



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR MISCELLANEOUS APPLICATION NO. 565 OF 2017

IN THE MATTER OF APPLICATION BY DAVID JOHN NDERITU

FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AGAINST THE REGISTRAR OF COMPANIES DECISION OF 28TH JULY 2017

AND

IN THE MATTER OF ARTICLE 10, 22, 23(3), (F), 47(1), 50(1) AND 165(6) & 7 OF THE CONSTITUTION

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO 4 OF 2015

AND

IN THE MATTER OF THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA

AND

IN THE MATTER OF THE COMPANIES ACT NO. 17 OF 2015

AND

IN THE MATTER OF THE REGISTRAR OF COMPANIES DECISION TO DECLARE AGM UNPROCEDURAL AND ILLEGAL

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

REGISTRAR OF COMPANIES.....RESPONDENT

AND

BOARD OF DIRECTORS MUHOTETU

FARMERS LIMITED.....1ST INTERESTED PARTY

KEDONG RANCH LIMITED.....2ND INTERESTED PARTY

EXPARTE APPLICANTS

DAVID JOHN NDERITU..... 1ST APPLICANT

JOSEPH WAGURA NG'ANG'A.....2ND APPLICANT

JUDGMENT

1. By a Notice of Motion dated 29th September, 2017 and filed on 2nd October, 2017, the *Exparte* Applicants **David John Nderitu** and **Joseph Wagura Ng'ang'a** seek from this Court the following orders:

(a) ***Certiorari***: to remove and quash the decision of the 1st Respondent vide a letter dated 28th July 2017 cancelling the planned Annual General Meeting by Members of Muhotetu Farmers Limited;

(b) ***Mandamus***: to compel the Respondent herein the Registrar of companies to convene an Annual General Meeting of the Shareholders of Muhotetu Farmers Limited in accordance with the provision of the Companies Act, 2015 Laws of Kenya to deliberate and conduct matters listed in the Agenda for the Annual General Meeting which was to be held on 5th August 2017, and to

(c) An ***Order of Mandamus***: to compel the Respondent to hold an AGM of Muhotetu Farmers Company on or before 13th October 2017, in the Company of Officers and further;

(d) ***Mandamus***: to compel the Respondent to produce the Applicant's minutes of the meeting held on 25th July 2017, signatures of who withdraw their requisition notice and further copies of returns furnished to her by the board of directors from 2008 – 2017;

(e) ***Prohibition***: Stopping the 1st Interested Party from proceeding to negotiate and/or Sale (sic) Shares of Muhotetu Farmers Company Limited in Kedong Ranch Limited until an AGM is held.

(f) Costs of the proceedings be provided for.

2. The Notice of Motion is predicated on the Amended Statement of facts dated 22.9.2017 and the Verifying Affidavit sworn by David John Nderitu on 14.9.2017 and a further Affidavit sworn by the same Deponent and filed in Court on 21.11.2017 and a list and bundle of authorities.

3. The *Exparte* Applicant's case is that Muhotetu Farmers Company Limited is a Public Limited liability Company registered as such by the Registrar of Companies and is the major shareholder in Kedong Ranch Limited controlling about 40.66% of the shares.

4. Further, that there has been a long standing dispute between the Members of Muhotetu Farmers Limited and its Board of Directors over the running of the company affairs and embezzlement of funds in the company which dispute was worsened by refusal or rejection of the frustration of any move by the Members to conduct an AGM for three consecutive years.

5. It is alleged that instead, the Directors have been relying on an illegal clause of the meeting dated 14.9.2014 that purportedly abolished the AGM.

6. It is asserted that a proposed Inland Dry Port has been earmarked to be set up at the Kedong Ranch and that even the flagship project of the Standard Gauge Railway (SGR) is bound to cut through a large Section of Kedong Ranch as it lies on the proposed route of Nairobi – Naivasha Map, which implies that there is going to be compensation when the Government compulsorily acquires a significant portion of the said property for its project.

7. It was alleged that the Directors of Muhotetu have taken advantage of this to start the process of selling Members' Shares without their knowledge or express consent and without following the proper laid down procedure in the Memorandum and Articles of Association of Kedong Ranches. It was further alleged that on or about the 22nd day of May 2017 the shareholders of Muhotetu Farmers Company deposited a requisition with the Company and the same was duly served and received by the Registrar of Companies' on 25th May 2017.

8. The said requisition was also allegedly served upon the Chairman of Muhotetu Farmers Company but that the Directors schemed and maneuvered to defeat the purpose of the said requisition by embarking on the fraudulent sale of the company shares.

9. According to the deponent, it was this non-adherence to the terms of the requisition pursuant to Sections 277, 278 and 279 of the Companies Act that the Applicants filed a Notice on 12.7.2017 for an AGM to take place on 5th August 2017.

10. That the Shareholders protested to the Registrar of Companies vide their letters dated 19.6.2017 and 28th June 2017, contesting the sale and transfer of 181,250 shares of Muhotetu Farmers Company Limited in Kedong Ranch and that the Registrar of Companies vide letter dated 21.7.2017 acknowledged receipt of the two letters and invited the Company Secretary of Muhotetu Farmers Company for a Consultative Meeting which was a surprise to Members as the date set for the meeting of 25.7.2017 had lapsed which, according to the Applicants, demonstrated open bias.

11. It was further claimed that the Registrar's claims that certified Annual Returns filed between 2008 and 2016 were availed to her was false because she had failed to furnish Members with copies thereof hence it was not clear how the Directors complied with filing of returns

which returns could not be available to Members.

12. It was further claimed that the Members who are alleged to have withdrawn their names from the requisition notice did not swear any affidavit to confirm their said withdrawal. It was therefore claimed that the Registrar's letter of 28.7.2017 cancelling the planned AGM and copying it to State Security agencies went beyond her duty and scope and therefore *ultra vires*. It was alleged that the Registrar was biased because she only heard evidence from the 1st Interested Party on the withdrawal of names from the requisition Notice by several Members without ascertaining the truth, veracity or hearing from the Applicants herein. That despite the Registrar acknowledging by her letter of 28.7.2017 that she no longer oversees meetings for Companies entities due to the perceived conflict of interests, she went ahead to cancel the Applicants and expressly instructed the security apparatus to enforce the same hence, she exhibited open bias and malice against the Applicants.

