



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.331 OF 2015

BETWEEN

JACOB JUMA PETITIONER

AND

**HON. EVANS KIDERO, THE GOVERNOR, NAIROBI COUNTY
GOVERNMENT.....RESPONDENT**

RULING

Introduction

1. The Petitioner, Jacob Juma, filed the present matter against the Respondent, Evans Kidero, the Governor of Nairobi County on 5th August, 2015 together with a Notice of Motion Application dated 5th August 2015, and before the hearing of the Petition, the Respondent filed a Notice of Preliminary Objection dated 13th August, 2015 in which he sought orders that the Petition and Notice of Motion be struck out on the grounds that:

- a. The Petition and Notice of Motion do not comply with Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, as the Petitioner has not demonstrated the violation in relation to Mumias Sugar Co. Ltd in which he holds no shares.*
- b. That the Petitioner lacks the pre-requisite locus standi to bring an action against the Respondent in relation to Mumias Sugar Co. Ltd in which he holds no shares.*
- c. That even if the Petitioner held shares in the said company, an action in the nature filed in this Petition can only be commenced as a derivative suit against the other shareholders and former Directors of Mumias Sugar Co. Ltd and only with the leave of the Court.*
- d. That the contracts that form the subject matter of the claim against the Respondent herein were signed between Mumias Sugar Co. Ltd and Y.H Wholesalers on the other hand and Mumias Sugar Co. Ltd and Abdul Mwasera on the other hand. The Petitioner cannot claim from a contract to which he is not a Party.*
- e. The claim for alleged falsified accounts is a claim against the former Directors of Mumias Sugar Co. Ltd and not the Respondent.*

f. That the prayer sought in the Application for freezing of accounts of the Respondent are conservatory orders which must be made only where there is an express violation of a constitutional right under Article 22 of the Constitution.

g. That the Application and the Petition do not raise substantial questions of law to merit the intervention of this Court under Article 165 of the Constitution.

h. That a request for an Advisory Opinion for the interpretation of the Constitution is a preserve of the Supreme Court under Article 163 (4) (6) as read together with Article 165 (5) (a) of the Constitution.

2. This Ruling therefore relates to the said Preliminary Objection.

The Respondent's Case

3. In his Written Submissions dated 27th October, 2015, the Respondent contended that the Petition together with the Application therein are fundamentally defective and the prayers sought in both cannot issue against him. In his view, the same therefore ought to be struck out for non-compliance with the mandatory provisions of **Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Mutunga Rules)**.

4. It was the Respondent's further argument that it is now settled law that a party seeking protection of the Court under the Constitution or any law must first demonstrate how his rights have been violated as it was held in **East African Pentecostal Churches Registered Trustees and 1754 Others vs Samuel Muguna Henry and 4 Others [2015] eKLR**, **Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 Others [2013] eKLR**, **Stephen Kuria Muiruri and 12 Others vs Minister for Youth Affairs and Sports and 2 Others [2012] eKLR**, and **Matiba vs Attorney General HC MISC App. No. 666 of 1990**.

5. On the question of *locus standi*, the Respondent's view was that the Petitioner lacks the standing to institute any action in the nature of the present Petition since he is neither a shareholder nor a director of Mumias Sugar Co. Ltd on whose affairs the Petition is founded. That the Petition and Notice of Motion also have glaring errors in respect of the rules and procedure of Company law and specifically the **Companies Act, 2015** on the right to sue on behalf of the said company. In that regard, his argument was that Mumias Sugar Company is a private company and not a public company as the Government's investment in it is only 20% and as such, to allege public interest as stated by the Petitioner is an error and therefore misleading. Reliance was placed on **Foss vs Harbottle (1843) 67 ER 189** and **James Mbera Macharia and Another vs Samuel Mwangi Macharia and Another [2015] eKLR** in support of the argument that an action in respect of the activities of a company can only be brought by the company itself.

