsection (2), be deemed to be exempt from the provisions of this Act.”**

[Emphasis supplied]

65. Although the State Corporations Act has evolved over time, Section 5A(3)(b) takes care of the exemption granted to NBK and subjects the said exemption to Section 5A(2) of the Act. The petitioners are therefore correct that NBK is a state agency. Indeed NBK is listed as a parastatal under the Treasury whereas NSSF is indicated as a parastatal under the Ministry of Labour, Social Security and Services. None of the respondents disputed the fact that NSSF is a state agency as claimed by the petitioners.

66. Section 2 of the State Corporations Act provide four definitions of the term ‘state corporation’. Of relevance to this case is definition number (c) which states that a state corporation is **“a bank or a financial institution licensed under the Banking Act (Cap. 488) or other company incorporated under the Companies Act (Cap. 486), the whole or the controlling majority of the shares or stock of which is owned by the Government or by another state corporation;”** The petitioners placed evidence before this court which established that NSSF and the Treasury own over 70% shares of NBK thus making it a state corporation as per the above definition. In view of the evidence placed before the court, I find and hold that NBK is a state corporation and the exemption granted to it did not in any manner make it something else. As per Section 5A(3)(b) of the State Corporations Act, it continues to be governed by the sections identified in Section 5A(2) of the Act.

67. Having established that this court has jurisdiction to hear this matter and being satisfied that NBK is a state corporation, the question that remains to be determined is whether the ongoing amalgamation of KCB and NBK violates or threatens the fundamental freedoms and rights. It must be stated from the outset that NBK as a public entity ought to comply with all the constitutional dictates applicable to public bodies. It is not comparable to a private entity which can be disposed of at the whim of the owners.

68. The first sub-issue is whether the disposal of NBK has complied with the national values and principles of governance outlined in Article 10(2) of the Constitution. The petitioners have zeroed in on the need for participation of the people. One answer provided by the respondents is that public participation is not necessary in the circumstances of this case. The second answer is that public participation is

inbuilt in the CM Act and the Regulations made thereunder.

69. It is not difficult to agree with the respondents that if the course they have taken is indeed the correct one, then public participation is ingrained in the merger process. Section 5(1) of the CM Act establishes the CMA for the purposes of promoting, regulating and facilitating the development of orderly, fair and efficient capital markets in Kenya. It also approves public offers and listings of securities traded at the NSE. The Act further defines “securities exchange” to mean **“a market, derivatives exchange, securities organization or other place at which securities are offered for sale, purchase or exchange, including any clearing or settlement, with or without novation, or transfer services connected therewith.”** The NSE is therefore licensed and regulated by the CMA and has the mandate to oversee transactions such as the one between NBK and KCB. It exercises power over publicly listed companies such as the respondents as explained by Onguto, J in **Alnashir Popat & 8 others v Capital Markets Authority [2016] eKLR**.

70. Although Article 227 of the Constitution which provides the principles that should guide procurement of public goods and services was cited in the petition as one of the constitutional provisions upon which the petition is founded, the petitioners did not expound on the relevance of the said Article to this petition. In the circumstances, the question which was not asked by the petitioners and which will remain unanswered is whether the disposal of a public asset can be done in the manner that the sale of NBK is being done. Are there other laws that are better suited for use in the disposal of the shares held by the public in NBK? I think NBK and KCB should pose and ask themselves whether the activity they are engaged in is indeed legal. Since courts do not answer questions not asked, I will say no more.

71. The second sub-issue is whether the right to access information as guaranteed by Article 35 of the Constitution has been breached by all those involved in the transaction. This transaction is being undertaken pursuant to the provisions of the CM Act and related laws. The Act is clear on the procedures to be followed and when and how information should be released. There is nothing unconstitutional about the provisions of the CM Act guiding the release of information. The decision of Mumbi Ngugi, J in **Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company Limited & 2 others [2013] eKLR** is apt. She opined that:-

**“54. As correctly submitted by the 1<sup>st</sup> Interested Party and the Amici Curiae, the reasons for non-disclosure must relate to a legitimate aim; disclosure must be such as would threaten or cause substantial harm to the legitimate aim; and the harm to the legitimate aim must be greater than and override the public interest in disclosure of the information sought. It is recognised that national security, defence, public or individual safety, commercial interests and the integrity of government decision making processes are legitimate aims which may justify non-disclosure of information.”**

72. Owing to the nature of the transaction that is the subject of this petition, any disclosures must be made within the framework of the CM Act. The respondents are correct that some matters must be kept under wraps and only brought out at certain stages of the deal. Commercial transactions must enjoy some protection otherwise negotiations will fall through considering the sensitive nature of such transactions.

73. In the circumstances of this case, the petitioners have not expressly stated how the public good will be harmed if certain information is not disclosed. A perusal of the CM Act shows that the information that needs to be revealed will eventually be disclosed. I therefore do not find any merit in the petitioners’ claim that the right to access information has been violated by the respondents.

74. The third sub-issue revolves around consumer protection and social and economic rights. On the alleged breach of the consumer rights protected by Article 46 of the Constitution, the petitioners state that the acquisition of NBK by KCB is being handled in such an opaque manner with no information to the public and customers alike on how the transaction will affect them. According to the petitioners, there is no explanation as to what will happen to the customers of NBK once it is fully acquired by KCB hence a violation of the consumer rights protected by Article 46 of the Constitution.

75. On alleged violation of economic and social rights, the petitioners aver that there is a high likelihood that some employees of NBK will be retrenched or declared redundant in an attempt to streamline the operations of the merged entity. They contend that the majority of the employees rely on their jobs as their sole source of livelihood and the social and economic rights of the employees as protected by Article 43 of the Constitution are thus threaten by the merger.

76. In my view the allegations by the petitioners are speculative and not supported by evidence. They have not disclosed what unique services NBK is providing which will not be availed by the merged entity. There is therefore nothing to support the assertion that the merger will threaten the rights of the customers of NBK.

77. On the question of the effect of the merger on the employees of NBK, I find that the respondents have correctly submitted that the merger details will disclose how the deal will affect the employees and how the rights of the employees will be protected. I only need to add that the labour laws of this country will take care of the employees of the merged entity. Without particulars of how individual employees will be affected, it becomes difficult to agree with the petitioners that the social and economic rights of the employees will be affected by the merger.

78. The fourth and final sub-issue is the claim by the petitioners that the transaction violates Articles 226(a) and 229(6) of the Constitution which provides for efficient and transparent fiscal management of public entities and mandates the Auditor-General to audit public entities in order to confirm whether or not public money has been applied lawfully and in an effective manner. According to the petitioners, the notice that exempted NBK from the provisions of the State Corporations Act curtail the powers of the Auditor-General. The petitioners’ case is that the Gazette Notice that exempted NBK from the provisions of the State Corporations Act is by virtue of Article 2(1) of the Constitution null and void. Is there is merit in the petitioners’ assertions? First and foremost it is noted that the petitioners made averments not backed by evidence. The letter dated 14<sup>th</sup> May, 2019 summoning the Managing Director of NBK to appear before the Public Investments Committee of the National Assembly cannot be treated as evidence. In that letter it is alleged that NBK has not submitted itself for a statutory audit by the Office of the Auditor-General as provided for in Article 229(5) of the Constitution. There is nothing from the Auditor-General, and more importantly the Inspector-General (Corporations) as established by Section 18(1) of the State Corporations Act, to show that NBK refused and or failed to submit itself to audit by the said offices. It is noted that the exemption granted to NBK from the provisions of the State Corporations Act does not, as per Section 5A(2) of the Act, extend to the sections creating the office of the Inspector-General (Corporations) and the mandate of that office. At the end of it all I find no evidence from the petitioners to support their allegation that NBK has declined to

be audited.

79. There is the issue of the validity of the exemption of NBK from the provisions of the State Corporations Act. The said exemption, which appears to have been effected under a repealed section, was affirmed by Section 5A(3)(b) of the said Act. The constitutionality of Section 5A has not been challenged in these proceedings. The court cannot invalidate Legal Notice No. 59 of 1987 issued through Kenya Gazette Supplement No. 12 of 27<sup>th</sup> February, 2017 since the same was based on a valid law. The President acted within the powers granted to him by the law when he exempted NBK from the provisions of the State Corporations Act.

80. Before I conclude, I need to say something about the petitioners' claim that the deal has not received the blessings of CAK as required by Competition Act. All the parties who participated in these proceedings concurred that CAK must authorize certain mergers and any merger which does not receive the authorization of CAK, where the same is necessary, has no legal effect. That being the case, then it goes without saying that the respondents must at the appropriate stage, seek the approval of CAK in order to validate their proposed union.

81. Considering what I have stated in this judgement, it goes without saying that the petition is without merit. It is therefore dismissed. As for costs, I find that the petition was brought in the public interest and the most appropriate order is to direct each party to meet own costs of the litigation. It is so ordered.

**Dated, signed and delivered at Nairobi this 8<sup>th</sup> day of August, 2019.**

**W. Korir,**

**Judge of the High Court**