13. Annexed to the verifying affidavit of David John Nderitu is a Notice written in the Kikuyu language which was translated into English on the Court's directive. The Notice was allegedly issued by Shareholders of Muhotetu Farmers Company [Muhotetu] calling for an Extra-Ordinary General Meeting (EOGM) for 5.8.2017 at Lariak Mutanga within the office of the Company at 10.00 a.m., for purposes (Agenda) of:

(1) Reading the Notice convening the meeting;

(2) Taking stock of the resolutions passed at the AGM in 2013 in regard to sale of Kedong Ltd Shares;

(3) To appoint forensic auditor of the Company Accounts;

(4) Election of Directors

14. Another annexure is a Notice dated 31.7.2017 to John Theuri to attend to summons by directors of Muhotetu Farmers Co. Ltd on 1.8.2017 at 9.00 a.m.

15. The Applicants also annexed a Notice dated 8.7.2017 for an AGM addressed to all Shareholders which they allege that the Registrar cancelled by her letter dated 28.7.2017; a protest letter of 28.6.2017 against transfer Notice and sale of the Muhotetu Farmers Company Ltd Shares in Kedong Ranch Limited, Company Sale Agreement dated 15.11.2013 of L.R No. Nyahururu Municipal Block 4/138 by Muhotetu Farmers Co. Ltd to Charles Warugongo Kieru; and L.R No Nyahururu Block 4/100 to James Kibicho Ndaruga dated 24.2.2014; search certificate for Nyeri Municipal Block 44/57; and Minutes of the Extra-ordinary General Meeting (EOGM) held on 14.9.2013; among other documents.

The Respondent's case

16. The Respondent Registrar of Companies filed a replying affidavit sworn by Joyce Koech, Assistant Registrar of Companies, on 15.11.2017 deposing in contention that the Respondent is a regulator and custodian of all companies and implements the Companies Act, 2015.

17. That on 25.5.2017 the shareholders of Muhotetu Farmers Company filed and served a requisition notice dated 10.5.2017 with the Registrar of Companies and served on the Board of Directors; that on 2.6.2017 the requisitioning Members served the Respondents with letters withdrawing the requisition Notice (annexed). That further on 28.6.2017 Members wrote to the Registrar seeking an advisory opinion on whether Members could call, convene, hold and conduct an Extra-ordinary General Meeting where Directors have not called for an AGM.

18. That on 12.7.2017 the Board of Directors served the Registrar with a Notice dated 8.7.2017 of an AGM of the Company (Muhotetu Farmers Company (MFC) Ltd, Scheduled for 5.8.2017.

19. That from the various correspondences and requisition for Extraordinary General Meeting, it became apparent that there were opposing factions which resulted in the Registrar calling the two parties vide letter dated 21st July 2017 for a round table discussion with an attempt to resolve the issues on 25.7.2017 at 11.00 a.m. at the office of the Registrar.

20. However, it is contended that only the Board of Directors of Muhotetu Farmers Company attended the said consultative meeting wherein they furnished the Registrar with certified copies of Annual Returns for the period 2008 – 2010 indicative of AGMs having been held annually as required by law.

21. The Registrar denies ever interfering with the running of the company and maintains that she wrote the letter dated 28.6.2017 in the ordinary course of business.

22. Further, she contends that the acts of the Respondent are not based on bias since the requisition Notice was later withdrawn by shareholders.

23. In addition, it was contended that in any event, there is no special legal duty which the Respondent is alleged to have neglected or failed to perform to warrant the order of Mandamus. She maintains that she acted in good faith and that the application herein is fundamentally flawed, frivolous and an abuse of the Court process hence it should be dismissed with costs.

The 1st Interested Party's Case

24. The 1st Interested Party filed a replying affidavit sworn on 24.10.2017 by William Gathecha, its Secretary, deposing in contention that the proceedings are totally defective, incompetent, misconceived, untenable and devoid of any merit. That at the GM held on 14.9.2013 the Members of the 1st Interested Party passed a resolution among them, the sale of its 181,250 shares held in Kedong Ranch Ltd and that since then, such decision still stands.

25. That after the passing of the above referred to resolution, the *Ex parte* Applicants herein filed a derivative suit vide Nakuru HCC 20/2014 seeking for appointment of a Receiver Manager and Implementation of the Resolution passed on 14.9.2013 touching on the sale of specific properties owned by the Interested Party, which case is still pending hearing and determination.

26. That the said suit is against the Board of Directors of the 1st Interested Party herein and that the issue of sale of 181,250 shares held in Kedong Ranch Ltd is directly and substantially in issue in Nakuru HCC 20/2014.

27. That simultaneous with the filing of the said suit, the Applicants herein sought for an injunction against the 1st Interested Party which Application was dismissed with costs on 28.11.2014 and that to date no appeal has been lodged to challenge that ruling hence these proceedings are an attempt to have a back door appeal against the ruling in Nakuru HCC 20/2014. That the Copy of Notice dated 10.5.2017 served on the 1st Interested Party was a photocopy and that upon scrutiny, it was discovered that some names appearing in the list were persons who were not Members of Muhotetu Company Limited hence they lacked capacity to requisition for a general meeting

28. Further, it was deposed in contention that subsequently, the 1st Interested Party received 30 notifications of withdrawal from the said list from shareholders who had been included therein hence the said requisition became null and void as it never met the threshold for convening an AGM and that therefore no meeting could be held by the Company and that the Registrar was notified of the position on 20.7.2017.

29. It was further deposed in contention that the 1st Interested Party wrote to the Registrar a letter dated 20.7.2017 due to the suspicious Notice of AGM bearing the letter head of the 1st Interested Party which letter head was unknown and that it was following the letter of 20.7.2017 that the Registrar summoned the Company's Advocate and the 1st Interested Party for a consultative meeting, which letter was copied to the Advocates for the *ex parte* Applicants. It was contended that the *ex parte* applicants were not invited for the said meeting.

30. According to the 1st Interested Party, it was at the consultative meeting with the Registrar that the 1st Interested Party learnt of the letter dated 28.6.2017 seeking an advisory opinion by the *Ex parte* Applicants from the Registrar on whether shareholders had the right to convene, hold and conduct an extra General meeting of the Muhotetu Farmers Company Limited.