6. Further, it is his contention that there must be a resolution that is passed by the Board of Governors/Directors of the said Company allowing the institution of Court proceedings as was held in **East African Portland Cement Ltd vs The Capital Markets Authority and 5 Others, Petition No. 600 of 2013**, and in the absence of such a resolution, any suit cannot stand. In addition, that in the event that the Petitioner was a shareholder of Mumias Co. Ltd, such an action can only be commenced as a derivative suit against the other shareholders and former directors of the company and only with the leave of the Court. The Respondent relied on the decisions in **Shiawase Limited and Another vs Pianesi Gino [2012] eKLR**, **Prudenzio Nicholas Gaitara vs Patrick Kariuki Muiruri and 2 Others [2014] eKLR**, and **Dr. Jane Wambui Weru vs Overseas Private Inv. Corp. and 3 Others, HCCC No. 83 of 2012** in support of that proposition.

7. The Respondent also maintained that because Mumias Sugar Co. is a private company with more than 70% of its shareholding being held by private shareholders and the Government holding only 20% as an investor and not an owner, then, the company is not a public company and should not be subjected to public scrutiny as alleged by the Petitioner. Additionally, that the Petitioner has not in any event exhibited

a shareholding certificate to confer him the *locus standi* to institute any action including a derivative action.

8. The Respondent's other contention was that the Petitioner is not a party to the contracts forming the subject matter of the Petition and that he is therefore barred by the doctrine of privity of contract from raising any issue with them as was held in **Kenya National Capital Corporation Ltd vs Albert Mario Cordeiro and Another [2014] eKLR**. Furthermore, that the Petitioner lacks any interest in the contracts in question and cannot therefore purport to bring any action regarding the same.

9. Additionally, the Respondent asserted that the claim that the Company's accounts were falsified is a claim against the former directors of Mumias Sugar Co. and all its shareholders and not against him *per se*. That, by dint of **Sections 155 (1) and 157 (1) and (2) of the Companies Act**, the Board bears responsibility for the accuracy of the company's financial statements and that independent auditors are appointees and agents of shareholders as stipulated under **Section 159 of the Companies Act** at an Annual General Meeting and as such, the claims in the Petition ought to be directed to the Board.

10. On the prayer to have his accounts frozen, the Respondent argued that the allegations pertaining to allegations of theft of Kshs.650 million shillings are unsubstantiated and untrue and that he has never received any such sums in cash or on behalf of the company. In that regard, it was his submission that the said prayer is solely and wholly premised on unsubstantiated allegations and therefore, to have his accounts frozen would occasion great injustice and his property rights would be greatly curtailed. In any event, that the said monies were paid into Mumias Company's accounts and the books of account indicate so. In addition, he argued that he does not intend to dispose off his property in any way and neither is there any evidence whatsoever before this Court to show that he has attempted to hide or get rid of his property in order to defeat the ends of justice and as such, to purport that there would be a justification in limiting his right to enjoy his property would be a blatant lie.

11. While relying on **Kanduyi Holdings Limited vs Balm Kenya Foundation and Another [2013] eKLR** it was his other argument that the present Petition was filed in order to settle personal scores and not to achieve justice and the Petitioner has not satisfied the criteria for the grant of a Mareva Injunction which is equivalent to an order to have personal accounts frozen. Further, that a freezing order should be granted based on substantiated claims and not mere suspicions as was held in **Harun M'njau vs Sagalla Ranchers Ltd and Another, Winding Up Cause No. 1 of 2014**. Relying further on **Kenya National Parents Association suing through the Secretary Musau Ndunda vs Cabinet Secretary Ministry of Education, Science and Technology, Jacob Kaimenyi and Others, Petition No. 424 of 2014** it was his contention that the Petition does not reveal any fundamental right that the Petitioner alleges has been violated so as to warrant the granting of the conservatory orders to freeze the accounts.

12. On whether the Petition should be forwarded to the Chief Justice for empanelment of a bench of an uneven number of Judges, the Respondent, while relying on **Amos Kiumo and 2 Others vs Cabinet Secretary Ministry of Interior Coordination of National Government and 3 Others, Petition No. 16 of 2013, Okiya Omtatah Okoiti and Another vs Anne Waiguru and 3 Others, Civil Application No. 3 of 2015, Intoil Limited and Another vs Permanent Secretary, Ministry of Energy and 4 Others, Petition No. 156 of 2006, Harrison Kinyanjui vs Attorney General and Others, Petition No. 74 of 2013, and George M. Muchai vs Francis Atwoli and Others, Petition No. 69 of 2014**, took the position that there is no substantial question of law to merit such empanelment and the Petition does not satisfy the criteria thereof. In addition, that there is nothing in the Petition to show the rights breached or what aspect of the **Constitution, 2010** that the Petitioner wants interpreted and in any event, he has failed to plead with precision such matters as would raise substantial questions of law as per the principles that were set out in **A.K.M.M vs E.M.K.K and 2 Others [2014] eKLR**.

13. Furthermore, the Respondent relied on the authority of **County Government of Meru vs The Ethics and Anti-Corruption Commission and Another, Petition No. 177 of 2014** to argue that every matter that touches on public interest cannot be a ground alone to warrant the certification of a matter as raising a substantial question of law and that the present Petition does not in any way warrant such empanelling.

14. Finally, the Respondent relied on **Speaker of the Senate and Another vs Attorney General and 4 Others [2013] eKLR** and **Re The Matter of the Interim Independent Electoral Commission [2011] eKLR** and submitted that this Court does not have the jurisdiction to give advisory opinions and that fact notwithstanding, the Petitioner has not even attempted to show how the Petition qualifies to be considered for an advisory opinion.

The Response

15. The Petitioner opposed the Preliminary Objection and filed Written Submissions dated 22nd April, 2016. It was his position that the said Objection lacks merit and is defective and as such, ought to be dismissed. While relying on **Mukisa Biscuit Manufacturing Company Ltd vs Westend Distributors Ltd (1969) eKLR** and **Independent Electoral and Boundaries Commission vs Jane Cheperenger and 2 Others [2015] eKLR**, he contended that the Respondent has resorted to using a Preliminary Objection as a sword in an attempt to advance his case by propagating facts and legal issues which are of contention and are in issue. Accordingly, that the Respondent has used the Preliminary Objection to list irrelevant, uncalled for and argumentative averments and as such, the same ought to be disregarded.

16. It was his further contention that the Respondent's narrow and technical interpretation of *locus standi* of a person before this Court is wrong and misconceived because the desire of the framers of the **Constitution** was to open up the Courts to citizens in an attempt to further jurisprudence in our legal jurisdiction more so in constitutional law and to provide a cure and remedy where Courts struck out meritorious suits on the basis of lack of *locus standi* before the much needed reforms to the Judiciary were undertaken. In that regard he argued that to construe the concept of *locus standi* in a narrow sense would be akin to propagating the ills that the framers of the **Constitution** sought to address. In the Petitioner's view, the Constitution provides a wide scope of standing and access to Courts by dint of **Articles 22 and 258** as read with **Rule 4 (2) (iii) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules)** and therefore, he has a right to sue in the public interest as he has done in the present Petition.

17. The Petitioner further took the position that the pertinent issue in the Petition relates to the loss making aspect and mismanagement of the Mumias Sugar Co. Ltd and that indeed investigations were undertaken by the National Assembly and a Report was consequently tabled on the floor of the House and furthermore, a heated debate ensued which resulted in a significant portion of blame being directed at the Respondent. Accordingly, that it cannot be said that the issues plaguing the Company are private in nature and as such, this Court ought to pro-actively take up the issue as it has the potential of assisting in settling the present dispute. Further, that the said company is limited by shares and the Kenyan Government holds shares in trust for Kenyan citizens and therefore, it cannot be true that it is not a public company.