31. That in the Registrar's reply letter dated 28.7.2017, she never made any decision that would have the effect of cancelling the Intended meeting.

32. It was contended that the 1st Interested Party had always complied with the law but that nonetheless, the prayer seeking to prohibit the 1st Interested Party from selling the 181,250 shares held at Kedong Ranch Ltd had been overtaken by events as the sale had been completed and some of the proceeds distributed to the Company's shareholders, the *Ex parte* Applicants herein included as per annexed copies of cheques honoured by Equity Bank Limited (1st annexure WGN 8) hence the Applicants could not purport to stop the Sale of Shares of the Company (MFC) held in Kedong Ranch Ltd.

33. The 1st Interested Party maintained that these proceedings are brought in bad faith and are an abuse of the Court process hence the Court should dismiss it with costs.

The 2nd Interested Party's case

34. The 2nd Interested Party Kedong Ranch Limited filed a replying affidavit sworn by Paschal Babu Wood, its Managing Director, deposing, Inter alia, that the 1st Interested Party was a shareholder in the 2nd Interested Party and that the Sale of Shares of the 1st Interested Party in the 2nd Interested Party is governed by Articles 33–37 of the Company's Articles of Association and that the duty of the 2nd Interested Party is to ensure that any transfer of shares in the Company is in writing, duly signed by the transferor and transferee and that such sale would only take effect after the right of pre-emptive rights by the 1st Interested Party in the 2nd Interested Party, that the latter received a notice from the 1st Interested Party supported by various extracts of Resolutions of the 1st Interested Party's Board of Directors confirming such intentions of the sale in line with the intentions of shareholders as shown by the annexures.

35. That upon receipt of the Notice, the 2nd Interested Party notified its shareholders of the intended sale and offered each shareholder an opportunity to acquire the shares on terms in accordance with **Article 34(c) of the Articles of Association of the 2nd Interested Party**.

36. That save for 2 shareholders namely, the estate of the late Jackson Hanester Angaine and the Estate of the late J.M. Kariuki, all other shareholders responded to Kedong Ranch Limited's letter of offer by waiving their pre-emptive rights on the purchase of the 181,250 shares. That as a consequence, the 1st Interested Party sold its shares in Kedong Ranch Limited(KRL) to Mewell Holdings Ltd and a transfer of shares of stock was issued on 23.8.2017 and the sale and transfer finalized on 22.9.2017 as shown by stamp duty payment hence the sale was conducted in accordance with the law and the Articles of Association.

37. It was further deposed in contention that the *ex parte* Applicants are not shareholders of the 2nd Interested Party KRL hence they do not fall within Articles 33 – 37 of the 2nd Interested Party's Articles of Association.

38. Further, it was deposed that the *ex parte* Applicants are not shareholders of KRL hence they do not fall within Articles 33 –37 of the 2nd

Interest Party's Articles of Association.

39. It was further contended that the Application herein revolves around the conduct of the affairs within Muhotetu Farmers Company, which the 2nd Interested Party is not privy or Party to. The 2nd Interested Party urged the Court to dismiss the motion as filed by the Applicants with costs.

Rejoinder by the Exparte Applicants

40. In a further affidavit filed by the *Exparte* Applicants responding to the replying affidavit of the Respondent and Interested Party, the *Ex parte* Applicant contended through Mr. David John Nderitu's further affidavit sworn on 20.11.2017 that the purported withdrawal of requisitions for meeting does not meet the requirements as it was never procedurally done and delivered.

41. It was further averred that the Registrar of Companies only replied to the request for an advisory after the Applicants filed a requisition for a meeting of AGM hence the Applicants' legitimate expectations were compromised. The Applicants deny being invited for a consultative meeting on 21.7.2017 contending that they received a posted letter which reached their advocates on 28.7.2017 hence the Registrar breached rules of natural justice, acted *ultra vires*, irregular, null and void *ab initio*.

42. It was further averred that as the company had no Certified Secretary, it did not file certified copies of the Annual Returns as alleged.

43. That copy of Annual Report of AGM held on 14.9.2013 is clear that there were no Annual General Meeting of the 1st Interested Party and that the last Annual General Meeting was held on 24.9.2013 hence the declaration by the Respondent that the meeting was unprocedural, was done totally in breach of the Rules of natural Justice, since the affected persons were never given an opportunity to be heard on the issue of compliance with the provision of the Companies Act before the decision was made.

44. It was further asserted that this matter is not *res judicata* as it is a claim challenging the decision of the Registrar as opposed to private law case seeking for an injunction. The deponent also denied that the company had altered the paid up capital or that the transfer of shares was made on 22.9.2017 or that the consideration had already passed on to the shareholders, contending that there was no copy of the sale agreement to support the allegation of sale of shares.

45. It was further deposed that the said alleged sale of shares was *ultra vires* the provision of Section 34 of the Articles of Association of the 2nd Interested Party for failure to adhere to the procedures for such sale hence the sale is null and void for failure to inform shareholders to waive their pre-emptive rights and engage Third Parties to buy their shares.

46. It was further deposed that in any event, many waivers were deposited at the end of August 2017 whereas the 1st Interested Party had commenced sharing proceeds for the sale on 1.8.2017 before the shareholders had waived their rights as per the Articles of Association of the company.

47. It was further deposed that the 2nd Interested Party did not discharge its obligations within the parameters of the Articles of Association. The *exparte* Applicants further alleged that the alleged withdrawal of requisition of a meeting notice is not a valid notice hence the same should be expunged from the Court record.

Submissions.

48. The Parties' Advocates made oral submissions with Mr. Mathenge Advocate submitting on behalf of the *Exparte* Applicants and reiterating the prayers sought and the grounds upon which the Notice of motion was predicated, relying on the filed pleadings, affidavits and documents annexed as exhibits and the amended statements of facts. The *Exparte* Applicants' Counsel maintained that the Respondents violated his client's right to a hearing as her decision to declare the meeting illegal was made without according to them a hearing which is contrary to **Section 4 of the Fair Administrative Action Act, 2015**.

49. It was submitted that the decision by the Registrar was an administrative action as stipulated in Section 2 of the Fair Administrative Action Act, 2015 hence, she was under a duty to ensure that the actions were lawful, expeditious and fair. It was submitted that there was no denial that no hearing was given to the persons affected by the administrative action. Reliance was placed on **R Vs Minister of Local Government Exparte Taib Ali Taib**.