18. The Petitioner relied on the holding of the Courts in **Koech Kemboi vs Halakhe and 2 Others [2015] eKLR**, **Tom Ojienda t/a Tom Ojienda and Associates vs Ethics and Anti-Corruption Commission and 5 Others [2016] eKLR**, and **Judicial Service Commission and Secretary, Judicial Service Commission vs Kalpana H. Rawal [2015] eKLR** in support of its other submission that **Article 3 (1) of the Constitution** dictates that every person has an obligation to respect, uphold and defend the **Constitution** and that on the other hand, every person has the right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention.

19. It was the Petitioner's other position that the Respondent, through the Preliminary Objection, is merely attempting to escape scrutiny and accountability on his part. Accordingly, that the Respondent ought to be ready to be scrutinized by ordinary private citizens and should not resort to employing technicalities such as the filing of Preliminary Objections as he has done herein. That, on the other hand, he brings the present Petition as a Kenyan citizen and a farmer and supplier of Mumias Sugar Co. Ltd. and in the interest of the public.

20. On the question of an advisory opinion being rendered by this Court, the Petitioner, while placing reliance on **Re The Matter of the Interim Independent Electoral Commission [2011] eKLR** and an article by James R. Rogers and George Vanberg titled **Judicial Advisory Opinions and Legislative**

Outcomes in Comparative Perspective, (Vol. 46, No. 2, 2002, pp 379-397, **American Journal of Political Science**), expressed the view that advisory opinions, in character, stand quite apart from the situation in a normal Judgment or judicial decision, which is usually marked by pleadings, causes of action, parties, evidence and specific issues for determination. That, in so far as the jurisdiction reposed in the Supreme Court, under **Article 163 (6)** of the **Constitution** employs the term ‘may’, the jurisdiction in that regard is discretionary and at the instance of that Court. He argued further that he is not the national government, State organ or a County government and the advisory opinion sought herein is not in any way related to one under the said Article.

21. The Petitioner thus stated that among his rights that have been infringed by the Respondent are the right to property under **Article 40**, the right to access justice under **Article 48**, economic and social rights under **Article 43**, the right to access information under **Article 35** and the right to a fair hearing under **Article 50**. In addition, that the Respondent has acted in contravention of **Articles 73** and **75** of the **Constitution** and the provisions of the **Public Officers Ethics Act**.

22. Finally, he submitted that he has duly satisfied and met the threshold in relation to the contents of a Petition as stipulated under **Rule 10** of the **Mutunga Rules** and therefore, for the above reasons, the Court ought to dismiss the Preliminary Objection and hold the Respondent in contempt especially at this interlocutory stage of the present Petition.

Determination

23. Does the Preliminary Objection stand? A Preliminary Objection was defined in the *classicus* case of **Mukisa Biscuit Company vs Westend Distributors Limited (supra)** in the following terms:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and occasion confuse the issues. This improper practice should stop.”

24. The essence of a Preliminary Objection is thus a point of law which disposes of a matter in *limine* without a Court having to call for any further additional evidence or going into contested issues *per se* - See **Kenya Council of Employment Migration Agencies vs Nyamira County Government and 10 Others, Petition No. 1 of 2015**.

25. That being the law, I shall limit my findings to pure questions of law only as arising from the Notice of Preliminary Objection. However, there is the rider which flows out of the edict by Sir Charles Newbold P. in **Mukisa Biscuits** and which was also the basis for the decision of the East African Court of Justice in **Secretary-General of the East African Community vs Rt. Hon. Margaret Zziwa, Appeal No. 7 of 2015**. In the latter case, the Appellate Division of the EACJ rendered itself thus:

“... The Court must avoid ‘treating, as preliminary objections, those points that are only disguised as such; and will instead treat as preliminary objections, only those points that are pure law; which are unsustained by facts or evidence, especially disputed points of fact or evidence or such like’.”

Where a Preliminary Objection therefore raises matters of facts that are uncontested, it will not be justifiable to strike out such a matter but parties shall proceed to hearing on the same in the usual manner.

26. In that context, the Respondent herein has opposed the present Petition on a number of grounds. In regard to the first ground, his argument is that the Petition and Notice of Motion Application do not comply with **Rule 4** of the **Mutunga Rules** as the Petitioner has not demonstrated the violation of any rights or fundamental freedoms. The aforesaid **Rule 4** stipulates that:

“(1) Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

(2) ...”

27. In my view and reading the above Rule, whereas it is a requirement that a litigant alleging violation of constitutional rights must plead so with precision, the question whether such a litigant has pleaded so is one which must be examined while looking at the Petition as a whole and examining the evidence adduced in support of such contentions. The question of pleading with precision therefore has to be evaluated wholly and on the merits of a matter and as such, that ground cannot form the subject of a Preliminary Objection as suggested by the Respondent. In the circumstances, such a ground cannot be sustained and in the present case, it must be overruled.

28. The Respondent furthermore challenges the sustainability of the Petition on the basis that the Petitioner does not have the *locus standi* to institute the Petition against him in relation to Mumias Sugar Co. Ltd in which he holds no shares. In that regard and as rightly pointed out by both Parties, **Article 258** of the **Constitution** gives every person the right to institute Court proceedings in the following terms:

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-

- a. A person acting on behalf of another person who cannot act in their own name;**
- b. A person acting as a member of, or in the interest of, a group or class of persons;**
- c. A person acting in the public interest; or**
- d. An association acting in the interest of one or more of its members.**

29. Furthermore, in regard to alleged violations of rights and fundamental freedoms in the Bill of Rights, **Article 22** states thus:

1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-

- a. A person acting on behalf of another person who cannot act in their own name;**
- b. A person acting as a member of, or in the interest of, a group or class of persons;**
- c. A person acting in the public interest; or**
- d. An association acting in the interest of one or more of its members.**

3. ...

30. It is apparent from the above provisions that the **Constitution** gives wide latitude for parties to access court and in the present case, does it then mean that the Petitioner has the *locus standi* to institute a claim against the Respondent in regard to the affairs of Mumias Sugar Co. Ltd?

31. In that regard, it is not in dispute that Mumias Sugar Co. Ltd. is a private limited company but the Government also holds shares therein. The question then that begs for an answer is whether the Petitioner can file a Petition alleging breaches of the law in regard to the management of the company among others where the company, its Directors or shareholders have chosen not to do so. From the material before me, it is apparent that the Petitioner, allegedly a sugarcane farmer at Mumias area alleges mismanagement of Mumias Sugar Co. Ltd by the Respondent and at paragraph 24 of the Petition, he asserts thus:

“The Respondent was personally liable for the downfall of Mumias Sugar Co. Ltd as he did not properly advise the Board of Directors in regard to matters that would negatively affect the company.”

At paragraph 51, he asserts further that:

“The Petitioner as a sugarcane farmer and supplier of cane to Mumias Sugar Co. Ltd has sought to actively pursue the mismanagement of Mumias Sugar Co. Ltd under the reign of the respondent which has led to its downfall as the same has directly affected him.”

32. If the Petitioner is aggrieved by the manner in which the Respondent undertook his management duties at the Mumias Sugar Co. Ltd., is it then in order for him to lodge a complaint in regard to wrongs committed against the company as a constitutional petition or should he have pursued the said complaints by use of the common law principle of derivative action? That principle was developed as a mechanism to be invoked by persons aggrieved by the wrongs committed upon a company and where the company, through its Board, fails to take action in regard to such wrongs.

33. The concept of derivative action has also overtime received judicial pronouncement on a number of occasions both in this and other jurisdictions. In **Shiawase Limited and Another vs Pianesi Gino (supra)** the Court stated that:

“It is a cardinal principle in company law that it is for the company and not the individual shareholder to enforce rights of action vested in the company and sue for wrongs done to it... that in the absence of illegality, a shareholder cannot bring proceedings in respect of irregularities in the conduct of the company’s internal affairs in circumstances where the majority are entitled to present the bringing of an action in relation to such matters. However, if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such a shareholder can bring an action by way of a derivative suit... (but) mere irregularity in the internal management of a company cannot be a basis for one to bring derivative suit for such can be rectified by a vote/resolution at the company’s meeting...”