50. It was further submitted that the decision by the Registrar was *ultra vires* her powers and that it contravened **Sections 3 and 831-840 of the Companies Act**. That the Companies Act does not make provision for the Registrar to cancel the meeting hence her decision was void and unlawful.

51. On the question of legitimate expectation, it was submitted that the Respondent is bound by the law and the Constitution hence in this case, **Articles 10, 73 of the Constitution** on transparency, accountability and Leadership and Integrity were violated. That the Registrar as a state officer is obliged to ensure that the 1st Interested Party complied with the law (Companies' Act) including the holding of an AGM in accordance with **Section 310 of the Companies Act**; appointing a **Public Secretary as per Section 243 of the Act** and ensuring that the company files its Annual Returns and Financial statements in time.

52. On abuse of power, it was submitted that the Respondent abused her power and acted *malafides* by copying the letter to the Assistant County Commissioner; Deputy County Commissioner; and the OCS to ensure that the AGM was not held on the scheduled date yet the Act does not mandate her to do that and that in any event, the Company had not held an AGM for 4 years hence she should have heard the parties before making that decision.

53. On the alleged withdrawal of signatures of shareholders, it was submitted that the letters of withdrawal were unprocedural and the letters of withdrawal were made up by the Company as no affidavit had been sworn by the alleged withdrawn shareholders.
54. On the issue of *res judicata*, Counsel for the Applicants submitted that this matter was in the Public realm purview hence it cannot be *res judicata*. It was submitted in contention that the previous cited matter was in the private law realm seeking an injunction.
55. It was also submitted that the 2nd Interested Party acted *ultra vires* the Company's Articles of Association and that Section 35 of the Articles of Association bars agreement or transfer of shares which should only be effected after all shareholders have waived their preemptive rights. In this case, it was submitted that the agreements and transfers were entered into before the shareholders waived their rights. It was submitted that the applicants were shareholders of the 1st Interested Party Company of over 700 shareholders and that the 1st Interested Party holds over 40% shares in Kedong Ranch Limited hence the Applicants have the right to property and therefore they were protecting their interests in the company.
56. It was further submitted that the Applicants' right to be involved in the affairs of the Company could only be through the AGM being held as an accepted medium of accountability to shareholders and to fulfil the legal and Constitutional Mandate under Section 310 of the Companies Act hence the letter of 28.7.2017 should be quashed.
57. It was also submitted that the Court can order for an AGM under **Section 280 of the Companies Act** where it finds that an AGM ought to have been held, and that the Court should compel the Registrar of Companies to ensure that the Company complies with the Act and that it holds an AGM.
58. On whether prohibition was merited, it was submitted that the Interested Parties should be prohibited from selling shares until members of the company hold an AGM because the sale of shares was done to defeat the AGM Notice issued by the *Exparte* Applicants pursuant to **Section 277, 278 and 279 of the Companies Act** which mandate the Shareholders to call for a Meeting where the Directors fail to call for such meeting.
59. The Applicants' counsel further maintained that the Registrar should be compelled to produce a copy of minutes of a meeting held on 21.7.2017 forming the basis of the impugned letter barring the AGM from being held. Counsel relied on the famous case of Kenya National Examinations Council (**KNEC**) **Vs. Republic Exparte Gathenji Njoroge** and submitted that his clients had fulfilled conditions espoused in that case for the grant of the Judicial Review orders sought, and urged the Court to apply Section 11 of the Fair Administration Act to give any other orders and costs, because, his clients had come to Court under **Section 22 and 23 of the Constitution** on Enforcement of rights.
60. Opposing the Notice of Motion, Mr. Munene Litigation Counsel for the Respondent submitted relying on the replying affidavit of Joyce Koech sworn on 15.11.2017 as reproduced above and added that the Respondent regulates all companies registered and incorporated in Kenya under the Companies Act.
61. According to the Respondent, the impugned decision is pursuant to a letter written by the Applicant's Counsel seeking for advise on whether shareholders have a right to call for an AGM, and that the said decision does not state that the meeting was illegal. That the letter only advised the Applicants on the requirements for calling for an AGM.
62. Further, that the Applicants were invited for a consultative meeting on 25.1.2017 at 1.00 a.m. at Sheria House but that they never turned up hence the meeting never took place as scheduled.
63. It was submitted that the Notice of Motion is not merited because there is no specific duty that the Respondent has not performed to warrant the relief of mandamus. Further, it was submitted that this application is overtaken by events and that even if the orders sought were granted, it will be a paper judgment.
64. It was submitted that there are no minutes because no meeting took place. The Respondent's Counsel urged the Court to dismiss the application by the Applicant with costs.
65. Mr. Nderitu, Counsel, for the 1st Interested Party opposed the application on behalf of his client submitting, relying on the affidavit sworn by William Gathecha and associating himself with the submissions made by Mr. Munene Counsel for the Respondent.
66. According to Mr. Nderitu, the issues raised cannot be determined by a Judicial Review Application. Further, that the Registrar by writing the impugned letter was only giving the position of her office to the effect that the intended scheduled meeting would be unprocedural but that she never cancelled the meeting.
67. It was therefore submitted that prayer No. 1 of the Notice of Motion must fail because there was no decision but only an advice as sought by the Applicants. It was also submitted that section **831 of the Companies Act** was clear on powers of the Registrar under the Act hence she cannot act outside the statute.
68. It was submitted that an AGM can only be convened in accordance **with Sections 276, 277 and 280 of the Companies Act** by the Court and not by the Registrar. It was submitted that the notice for a meeting dated 10.5.2017 expired three months after the giving of notice.
69. It was submitted that the applicant never applied for public documents to be given to them by the Registrar and that the Court cannot order what is stale.
70. Further, that this Court exercising Judicial Review Jurisdiction cannot call for an AGM. It was submitted that the applicants were abusing Court process as they had filed Nakuru HCC 20/2014 which was pending and that in one of the prayers sought, they have urged the

Court to grant them an injunction to stop the sale of shares, which prayer is similar to the prayer of prohibition sought herein. Further, that prohibition had been overtaken by events as the shares sale and transfer had been effected and completed. The Court was urged to dismiss the motion with costs.

71. Miss Wahura Counsel for the 2nd Interested Party submitted opposing the Applicant's application and relying on the Replying affidavit sworn by Pascal Babu Wood on 10.10.2017.

72. According to the 2nd Interested Party, associating itself with the submissions made by the Respondent's Counsel and the 1st Interested Party's Counsel, Muhotetu Farmers Company Limited was a shareholder in Kedong Ranch Ltd and that the Applicants herein are shareholders of Muhotetu Company.

73. It was submitted that Kedong Ranch Ltd notified all shareholders of the communication by Muhotetu, to sell the shares through a resolution and that the 2nd Interested party complied with all the procedures as shown by the annexures, for transfer of shares.

74. It was submitted that the prayer for prohibition had been overtaken by events as the sale and transfer of shares had been effected before these proceedings were initiated, and that already, stamp duty had been paid and share certificate was issued to Kedong Ranch Ltd.

75. On the prayer for mandamus, it was submitted that the same can only be granted if there is no other remedy available for the Applicant to resort to. In this case, it was submitted that compelling the holding of an AGM can be sought in another Avenue not by way of Judicial Review.

76. It was further submitted that there is no evidence that there are minutes of any meeting hence the application should be dismissed with costs.

77. In a rejoinder, Mr. Mathenge Counsel for the Applicants submitted that the Registrar had stated that the meeting was unprocedural and that she confirmed that a meeting was held and that documents were availed to her.

78. Further, that her letter was written after Notice of the AGM had been issued. The Applicant's Counsel maintained that the issues raised are to do with administrative action which is within judicial Review purview. It was further submitted that only when Directors refuse to hold an AGM that shareholders would be entitled under **Section 277 of the Companies Act** to convene a meeting and only after satisfying the provisions of **Section 270 of the Act**.

79. It was submitted that there was no legal provision that the applicants would invoke to compel for an AGM of the Company to be held under **Section 280 of the Act**. Counsel for the Applicants maintained that the orders sought had not been overtaken by events since they approached the Court in September 2017 and that time only lapsed after they sought to amend pleadings.

DETERMINATION:

80. I have considered all the foregoing and in my humble view, the following issues how for determination:

- (1) Whether the prayer for prohibition is available or whether it is Res judicata Orders in Nakuru HCC 20 of 2014;*
- (2) whether the exparte applicant is guilty of non-disclosure of the pending suit being Nakuru HCC 20/2014 over the alleged same subject matter and whether nondisclosure would be fatal to these proceedings.*
- (3) Whether the Judicial Review Orders sought are available to the exparte Applicants.*
- (4) What Orders should this Court issue?*
- (5) Who should bear costs of these proceedings.*

81. There are other ancillary questions which this Court will endeavor to answer in resolving the above framed issues.

82. On the first issue of whether prohibition is available to the applicants and whether these proceedings for prohibition are Res Judicata Nakuru HCC (Commercial & that Division Suit No. 20 of 2014 between Muhotetu Farmers Company Ltd vs 9 Directors Shareholders of the said Company and more specifically a derivative suit filed against the 9 directors of the company, the Court notes that vide a ruling dated 28.11.2014 in the said Nakuru HCC 20 of 2014, Hon. Lady Justice Janet Mulwa – J. rendered a ruling on an Application dated 8.5.2014 seeking for an injunction restraining the defendants/Directors of the plaintiff Company and Other 2 Interested Parties form (selling, transferring or in any other manner disposing of LR No. Nyeri Municipality Block 1/57; LR No. Nyahururu Municipality 4/138, 40% shares in Kedong Ranching Company Ltd or any other belonging to the plaintiff Pending the hearing and determination of the suit.

83. The learned judge in her ruling observed that the defendant's bundle of documents had an exhibit No. 3 at P. 22 which was a company's resolution made on 14.9.2013 at the Plaintiff's Extra Ordinary General Meeting held at Muhotetu Dispensary where the Chairman also presented a report on the Company's state of affairs touching on the assets and liabilities of the company for the year ended 31.12.2012. The learned Judge observed that among the Resolutions passed and as appeared in the minutes of the Extra Ordinary General Meeting attached as exhibits, was the Resolution that states:

“----- In addition, it was unanimously resolved that the current Board of Directors should immediately commence the exercise of disposing off the Company’s Assets, and thereafter declare Dividends and distribute them among its members. The assets to be disposed offs were identified as:

- (a) 181,250 shares held at Kedong.
- (b) LR No. 6585/2&4 (Nyahururu Municipality)
- (c) Nyahururu Municipality Block 4/135
- (d) LR No.6585/585 Nyahururu Municipality
- (e) Nyeri Municipality Block 1/57”

84. The learned Judge further observed that the **shareholders being dissatisfied with the running of the Company, Members unanimously resolved to sell all the Company’s properties which resolution amounted to a voluntary winding up**, in which case then, a liquidator ought to have been appointed to carry on the liquidation process, and no the directors of the company.

85. Further the learned Judge observed that following the said resolution, the directors of the company who are the defendants in the said suit started the process of selling the assets, as mandated by the AGM resolution and that indeed, they had sold two of the properties at the time of coming to Court which were **LR No. Nyahururu Municipality Block 4/110 and 138** and that the funds were in the plaintiff’s account awaiting distribution to members as dividends, while offers for sale of other properties were underway.

86. The Court also observed that the minority shareholders being dissatisfied with the manner in which the assets were being disposed of by the directors of the company, filed an application for leave to bring a derivative suit against the directors vide **HC Misc. Appl. No. 55/2014 at Nakuru** whereof leave was granted resulting into **Nakuru HCC 20/2014**.

87. In dismissing the plaintiff’s application for an interlocutory injunction, the learned judge observed that the interpretation of the Resolution reproduced above which allowed sale of the Company’s properties could only be adequately be determined at the hearing of the suit and should not be used to obtain an injunction and or conservatory orders as was stated in the case of **Jane Wambui Weru Vs. Overseas Private Inv. Corp and 3 Others (2012) KLR** that:

*“Whereas the validity of otherwise of a change document can only be determined at the hearing of a suit **nonetheless the interpretation or validity of a charge document cannot be used to obtain orders preserving the status quo of the property.**”*

88. The learned Judge, while referring to the Resolution of 14.9.2013 observed that if an injunction was granted, then the Respondents would suffer losses which are irreparable because they had carried out valuations of the properties identified for sale and contracts for sale had been entered into, and money had been spent by the company pursuant to the said Resolution hence if an injunction was issued, there would be huge losses due to the cancelled contracts, damages for breach of contracts and unpaid debts for contracted services, which loss will be passed over to the shareholders of the company and the company, and that as directors, they may have to be called upon to settle the losses but not to the shareholders, which they may not be able to.

89. With the above background in sight, it is clear to this Court that indeed, the question of whether prohibition can issue prohibiting the sale of the shares of the Muhotetu fFarmers Company Limited (MFC) company held in Kedong Ranch Limited is an issue that was subject of a Resolution made by shareholders on 14.9.2013 and which is subject of **Nakuru HCC 20/2014 and the ruling by Justice Mulwa**.

90. On the question of resjudicata, Wing ram V- C in the case of **Henderson Vs Henderson [1843] 67 ER 313** stated:

“.....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction the court requires the parties to a litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the subject of litigation in respect of matter which might have been brought onward, as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of Resjudicata applied, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which property belonged to the subject litigation and which the parties, exercising reasonable diligence, might have brought forward at that time.”

91. Further, Majanja J in **E.T.V. Attorney General & Another [2012] e KLR** called upon courts to be ‘hawk eyed’ to avoid suits that are otherwise Resjudicata from being instituted by employing devious means. The Learned Judge observed and I agree with him entirely that:

“The courts must always be vigilant to guard litigants evading the doctrine of Resjudicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction.

92. In **Omondi V National Bank of Kenya Ltd & Others [2001] EA 177** the court held:

*“Parties cannot evade the doctrine of Resjudicata by merely adding other parties or causes of action in a subsequent suit.” In that case the court quoted **Kuloba J, in the case of Njanja V Wambugu and Another Nairobi HCC 2340 of 1991 (unreported)***

where he stated, if parties were allowed to go on litigating forever over the same issue with the same opponent before court of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of Resjudicata.....”

93. In **Hunter Vs. Chief Conotable of West Midlands and Another** [1981] 3 All E R 127, Lord Diplook at P. 773 Para b where it was stated:

“it is an abuse of process which the instant case exemplifies is the initiation of proceedings against the intending plaintiff which has been made by another Court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the Court by which it was made.” ----- I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case the litigant were to be permitted by changing the form of the proceedings to set up the same case against.”

The Court further held that the initiation of proceedings in a Court of justice for purposes of meeting a collateral attack on a final decision adverse to the intending plaintiff reached by a Court of competent jurisdiction in previous proceedings in which the plaintiff had a full opportunity of contesting the matter was a matter of public Policy an abuse of the Court process.”

94. Further in **Northwest Water Ltd Vs. Binnle & Partners (a firm)**, [1990] 3 A.E.R. 547, it was held:

“ where an issue had for all practical purposes been decided in a Court of competent jurisdiction the Court would not allow that issue to be raised in separate proceedings between different parties arising that of identical facts and dependent on the same evidence, since not only was the party seeking to litigate the issue prevented from doing so by issue of estoppel but it would also be an abuse of Court process to allow the issue to be re-litigated.”

95. **Somevell L – J.** stated in **Green halgh V Masllod** [1947]2All E.R. 257:

“It would be accurate to say that res judicata for the purpose is not confined to the issues which the Court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceedings to be started in respect of them sold and transferred and proceeds shared among shareholders including the Applicants herein.”

96. In this case, it is now trite that a similar order by way of an injunction had been sought in NKR.HCC 20/2014 but dismissed at the Interlocutory stage and the plaintiffs now applicants in these proceedings having lost their interlocutory application for an injunction in the Nakuru HCC 20 of 2014 , simply panel beat the facts to take a new shape by simply seeking for prohibition in these judicial review proceedings.

97. And even if the doctrine of resjudicata were inapplicable, as the main suit in Nakuru High Court is still pending, since Hon Mulwa J made her ruling in the matter dismissing the application for injunction on 28.11.2014, and as the dismissal order was only made at the interlocutory stage of the suit and is subject to the full hearing and determination of the whole suit, it is not in doubt that the question of sale of shares in Kedong Ranch Limited is **Res Subjudice Nakuru HC CC No.20/2014** which is still pending before a court of competent jurisdiction, was as a result of a resolution made by the shareholders at an AGM held on 14.9.2013

98. I have no further doubt that an attempt to prohibit the sale of the shares in Kedong Ranch is matter that is overtaken by events as was observed by Hon. Mulwa – J in her ruling that the sale of the said shares had been conducted in line with the Resolution made by shareholders on 14.9.2013.

99. Further, albeit the Applicants claim that the requisition and sale of shares in Kedong Ranch Ltd are a fraud, this Court being a Judicial Review Court does not have any Jurisdiction to hear and determine questions of fraudulent acquisition of shares in Kedong Ranch Ltd. Fraud can only be determined by adduction of evidence and only a Court exercising Civil Jurisdiction would hear evidence, which evidence would be subjected to cross-examination to determine whether or not the sale of shares in Kedong Ranch is or was fraudulent.

100. What is before this Court is that there are documents showing that shares of Muhotetu Farmers Company in Kedong Ranch Ltd had already been sold and proceeds thereof already applied to shareholders as Dividends, by the time the exparte applicants approached this court, and after they lost an application for injunction before Nakuru HCC 20 of 2014. Any challenge to that sale is therefore now subject of a commercial Dispute between the parties concerned and as the 2nd Interested Party is a Private Company, any matters affecting its shareholders should be filed in the High Court as a Civil or Commercial Dispute for determination on its merits, and not to be challenged by way of Judicial Review, especially where it is contended that the Applicants herein are beneficiaries of the sale of the said shares and to which the Applicants have not denied.

101. This Court further notes that albeit the Applicants strenuously argued their case on questions of pre-emptory rights and waiver, it is the view of this Court that those are questions which can only be answered fully by a Court exercising Civil or commercial jurisdiction and not this Court whose jurisdiction is limited to procedure and not merits of the actions of an administrative body.

102. It should also be noted that there are no affidavits from the shareholders stating that their withdrawal letters from requisition of a scheduled meeting were forgeries.

103. Accordingly, I find and hold that the prayer for prohibition is not available to the applicants. The same is therefore dismissed.

104. On non disclosure of pending similar suit and the consequences thereof , this Court further finds that the Applicants deliberately failed to disclose to this court in their pleadings and affidavits the existence of similar litigation in **Nakuru HCC 20/2014** yet the subject matter and the parties are the same and similar orders were sought in both cases namely, injunction in the Nakuru matter and prohibition in this matter which orders if granted have the same effect namely, preventing the sale of shares in Kedong Ranch Limited, notwithstanding the Resolution of 14.9.2013 by shareholders.

105. In my view it is an abuse of Court process for a party to seek similar orders in different proceedings. Courts have severally warned that non-disclosure of existence of similar proceedings would lead to dismissal of the matter and orders granted would be discharged without examining its merits (see **Rashida Rajabali Ganjijee & Another Vs. Harveen Gadhoke & 3 Others [2007] eKLR**).

106. In this case, the Applicants were denied an injunction in **NKR HCC 20/2014** and instead of appealing against that decision, they jumped into this Court with a prayer for prohibition by way of judicial Review. That is unacceptable because an injunction and a prohibition orders would have the same effect of stopping the sale of shares in Kedong Ranch Ltd. See **North West Water Ltd Vs Binnle & Parties confirm, (1990) 3 A.E.R. 547**, and now that the said shares are already sold, whether rightly or wrongly, there is nothing for this Court to prohibit because prohibition looks into the future and not in the past. prohibition cannot prohibit that which is already done.

107. This court further observes that when the Applicants appeared before this Court *ex parte*, they made the Court believe that the matter was so urgent for consideration because the shares in Kedong Ranch Ltd were being disposed of to the detriment of the shareholders who had not given their consent to such sale. The Court on 25.9.2017 granted an interim stay of sale of the said shares until the main motion once filed was heard and determined on merit.

108. However, as earlier stated, once the Respondents and the Interested Parties were served with pleadings and they filed their responses, they laid it bare that the issue of sale of shares in Kedong Ranch Ltd was a foregone conclusion as shares had already been sold on the strength of the Company's Resolution made in 2013.

109. In my humble view, the Applicants herein obtained leave and stay orders from this Court by way of concealment of material facts and by deception and on that ground alone, the Application herein is amenable for dismissal and the interim stay effectively discharged. See **Shirikhanu Amiral Shariff V. Alibhai Sharif and Seven Others NRB HCC 660/2004 (Per Azangalala – J)** (as he then was). In **Muigai & Others is John Wainaina & Others NRB HCC 346/2002 P.K. Kihara – J** (as he then was) held that the defendants were not entitled to the discretionary orders of injunction, having failed to discharge their paramount duty of making full disclosure of all material facts pertaining to their application.

110. In other words, where a party is not candid enough to disclose to the Court all facts of the case and states them in such a way as to mislead and deceive the Court, there is inherent power in the Court in order to protect its integrity and to prevent an abuse of its process, to discharge the order nisi and refuse to proceed further with the examination of the merits of a case (see **King Vs. the General Commission for income Tax Acts for the District of Kensington [1917] KB 486**).

111. There is then the issue of whether the other judicial review Judicial Review orders of certiorari, and mandamus as sought are available to the *Ex parte* Applicants.

112. This court having already found and held that the order for prohibition is not available to the Applicants firstly, because the matter was subject of **NKR HC 20/2014** and therefore *res judicata* the Ruling by **Hon. Mulwa – J** and secondly, that the Applicants failed to disclose to this Court that there were similar issues pending in **NKR HCC 20/2014 over the same subject matter of sale of shares in Kedong Ranch Ltd**, which shares were long disposed of by the time the *ex parte* applicants filed the NAKURU case and before this case was initiated. Third, that in any event, the sale of shares as impugned has already taken effect whether rightly or wrongly hence any challenge thereto can only be made before a Court exercising Civil or Commercial Jurisdiction and not by way of Judicial Review; this being the case because Judicial Review looks into the procedure leading to the impugned decision and further; that prohibition in Judicial Review proceedings looks into the future and not that which has already been fully performed to completion; (see the case of **Republic Versus Chief Magistraes Court at Mombasa Ex parte Ganijee & Another [2002] 2 KLR 703**;

113. Therefore, as to whether the Applicants are entitled to the Judicial Review orders of certiorari and mandamus sought in the Notice of motion herein, it is important to first appreciate what Judicial Review is and under what circumstances would this Court exercise jurisdiction in Judicial Review and grant or issue certiorari and mandamus. **Article 165(6) of the Constitution stipulates that:**

“The High Court has supervisory Jurisdiction over the subordinate Courts and over any person, body or authority exercising Judicial or quasi-judicial function, but not over a superior Court.”

114. **Under Article 165 (7)**, the High Court may call for the record of any proceedings before any subordinate Court or person, body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

115. The Judicial Review Orders of certiorari, Mandamus and prohibition can only be available to a party who invokes the Court's jurisdiction to quash, compel or remove and stop certain specific acts or omission of a subordinate body in the exercise of Judicial, quasi-judicial or administrative functions, to the High Court. In **Rex V Electricity Commission, Lord (1924) 1KB 171 P. 205 C, Justice Atkin** Stated:

“Whenever anybody or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially acts in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.”

116. Of importance is that in exercising Judicial Review Jurisdiction to grant certiorari, the Court does not exercise the powers of an Appellate Court. The Court does not review or examine the evidence upon which the determination of the subordinate tribunal or body purports to be premised.

117. The Court only demolishes the order which it considers to be made without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal. The offending order or proceeding or decision is put out of the way as one which should not be used to the detriment of any person. [see Lord **Cains in Walsalls Oversees V. L & N W. Rly Co. (1879) 4 AC 30 P.39D.**

118. **Article 47** of the Constitution espouses the right of every person to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Secondly, that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrations action, that person has the right to be given written reasons for the action. The constitutional provisions above have been given effect by the enactment of the **Fair Administrative Action Act, 2015**, in recognition that every person has the right to be accorded procedural fairness or natural justice when a decision is being made, that affects that Person's rights, interests or legitimate expectations. In **Onyango Oloo Vs. A.G.**, the Court of Appeal held that a decision in breach of natural justice is not cured by holding that the decision would otherwise have been right. And that if the principle of natural justice is violated, it matters not that the same decisions would have been arrived at.

119. The right to be heard is a valued right and it would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard. Section 4 of the Fair Administrative Action Act restates the Constitutional enactment in **Article 47** that every person has a right to an expeditious, efficient, lawful, reasonable and procedurally fair administrative action.

120. The *ex parte* Applicants allege that they were not heard by the Respondent before she made a decision vide letter of 28.7.2017 canceling the planned AGM by members of Muhotetu Farmers Ltd. They therefore seek the intervention of this Court by way of certiorari to quash the decision thereof. At page 2 of the impugned letter advised the applicants not to proceed with the holding of an Extra AGM as planned on 5.8.2017 at 10 a.m. because in the view of the Registrar, the planned meeting was unprocedural and that the quorum required by the Companies Act had not been met once some of the members who had requisitioned for the meeting had withdrawn their names from the requisition Notice.

121. From the onset, this Court observes that even assuming that the *Ex parte* Applicant's Prayer for certiorari were merited, the same has been overtaken by events for reasons that the requisition Notice was for an Extra-Ordinary General Meeting to be held on 5.8.2017 which the Registrar advised, was unprocedural and would lack quorum. It follows that this Court is being asked to act in vain by making Orders that would be for academic purposes and therefore of no legal effect. Even if the said letter was to be found to be a decision made by the Registrar canceling the planned AGM which it is not, the date on which the said meeting was to be held did expire before these proceedings were initiated and therefore Certiorari would serve no useful purpose. The applicant had the option of issuing a new Notice for another date to hold an AGM of shareholders. But again, the shareholders who are said to have denied withdrawing their requisition for an AGM have not sworn any affidavits disowning their withdrawal.

122. The Court further observes that in the prayer No. 2 (a) of the Notice of Motion, the Applicants carefully and in a calculated manner, avoided mentioning the date of the meeting and only stated:-

“----- the planned Annual General Meeting by Members of Muhotetu Farmers Limited.”

123. There could have been no “planned AGM” without a date. The facts as a whole and ground No. (a) of the application show that the AGM Meeting was scheduled for 5.8.2017. The view of this Court is that whether or not the Registrar had power to cancel that meeting, it would make no legal sense to attempt to quash a decision which no longer exists as the validity of that so called decision was dependent of the date of the AGM as scheduled.

124. The moment 5.8.2017 passed, then there was no decision affecting that date or event to be held on that date and therefore I would not waste precious judicial time and resources to delve into the merits and or demerits of the contents of the Registrar's letter dated 25th July 2017. In the end, I find and hold that certiorari is not available to the Applicants.

125. On whether mandamus is available to the Applicants, the Applicants amended their Chamber Summons dated 22.9.2017 on the advise of the Court in order to clarify the orders sought therein.

126. However, they did not amend prayer No. 2 of the Notice of Motion dated 29.9.2017 which prayer is too verbose, too convoluted and overloaded with several compulsive prayers of mandamus designed, ostensibly, to evade payment of Court fees for each of the prayers sought in the Chamber Summons, as amended, by combining many prayers into one.

127. In other words, whereas the main prayers in the amended Chamber Summons for leave are five (5) namely, one prayer for certiorari, three prayers for mandamus and one prayer for prohibition, in the main motion, the Applicants lumped together all the three prayers for mandamus into one.

128. In addition, despite this Court bringing to the attention of the Applicant's Counsel that the date of 13.10.2017 on which they sought the court to compel the respondent to hold the AGM OF Muhotetu Famers Company Ltd had long past, the Applicants still seek the Court to compel the Respondent to hold an AGM on or before 13.10.2017 in the company offices.

129. Judicial Review Remedy of Mandamus issues to compel performance of a statutory/legal or constitutional duty. It is a discretionary remedy and the Court will therefore only issue the remedy where there is no other alternative efficacious remedy. The conduct of the Applicants will also be considered in the Court's exercise of its Judicial discretion in the matter.

130. In this matter, albeit the Applicants claim that they are entitled to mandamus, the manner in which the “prayer” or “prayers” for mandamus is or “are” framed makes it impossible for this Court to make a decision on what mandamus should issue, considering the nebulous prayer and the fact that the 13th October 2017 is long gone hence even if the Court was to grant mandamus, it would be a mere academic exercise. The Applicants in my view do not deserve any discretionary orders of this Court.

131. Neither was there demonstration of any duty imposed on the Respondent to produce minutes of a meeting allegedly held on 25th July 2017, signatures of shareholders who had withdrawn their requisition notice and further copies of returns furnished to her by the Board from 2008-2017.

132. In addition, there is no legal duty imposed on the Respondent to hold an AGM of the Muhotetu Farmers Company on or before a specific date.

133. Furthermore, the oral submissions by Mr Mathenge counsel for the exparte applicants are not supported by the pleadings which are very vague, verbose and unclear. The prayer for mandamus is therefore a waste of judicial time and resources. To compel production of minutes of alleged meeting between the Registrar and the 1st Interested Party would not serve any purpose. The Applicants have every opportunity to follow the procedure set out in the companies Act to call for an AGM, as the earlier requisition has been overtaken by events. They also are at liberty to apply for copies of Returns if any made by the 1st Interested Party to the Registrar in the normal manner stipulated in the Act and not to seek for mandamus to compel production of the same. They can do so in the pending Nakuru HCC 20 of 2014 by seeking for discovery under Order 11 of the Civil Procedure Act.

134. On whether prohibition should issue against the 1st interested party to prohibit it from selling shares or negotiating for sale of the said shares of Muhotetu Farmers Company Limited in Kedong Ranch Limited until the AGM is held, I have already found that that prayer was overtaken by events and that the Hon Mulwa J in Nakuru HCC made it clear that the sale of shares complained of had been authorized by shareholders Resolution made in 2013. That decision was never appealed against. There is therefore nothing to be prohibited.

135. In the end, I find and hold that the Applicants have not made out a case for grant of any of the Judicial Review Remedies sought.

136. Accordingly, I find and hold that the Application dated 29.9.2017 is devoid of any substance. The same is hereby dismissed with costs to the Respondents and the Interested Parties.

Dated, Signed and Delivered in open Court at Nairobi this 27th Day of September, 2018.

R. E. ABURILI

JUDGE