34. The above decision is authority for the proposition that claims against the wrongs committed to a company are to be instituted by way of a derivative action and more importantly, by a shareholder in a company. In **The Matter of CMC Holdings Limited, Miscellaneous Civil Case 273 of 2012**, the Court gave some insights on the mode of instituting such an action. It stated that:

“[35] The procedure for commencing derivative actions set out in Dadani vs Manji & 3 Others (Supra), in my view, can only be insisted on in Kenya if our Companies Act had such peremptory provisions but that is not the case. In the circumstances, the long standing practice, and which I find reasonable, has always been that before a derivative action is filed, the applicant brings to court an ex parte application for leave, supported by a detailed affidavit so as to demonstrate that he has locus standi to institute such an action and that he has a prima facie case. In so doing, the applicant must satisfy the court that the company is entitled to the intended relief and that the action falls within the threshold of the exceptions to the rule in Foss vs Harbottle.”

The Court went on to state that:

“[36] If the court is so satisfied and grants leave, then the suit is filed. In my view, if one were

to first file the suit and then follow with an application for permission to continue with the derivative action, if the court is not satisfied that the applicant has locus standi and/or prima facie case and therefore declines to grant the permission, the applicant will have wasted resources in filing the suit.

[37] Once leave has been granted, the plaint should then be filed in the same court file and must accord with the leave granted. The plaint together with a copy of the application for leave will be served upon the company and/or the alleged wrong doing directors, who may choose either to challenge the grant of the leave by way of an application or file a statement of defence. Since the plaintiff is suing in a representative capacity on behalf of himself and all the other members of the company other than the ones who may already be involved in the suit, it is necessary that all the other shareholders are notified of the suit. An application can be made at this stage under Order 1 rule 8 of the Civil Procedure Rules for the court to give appropriate directions as to the mode of service/notification of the other shareholders.”

The Court concluded thus:

“[38] It should be borne in mind that in derivative suits the applicant usually alleges that some ills have been or are being committed by some directors against the company and if the application for leave were to be served and argued inter partes, the directors are likely to use every means available to frustrate, delay or defeat such an application and the company may continue to suffer loss.” (Emphasis added)

35. The law thus contemplates a clear procedure to be followed when lodging of complaints in regard to alleged mismanagement of companies and it is the expectation of the law that such a procedure ought to be complied with but having so said, what is before me is a constitutional Petition where the issues to be addressed must be looked at from the prism of the Constitution and not company law *per se*. in that regard, the Prayers sought in the Petition are:

a. A declaration that the presumption of innocence in favour of the Respondent does not override or outweigh the overwhelming public interest to ensure protection and upholding tenets and principles of the Constitution set out under Articles 10 and 73.

b. A declaration that the Respondent be declared unfit to hold office.

c. A declaration that the respondent refunds Kshs.650,000/- that he received as Managing Director in cash as envisaged by the sale agreement dated April 23rd 2012 to Mumias Sugar Co. Ltd together with interest at 14% Court rates for three years (2013-2015) totalling Kshs. 923,000,000/=

d. A declaration that the Respondent refunds Kshs. 900,000/= that he irregularly paid the then Provincial Commissioner Mr. Abdul Mwasera for security services allegedly rendered together with interest at 14% Court rates for seven years (2008-2015) totaling Kshs.1,782, 000/=

e. A declaration that the Respondent be apprehended and charged in a criminal Court of law for theft of Kshs.650, 000,000/= (Kenya shillings six hundred and fifty million only) and Kshs.900,000/= (Kenya shillings nine hundred thousand only) being the property of Mumias Sugar Co. Ltd.

f. A declaration that a comprehensive financial audit be done on Mumias Sugar Co. Ltd during the period 2008 to 2012 when the Respondent was the Managing Director of the said Company to give a true and comprehensive financial picture of the status of the company.

g. A declaration that the Respondent be charged with engaging in fraudulent and scandalous financial accounting of Mumias Sugar Co. Ltd, insider trading and any other offence that this Honourable Court may prefer.

h. This Honourable Court be pleased to issue any other order that it may deem to be fit and just to ensure that public interest is protected and the Rule of Law is upheld.

(i) Costs of this Petition.

36. From the above Prayers, it is apparent that the Petition is premised on allegations of fraudulent dealings and engagements on the part of the Respondent and that is why the Petitioner urges this Court to grant orders whose effect is to have the Respondent charged for criminal offences. On that basis, I must out rightly decline the invitation by the Petitioner to encroach into the mandate of the office of the Director of Public Prosecutions and the National Police Service in regard to conducting investigations and instituting criminal proceedings. **Article 157** of the **Constitution** establishes the Office of the Director of Public Prosecutions and outlines his functions and powers. The relevant parts of the Article in relation of the present matter are the following:

1. There is established the office of Director of Public Prosecutions.

2. ...

3. ...

4. The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service any information or allegation of criminal conduct with any such direction.

5. ...

6. The Director of Public Prosecutions shall exercise State powers of prosecution and may-

a. Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

b. Take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

c. Subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

7. ...

8. ...

9. ...

10. The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

11. ...

37. It is therefore clear that the mandate of instituting Court proceedings where alleged criminal offences have been committed lies with the Office of the Director of Public Prosecutions and furthermore, where a person has evidence that a criminal offence has been committed, that person is entitled to move the relevant authorities to take the necessary action as permitted by law. The relevant authorities herein remain the office of the Director of Public Prosecutions and the Office of the Inspector General of Police

whose mandates includes the investigation of any particular offence(s).

38. For the foregoing reasons, it is not within the mandate of this Court to sit as a Criminal Court of first instance, without any input of the relevant criminal justice players to make a finding whether the Respondent is guilty or not guilty of criminal offences pertaining to fraud and theft of funds belonging to the Mumias Sugar Co. Ltd. and whereas this Court has unlimited original jurisdiction in criminal and civil matters by dint of **Article 165 (3) (a)** of the **Constitution**, such jurisdiction is only to be exercised sparingly and in the clearest of cases. This case is not one such case.

39. I must reiterate that while the Constitution under **Articles 22** and **258** grant every individual the right to institute proceedings claiming that the Constitution has been contravened or is threatened with contravention, this right must be exercised in appropriate cases and where substantive constitutional questions arise which warrant the invocation of this Court's jurisdiction. In the present case, and for the reasons that I have stated above, the facts giving rise to the present Petition ought to be raised with the relevant constitutional bodies and it is not for this Court to usurp the investigative powers of the police and the prosecuting powers of the Director of Public Prosecutions. This Court cannot further purport to sit to make findings pertaining to the innocence or otherwise in regard to allegations of fraud and falsification of accounts of the Company in question. Additionally, it should not be lost that the principle of derivative action still applies in cases such as this, where it is alleged that wrongs have been committed against a company by its former directors and a constitution petition cannot be used as a substitute for such a derivative action.

40. On the question whether this Court has the jurisdiction to give advisory opinions, the Constitution is explicit under **Article 163 (6)** which is to the effect that:

“The Supreme Court may give an advisory opinion at the request of the national government, any state organ, or any County Government with respect to any matter concerning County Government.”

I have not seen any provision under **Article 165** of the **Constitution** granting this Court the powers to issue advisory opinions and as such, I must decline the invitation by the Petitioner to do so.

41. Having addressed the substantive issues arising from the Preliminary Objection, and having addressed only matters of law as opposed to matters of fact, no other issues arise for determination in the present Ruling.

Disposition

42. Based on my findings above, the Preliminary Objection dated 13th August 2015 succeeds and the Petition dated 5th August 2015 is hereby struck out.

43. Noting that the Petitioner is now deceased, I shall make no orders as to costs.

44. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF AUGUST, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Miss Nderu for Petitioner

No appearance for Respondent

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE