



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 577 OF 2016**

**IN THE MATTER OF AN APPLICATION BY ARTHUR MUKIRA  
GACHUGI FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
BY WAY OF CERTIORARI PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER FOR ARTICLES 23(3) (F), 27, 28, 47  
AND 50(1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SECTIONS 4, 6,7,10 (1), 11 AND 12 OF  
THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015.**

**BETWEEN**

**ARTHUR MUKIRA GACHUGI.....APPLICANT**

**VERSUS**

**KENYA TEA DEVELOPMENT HOLDINGS LTD.....1<sup>ST</sup> RESPONDENT**

**CHINGA TEA DEVELOPMENT**

**AGENCY HOLDINGS LTD.....2<sup>ND</sup> RESPONDENT**

**JOHN KENNEDY OMANGA.....3<sup>RD</sup> RESPONDENT**

**AND**

**PETER TIRAS KANYANGO.....INTERESTED PARTY**

**RULING (1)**

1. This ruling determines the ex parte applicant's chamber summons application dated 18<sup>th</sup> November 2016 wherein the ex parte applicant herein, Mr Arthur Mukira Gachugi seeks leave of this court to apply for Judicial Review Orders of certiorari, prohibition and mandamus against the decision of the 1<sup>st</sup> respondent Kenya Tea Development Agency Limited dated 14<sup>th</sup> November 2016; the decision of the 2<sup>nd</sup> respondent Chinga Tea Factory Limited dated 15<sup>th</sup> November 2016 and the advertisement dated 16<sup>th</sup> November 2016 by the 3<sup>rd</sup> Respondent John Kennedy Omanga, the Company Secretary for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

2. It is claimed by the applicant in the prayers sought, grounds in support thereof and the statutory statement as verified by the ex parte applicant's affidavit sworn on 18<sup>th</sup> November 2016 and the annexures thereof that the applicant herein has been a sitting duly elected director of the 2<sup>nd</sup> respondent company Chinga Tea Factory Ltd for the past 12 years and that the 2<sup>nd</sup> respondent is an affiliate company of the 1<sup>st</sup> respondent which is the holding company for many other tea factory companies. That the 2<sup>nd</sup> respondent company falls within zone 4 of Nyeri County and that the applicant has been serving as the 2<sup>nd</sup> respondent's Chairman of the Board of Directors while also serving, by virtue of his elective position, as a director of the 1<sup>st</sup> respondent company.

3. Further, that the 3<sup>rd</sup> respondent is the Company Secretary of the 1<sup>st</sup> respondent as well as for all the subsidiary companies affiliated to the 1<sup>st</sup> respondent company. It is alleged by the applicant that he attended Chinga Boys High School for his 'O' level education and successfully completed his 'O' level education in 1976.

4. That thereafter the applicant proceeded to Strayer College in the United States of America where he undertook an academic bridging course and thereafter obtained two degrees one in Associate Arts Marketing and Retailing and a Bachelor of Science, Business Administration in 1982 and 1983 respectively.

5. That he has also participated in various programmes in governance and that since 2004 he has served as a sitting director of the 2<sup>nd</sup> respondent and that during that time, his academic qualifications have never been challenged since he has always complied with Article 88(2) of the 2<sup>nd</sup> respondent's Articles and Memorandum of Association which requires that for one to qualify as a director, he /she must have attained an 'O' level qualification as the minimum qualification.

7. That when a vacancy arose for the position of board member of the 1<sup>st</sup> respondent in September 2016, the applicant herein submitted all his academic papers for clearance and he was cleared by the 3<sup>rd</sup> respondent to contest and that prior to that, he wrote to Kenya National Examinations Council (KNEC) which submitted to the Regional Management informing them of his statement results before he was prequalified to contest for the said position of Board member of the 1<sup>st</sup> respondent company.

7. That besides the applicant, other contestants who were cleared to contest for the same position are one Mr Daniel Ndogoto the Director of Ragati Tea Factory Ltd and Peter Kanyago who is the interested party herein.

8. That on 26<sup>th</sup> October 2016, the applicant participated in the scheduled elections and was issued with an election certificate on 28<sup>th</sup> October 2016 by Willis Odhiambo the returning officer for zone 4.

9. That after the said election, the interested party herein Peter Tiras Kanyago having lost to the applicant, filed to the KTDA (Holdings) Ltd and Chinga Tea Factory Company Ltd challenging the applicant's academic qualifications.

10. That the applicant challenged the petition both on its merits and the powers of the Company

Secretary, the 3<sup>rd</sup> respondent herein to nullify the elections which the applicant believed were fairly and validly conducted.

11. That despite the applicant's protest that the 3<sup>rd</sup> respondent had no jurisdiction to hear and determine the merits of the petition challenging the elections, on 3<sup>rd</sup> November 2016 the 3<sup>rd</sup> respondent wrote to the applicant maintaining that the 3<sup>rd</sup> respondent had the jurisdiction to entertain the petition and that his powers were within the law namely, Article 86 of the KTDA (Holdings) Articles of Association and the Companies Act.

12. That the 3<sup>rd</sup> respondent also send to the applicant a copy of the legal interpretation on whether the result 9 in the East African Certificate Examinations would amount to a qualification of the said examination.

13. That the applicant protested vide his letter to the 3<sup>rd</sup> respondent dated 10<sup>th</sup> November 2016 against the legal interpretation of his academic qualifications by 3<sup>rd</sup> parties without involving him or giving him a hearing on the same.

14. That on 14<sup>th</sup> November 2016 the 3<sup>rd</sup> respondent delivered a ruling holding that the applicant did not possess the required academic qualifications to be elected to the board of directors of the 1<sup>st</sup> respondent.

15. That following that ruling, the applicant vide the letter dated 15<sup>th</sup> November 2016 communicating the decision of 14<sup>th</sup> November 2016 to the applicant and declaring the vacancy of office of director of Chinga Tea Factory Company Ltd the 2<sup>nd</sup> respondent and that therefore his office stood vacated with effect from 15<sup>th</sup> November 2016, the date of the said communication.

16. That on 16<sup>th</sup> November 2016, the said 3<sup>rd</sup> respondent issued an advertisement informing members of the 2<sup>nd</sup> respondent to submit their required academic papers before 5<sup>th</sup> December 2016 for the position of the Director which the applicant occupies.

17. That the applicant therefore had no other avenue of challenging those two decisions of the 3<sup>rd</sup> respondent but to come to court by way of Judicial Review, averring that the exercise of the powers of entertaining an elections petition and disqualifying the applicant as director and declaring his position vacant is without jurisdiction, was unreasonable in that the applicant was never allowed to be represented by an advocate contrary to Section 4(3) (e) of the Fair Administrative Action Act; that the act of removing the applicant as director is in excess of jurisdiction and Contrary to Section 7(2) (a) (1) of the Fair Administrative Action Act in that the company secretary who is appointed by a Board of Directors has no power to declare a director unqualified or to remove a director from office.

18. That no ordinary resolution was never passed in a meeting of Directors of the 1<sup>st</sup> Respondent to remove the applicant which act by the 3<sup>rd</sup> respondent therefore offends the provisions of Article 139 of the Companies Act. Further, that there was no special notice for a resolution for the removal of the applicant as director.

19. According to the applicant, the 3<sup>rd</sup> respondent's letters of 3<sup>rd</sup> and 15<sup>th</sup> November 2016 were an abuse of office and made in bad faith, was biased since the 3<sup>rd</sup> respondent reports directly to the interested party who filed the petition challenging the applicant's qualifications and after elections.

20. That the 3<sup>rd</sup> respondent never called upon the applicant to argue out his position in the petition before the decision of disqualification was made which was a breach of the applicant's legitimate expectation to be heard before a decision was made.

21. That the conduct of the 3<sup>rd</sup> respondent violated Article 10 of the Constitution on good governance, integrity, transparency and accountability hence it should be declared a nullity.

22. All the respondents filed a joint replying affidavit sworn by the 3<sup>rd</sup> respondent John Kennedy Omanga on 24<sup>th</sup> November 2016 opposing the applicant's chamber summons application.

23. In his depositions, the 3<sup>rd</sup> respondent contends that he is the Company Secretary for the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

24. That the 3<sup>rd</sup> respondent is also mandated to act as Company Secretary for all the subsidiary Tea Factory Companies affiliated to the 1<sup>st</sup> respondent and which number 54 country wide, hence he served as a Group Company Secretary and that his duties and responsibilities are derived from various instruments including, Memorandum and Articles of Association of the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent, the Management Agreement; KTDA Factory Directors' Code of Conduct, the Board of Governance Manual/Charter; his job description; the Companies Act; the Certified Public Secretaries Act. That his duties and responsibilities as the Group Company Secretary include:

- Overseeing the provision of legal and secretarial services to the 1<sup>st</sup> and 2<sup>nd</sup> respondents .
- Overseeing and managing the Directors' electoral process to the 1st and 2nd respondents
- Ensuring the 1<sup>st</sup> and 2<sup>nd</sup> respondents comply with the statutory and other regularity requirements, including the Companies Act and their respective Memorandum and Articles of Association.
- Offering Secretarial services to the Board of Directors of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

25. Mr Omanga deposed that the Directors of the 1<sup>st</sup> and 2<sup>nd</sup> respondents can either come into office through appointment or election.

26. With regard to appointment, it would be done by either subscribers, the Board of Directors or the shareholders/company.

27. That on the other hand, elections are done by shareholders by way of a secret ballot and that the applicant herein is a tea grower within the 2<sup>nd</sup> respondent's catchment area and his electoral area is Gikigie Electoral Area, and that elections of directors of the 54 Tea Factory Companies is done by eligible Tea growers/shareholders, whereas election of directors for the 1<sup>st</sup> respondent is done by Directors of the 54 Corporate shareholding Tea Factory Companies as clustered into electoral zones where Directors of each Tea Factory falling within a particular electoral zone convene on a scheduled election date and vote in one of their own as a representative board member nominee to the Board of Directors of the 1<sup>st</sup> respondent.

28. That in accordance of all the Articles and Memorandum of Association of the 1<sup>st</sup> & 2<sup>nd</sup> respondents, a director must meet the minimum qualifications to be elected and among those minimum qualifications are that one must have an 'O' level qualifications education.

29. That previously, the applicant herein never submitted his 'O' level certificate for the previous elections in 2011/2012 and following the new requirement for 'O' level qualification, the Management Agent KTDA wrote to KNEC to establish whether a result **9 fail** was a qualification but that no response was received.

30. That the applicant was therefore prequalified for elections in 2011/2012 and that the applicant

served his entire term as Director of the 2<sup>nd</sup> respondent until the election year 2015/2016 when his tea area was due for fresh elections of director under the 1/3 retirement directors' Rule and after being prequalified and successfully contesting for Directorship, he was elected as director of the 2<sup>nd</sup> respondent, after his documents including KNEC's verification letter, were approved by the Verification Committee for zone Four Director's elections.

31. That the 3<sup>rd</sup> respondent, after the elections wherein the applicant was elected, received a complaint from the interested party herein complaining that the applicant did not have a valid 'O' level qualification hence the inquiry made to KNEC which resulted in the communication of 25<sup>th</sup> October 2016 that the applicant's grade 9 was a fail in 'O' level.

32. That after receiving the petition, the 3<sup>rd</sup> respondent informed the applicant who wrote a detailed defence and that thereafter he rendered a decision on the preliminary objection raised by the applicant on the 3<sup>rd</sup> respondent's jurisdiction to hear and consider the petition.

33. Thereafter, that the 3<sup>rd</sup> respondent sought 5 external legal experts' opinion on the issue of the applicant's 'O' level qualifications for Directorship and which opinion he received and proceeded to render a decision on the merits of the petition by the interested party which he communicated to him after receiving his response to the legal opinion by the 5 independent legal experts.

34. That the 3<sup>rd</sup> respondent vide letter of 15<sup>th</sup> November notified the applicant of the findings and his disqualification as a director and or vacation of office and he also notified the vice chair and directors of Chinga Tea Factory of the vacation of office of the applicant.

35. That as the Group Company Secretary of the 1<sup>st</sup> respondent, the Managing Agent and its associate and subsidiary companies KTDA (Ms) Ltd and 54 Tea Factories managed Companies inclusive of the 2<sup>nd</sup> respondent, the 3<sup>rd</sup> respondent is the proper and competent office/person to preside over and or determined all matters relating to, touching on and or incidental to election of the Directors of the companies which he serves as the Company Secretary.

36. That the applicant voluntarily submitted to the jurisdiction of the 3<sup>rd</sup> respondent to hear and determine a petition challenging his educational qualifications and that he actively participated in the ensuing proceedings thereon, including raising a preliminary objection which was overruled; and that the applicant presented his defence which was considered hence his disqualification and vacation of office of a director is well grounded in both law and fact.

37. That the applicant failed his 'O' level; that his foreign certificates do not meet the recognition criteria pursuant to the Universities Act No. 42 of 2012 and Regulations/guidelines made there under.

38. That the issue of the applicant's qualification had never been determined prior to 14<sup>th</sup> November 2016 and that the applicant was cleared for elections by verifying committees for each of the election years 20<sup>th</sup> January 2012, 2015/2016 and not the 3<sup>rd</sup> respondent herein. That the 3<sup>rd</sup> respondent had received complains concerning the applicant's 'O' level qualification prior to the commencement of the voting period.

39. That there was no misconduct on his part in hearing the petition and that the defence by the ex parte applicant had a legal hand in its preparation.

40. Further, that no prejudice was caused to the applicant for not being represented by an advocate as the interested party was also not represented by an advocate.

41. The 3<sup>rd</sup> respondent denied that the applicant was removed from office but that he was disqualified from holding office by operation of Article 104(a) and 88(2) of the Articles and Memorandum of Association of the 2<sup>nd</sup> respondent and that he was accorded a fair hearing after

carrying out due diligence on the qualification of other candidates as well.

42. That the applicant having been disqualified after elections, it was in order to declare that position of director vacant for fresh elections to be conducted hence the notifications for submission of applications in the normal manner.

43. That neither of the respondents are a public body hence Judicial Review orders cannot issue; that his acts and omissions are in his capacity as Company Secretary of the 1<sup>st</sup> and 2<sup>nd</sup> respondents hence the suit is a nullity in law for seeking to hold the 3<sup>rd</sup> applicant personally liable as no cause of action lies against him.

44. That this 'suit' is an afterthought, hopelessly defective, misconceived, frivolous, vexatious, devoid of merit and an abuse of court process and therefore the same should be struck out and or dismissed with costs.

45. That to grant the orders sought will paralyze operations of the respondents and render the Articles and Memorandum of Association of the 1<sup>st</sup> and 2<sup>nd</sup> respondents of no effect and that the applicant can take positive steps to get the 'O' level qualification before seeking for the position of director of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

46. The interested party Mr Peter Tiras Kanyago filed a replying affidavit sworn by himself on 23<sup>rd</sup> November 2016 opposing the application herein and deposing and maintaining that his petition as heard and determined by the 3<sup>rd</sup> respondent was merited in the sense that the applicant lacked academic qualifications to vie for elections of Director of the 2<sup>nd</sup> respondent. That he presented the petition to the returning officer who nonetheless directed elections to proceed as the petition is presented to the 1<sup>st</sup> respondent for consideration.

47. The interested party further maintained that the applicant was given a fair hearing as he responded to the petition at length and that he even raised a preliminary objection on the jurisdiction of the 3<sup>rd</sup> respondent to hear and determine the petition, which preliminary objection was dismissed.

48. Further, that the communication by the 3<sup>rd</sup> respondent which is impugned herein was in order and procedurally correct since the applicant was not qualified to vie for position of director of 2<sup>nd</sup> respondent for lack of minimum academic qualifications. He denied influencing the decision of the 3<sup>rd</sup> respondent.

49. The interested party further deposed that the applicant was never denied the opportunity to avail a lawyer to represent him at the hearing of the petition and that as he never asked to avail a lawyer he waived that right; that having been found unqualified to hold office of director, it was in order for the 3<sup>rd</sup> respondent to communicate that fact to the shareholders to elect a qualified person as director. The interested party relied on Articles 88(2) and 105(a) of the Articles and Memorandum of Association of the 2<sup>nd</sup> respondent which provide for the minimum qualifications for election as director. He further deposed that the events which are to take place on 25<sup>th</sup> November 2016 are unknown.

50. In the supplementary affidavit of the applicant, it is deposed that the 2<sup>nd</sup> respondent held a board meeting on 8<sup>th</sup> November 2016 chaired by the applicant wherein it was decided that the next meeting would be held on 25<sup>th</sup> November 2016 to discuss the operations of the 2<sup>nd</sup> respondent, procurement and to read the minutes of the previous operation meeting, matters arising and any other business hence the request for orders of stay of any action that is prejudicial to his interests by the respondent including the intended meeting.

51. All the parties advocates ably argued the chamber summons and opposition thereto at short

notice on 24<sup>th</sup> November 2016 from 2.30 pm until 6.00pm when this court retired to write this ruling for delivery this morning.

52. In the submission by Mr Kanjama counsel for the applicant, he relied on the grounds in the statutory statement, the verifying affidavit and annexures and urged the court to grant the orders sought on both limbs for leave to apply for the Judicial Review orders of certiorari, mandamus and prohibition and that leave if granted do operate as stay of the decisions made by the respondents.

53. Counsel reiterated the applicant's depositions as reproduced in this ruling and maintained that what his client had demonstrated before this court was that he had an arguable case. In Mr Kanjama's view, the 3<sup>rd</sup> respondent lacked jurisdiction and acted ultra vires in purporting to disqualify the applicant from being a director of the 2<sup>nd</sup> respondent and even purporting to disqualify the applicant from being a director of the 2<sup>nd</sup> respondent company and even purporting to remove the applicant from holding office of director and declaring such office vacant for fresh elections to be conducted hence the matter herein is amenable for Judicial Review.

54. Further, that the Fair Administrative Action Act No. 4 of 2015 applies to all persons including public and private individuals where a decision of such bodies affect the rights of individuals. It was submitted that the 3<sup>rd</sup> respondent flouted the law and more so, Section 4, 5 and 7 of the Fair Administrative Action Act.

55. As to whether leave to apply for Judicial Review orders should operate as stay, Mr Kanjama submitted that since the 3<sup>rd</sup> respondent purported to annul the election of the applicant and has called for fresh applications for the applicant's position to be submitted by 5<sup>th</sup> December 2016, if the stay is not granted then the process will affect the applicant's rights.

56. Further, that the Annual General Meeting of the 1<sup>st</sup> respondent is due to take place anytime. Mr Kanjama relied on three authorities to articulate the point that where stay is efficacious, the court should not hesitate to grant leave and that such leave do operate as stay.

57. The authorities are: **William Kassait Kamket V Clerk County Assembly of Baringo [2015] e KLR; Republic Vs The Institute of Certified Public Accountants of Kenya Exparte Julius Ngumbau Mwengei T/A Mwengei & Associates [2012] e KLR;** and **Lady Justice Joyce N. Khaminwa V Judicial Service Commission & Another [2014] e KLR;** and the court was urged to grant the prayers for leave and that the leave do operate as stay until the hearing and determination of the substantive motion within the shortest time possible.

### **Submissions**

58. Mr Milimo counsel for the respondents vehemently opposed the application and relied on the depositions in the joint replying affidavit sworn by the 3<sup>rd</sup> respondent, and the preliminary list of the bundle of authorities as filed.

59. According to Mr Milimo, the issues involve a shareholder who is also a former director of the 2<sup>nd</sup> respondent. That the relationship between a shareholder and a company is contractual and governed by Articles of Association of the 1<sup>st</sup> and 2<sup>nd</sup> respondent. That the applicant is a contractual employee of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and that any dispute between a shareholder and the three respondents can only be a civil claim which cannot elevate itself to fall within the realm of Judicial review proceedings.

60. In Mr Milimo's view, the main question is of disqualification of a director who fails to meet conditions articulated in the Articles and Memorandum of Association of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

61. Counsel submitted that there is no statutory or procedural law governing qualifications of a director

and that the prequalification process of the applicant as a director which included the election process prior to his being nominated as a nominee director is the Articles of Association of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

62. Counsel for the respondents submitted that when the questions arose as to the qualifications of the applicant's nomination as a director of the 2<sup>nd</sup> respondent, that question was placed before the 3<sup>rd</sup> respondent. That there is no dispute that the applicant participated in the process of determination of the question of whether or not he was qualified to hold the position of director, upon the interested party filing a petition challenging the applicant's qualifications.

63. That the petition was served on the applicant and he filed a detailed response to that petition and annexed documents in support of his defence as shown at pages 302-310 of the respondents' reply. That the applicant also raised a preliminary objection to the jurisdiction of the 3<sup>rd</sup> respondent to handle the matter. That the detailed response at page 302-305 shows that the applicant received legal advice and so he expected a decision, having fully participated in those proceedings.

64. According to the respondents, the applicant did not meet the conditions to be prequalified as the director for the 2<sup>nd</sup> respondent in accordance with Article 88(2) of the Articles of Association of the 2<sup>nd</sup> respondent, after the Kenya National Examinations Council revealed that the applicant failed his '0' level.

65. It was further submitted the 3<sup>rd</sup> respondent has the powers to oversee elections of all companies affiliated to the 1<sup>st</sup> respondent. Reference was made to page 109 Clause 2: 2-9 which is a Management Agreement between the 2<sup>nd</sup> respondent and 1<sup>st</sup> respondent granting the 1<sup>st</sup> respondent powers to undertake certain duties in the management and conduct of affairs of the 2<sup>nd</sup> respondent by KTDA Management Services Ltd on 10<sup>th</sup> November 2009. It was therefore submitted that the 1<sup>st</sup> respondent is mandated to ensure that the 2<sup>nd</sup> respondent complies with its Memorandum and Articles of Association.

66. It was submitted that the 3<sup>rd</sup> respondent also serves as the Company Secretary of the Companies and he is assigned duties by the management agreement. That every Director who serves in the 2<sup>nd</sup> respondent must be qualified. The 2<sup>nd</sup> respondent was incorporated on 6<sup>th</sup> August 1963. And that it was within the mandate of the 3<sup>rd</sup> respondent to ensure non compliance with the law and the Articles of Association was dealt with.

67. The court was referred to the job description of the 3<sup>rd</sup> respondent at page 195-197 of the respondents' bundle, and that being the Group's Company Secretary it was therefore within his powers to entertain the petition and make the decision as he did in this case.

68. Mr Milimo also submitted that the prequalification process of the applicant was done by the 2<sup>nd</sup> respondent and that the minimum qualifications were placed in 2012 and therefore KNEC was consulted to provide details of the qualifications of the applicant, although the issue remained unresolved until 14<sup>th</sup> November 2016.

69. On the orders being sought, it was submitted that those orders are provided for by Section 8 of the Law Reform Act. And that those orders can only be granted against a public body. That the three respondents are private entities; the third respondent is a person and an officer of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. That any acts of omission or commission are done on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. That the 3<sup>rd</sup> respondent cannot be personally liable so, no order ought to lie against him as a person and therefore the orders sought against him do not lie in law.

70. Mr Milimo urged the court not to grant leave as it will be an exercise in futility to grant the leave sought against private entities. He relied on the case of **Joccinta Wanjiru Raphael v William Nangulu- Div Cr Investigations Officer KMakadara%2 others [2014] eKLR.**

71. According to Mr Milimo, the orders sought herein are not among the remedies set out under Section 11 of the Fair Administrative Action Act. That the remedies of Certiorari, mandamus and prohibition are excluded from Section 11 of the Fair Administrative Action Act hence they only fall under Section 8 of the Law Reform Act and that, that is why leave is not required under the Act.

72. It was submitted that there is a difference between removal of a director under Section 139 of the Companies Act, and disqualification of a director. That the latter is not provided for under the Companies Act.

73. In the instant case, it was submitted that the applicant was never qualified to serve as director and that Article 104(a) of the Articles of Association of the 1<sup>st</sup> respondent is clear on disqualifications of directors in that there is automatic disqualification if one fails to meet the minimum requirements to hold office of a director hence Section 139 of the Companies Act which provides for removal of director cannot be invoked.

74. Mr Milimo further submitted that there is nothing to be stayed as the applicant ceased to hold office on 15<sup>th</sup> November 2016. That the applicant is not holding any directorship of the 2<sup>nd</sup> respondent. It therefore follows that holding of meetings of the 2<sup>nd</sup> respondent cannot be stayed as his absence does not create any lacuna or lack of quorum, and that the notice of call elections has already been issued by the 2<sup>nd</sup> respondent.

75. Counsel for the respondents further submitted that the Annual General Meeting of 1<sup>st</sup> respondent is not an issue before this court hence it should not be raised here.

76. It was submitted that the applicant was granted every opportunity to be heard and the question before the 3<sup>rd</sup> respondent was on the applicant's qualifications to participate in the elections and not on the outcome of elections.

77. In Mr. Milimo's view, the orders sought are not merited and that the applicant does not have a prima facie case.

78. Finally, Mr Milimo submitted that the 1<sup>st</sup> respondent has hundreds of farmers comprising it so it should be allowed to run and not enjoined. He urged the court to dismiss the application.

79. Mr Nyamogo counsel for the interested party submitted opposing the applicant's application. On the allegation that there was no hearing of the petition against the applicant, counsel submitted that there was a hearing and that courts are also allowed to hear matters under certificate of urgency ex parte and in the absence of the parties.

80. On the criteria for grant of leave and stay, it was submitted that the applicant has invoked Section 8 of the Law Reform Act and Order 53 of the Civil Procedure Rules. That Judicial Review looks at the process not merits of the decision. That the impugned decision does not seek to remove the applicant as director of 2<sup>nd</sup> respondent, but that it is Article 88 and Article 104 (a) of Articles and Memorandum of Association of the 2<sup>nd</sup> respondent that disqualified the applicant from being a director.

81. That Article 88(a) is a mandatory requirement on qualifications and that Article 104(a) deals with disqualifications of directors (ceasing) and envisages a director who is sitting then he loses the capacity to sit as a director and so is Article 88(4) relevant.

82. In Mr Nyamogo view, the applicant ceased to qualify as director when on 25<sup>th</sup> October 2016 KNEC wrote a letter setting out that the applicant did not have 'O' level qualifications hence it is not the decision of the 3<sup>rd</sup> respondent that caused the applicant to cease being a director of the 2<sup>nd</sup> respondent.

83. It was also submitted that the second ground misreads Section 4(3) (e) of the Fair Administrative Action Act in the sense that that Section does not establish any right for the applicant. That the purpose of Fair Administrative Action Act can be discerned from the long title and that Article 47 of the Constitution establishes the right which is replicated in Section 4 of Fair Administrative Action Act. Further, that the Act places a duty on the administrator which duty is not absolute but only where applicable.

84. It was submitted that the 3<sup>rd</sup> respondent established that the applicant only attained a fail so he was entitled to find the way he did. Reliance was placed on **JR 43/2016 Imaran Ltd Vs Imperial Bank & Others** paragraph 135 and 137 thereof and **JR 106/2016 paragraph 113**.

85. Mr Nyamogo concluded that the orders sought do not lie.

86. On the prayer for stay, it was submitted that there must be an incomplete process, to do substantive justice to the parties. That the prayer for stay must be pleaded with sufficient particularity for the court to discern what is to be stayed. It was submitted that Prayer No. 9 only says: Leave granted do operate as stay, but that it is not stated stay of what, hence it was not for this court to say stay of what.

87. It was further submitted that Paragraph 7 of the supplementary affidavit tends to provide a prayer which was not pleaded in the reliefs sought is in the chamber summons.

88. It was further submitted that if stay were to be granted the operations of the 1st and 2nd respondents. Counsel urged the court to dismiss the chamber summons with costs to the respondents and the interested party.

89. In a rejoinder, Mr Kanjama counsel for the applicant submitted that the William **Kassait Kamket** case was clear as to what the court should not do.

90. Further, that the court is to determine whether the case herein is frivolous or arguable and that the same position holds for the 2<sup>nd</sup> case of **Honourable Lady Justice Joyce Khaminwa** as cited from paragraph 15.

91. It was submitted by Mr Kanjama that whereas the respondents had submitted at length on the merits of the substantive motion, the court should decline to enter into a detailed inquiry of the contested matters and facts.

92. On the question of whether the application for stay is merited, it was submitted that the test as per the decision in **William Kassait** case, is to avoid the application being rendered nugatory by acts of the respondents and where stay is efficacious the court should not hesitate to grant it, which issue was considered in the case of Lady Justice Joyce Khaminwa at page 19-20.

93. On the scope of Judicial Review it was submitted that in light of the Fair Administrative Action Act, Article 165(6) and (7) of the Constitution are relevant, and that the Constitution cannot be circumscribed by a statute. Further, that Article 47 refers to *every person* with sub article (3) giving Parliament powers to enact legislation to operationalised Article 47 (1).

94. It was further submitted that the Fair Administrative Action Act must be interpreted in light of Articles 47 and 50 of the Constitution and that Article 23 allows the court to grant any order including Judicial Review where it is shown that a right is violated.

95. It was further submitted that the Fair Administrative Action Act applies to both public and private individuals.

96. It was also submitted that Section 11 of the Act is also clear that the Act does not restrict orders to be granted in Judicial Review, as the language used is prohibiting, setting aside, restraining,

compelling, etcetera.

97. Mr Kanjama submitted that Section 9(1) of the Act grants to an aggrieved person the right to apply for Judicial Review to the High Court. That Section 10(1) of the Act imports Article 159 of the Constitution on procedural technicalities. Counsel urged the court to robustly reject technicalities. Further, that the Chief Justice has not made any rules hence Order 53 of the Civil Procedure Rules apply on applications for Judicial Review. In his view, the principal statement for relief is the statutory statement which sets out clearly the orders sought.

98. It was submitted that the prayers were clear on what was to be stayed which is the implementation of a decision.

99. On the argument that this matter is governed purely by contractual relationships, it was submitted that the issue was not substantiated and that there was no proof of where the 3<sup>rd</sup> respondent got the power to remove or disqualify the applicant, which act is completely ultra vires, as only shareholders can remove a director. It was submitted that the 3<sup>rd</sup> respondent's actions are abuse of power.

100. Mr Kanjama further submitted that Section 139 of the Companies Act stipulates how a director can be removed from while the 1<sup>st</sup> and 2<sup>nd</sup> respondents' instruments of incorporation provides for the procedure for election of directors therefore the respondents cannot, after election of a director seek to remove the director through the process used in this case against the applicant.

101. On the issue of '0' level Certificate, it was submitted that the respondents deliberately failed to say that the applicant had 2 degrees.

102. On the authorities relied upon by the respondents it was submitted that they are all prior to the commencement date of the Fair Administrative Action Act which came into force on 17<sup>th</sup> June 2015 hence not relevant to this case.

103. On the applicability of Nrb **JR 43/2016**, it was submitted that paragraph 184-185 of that decision are the dispositions and remedies, and that in that case the court recognizes expansion of Judicial Review jurisdiction of the court by the Fair Administrative Action Act.

104. On the issue of the scope of Judicial review remedies, it was submitted that the question is whether Judicial Review affects decisions of private bodies so long as they affect legal rights of persons on the basis of Article 47 of the Constitution. Further, that the Fair Administrative Action Act introduces an element of merit review in Judicial Review matters.

105. On the applicability of Judicial Review 106 **of 2016** it was submitted that, paragraphs 114 and 115, 116, 118, 119, of that decision show the procedural problems. Further, that unlike in that case, in this matter there are no alternative remedies or procedure for challenging the decisions of the respondents

106. Mr Kanjama maintained that the applicant had demonstrated that he has a substantive matter for determination in a substantive motion and if stay is not granted as particularized in the statement, this application will be rendered nugatory and that actions will be taken to appoint other directors in zone 4.

107. Mr Kanjama further added that there was a meeting scheduled for the following day among other actions which should be stayed and that status quo should be maintained until this ruling is delivered.

108. Counsel urged the court to give an order to stop any implementation of the decision of the respondents so that Article 48 of the Constitution is not reduced into a hollow right in substance.

## **Determination**

109. I have carefully considered the chamber summons and the prayers sought by the applicant. The application, from the citations is brought under the provisions of Articles 23 (3) (f), 27,28, 47,48 and 50(1) of the Constitution of Kenya, 2010; Sections 4,6,7,10(1) 11 and 12 of the Fair Administrative Action Act No. 4 of 2015, Articles 159(2) (d) of the Constitution, Section 3A of the Civil Procedure Act and Order 53 Rules 1 and 2 of the Civil Procedure Rules and all enabling powers and provisions of the law.

110. In the statutory statement, grounds and verifying affidavit as well as the submission by counsel for the exparte applicant, it is alleged among others, that the 3<sup>rd</sup> respondent in determining a petition concerning academic qualifications of the applicant as nominee director was without jurisdiction, illegal, unreasonable, acted in breach of the right to a fair hearing, acted in excess of jurisdiction or ultra vires; that he abused his powers and therefore his decision in the petition and subsequent communications to the shareholders of the 2<sup>nd</sup> respondent for holding of fresh elections is null and void and that all those actions call for Judicial Review action as sought in the chamber summons.

111. On the other hand, the respondents and interested party fiercely opposed the application on all limbs contending that the dispute is not one to be resolved through Judicial Review proceedings but vide civil proceedings; that the 3<sup>rd</sup> respondent acted with jurisdiction; that the applicant is not qualified to hold office of director because of his failure to satisfy the requirements under Article 88(2) and 104 (a) of Articles and Memorandum of Association of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

112. At the hearing of this matter, the court kept reminding parties who submitted for nearly 4 hours that at this leave stage, the parties were not expected to delve so much into the merits of the intended substantive motion but to address the court on the principles which guide the court in deciding whether to or not to grant leave to apply for Judicial Review orders sought and whether such leave if granted should operate as stay.

113. Nonetheless, the parties' advocates argued this matter with a lot of vigour bringing out all the issues and matters which can only be considered at the substantive merit hearing of Judicial Review application if leave is granted.

114. The Case of **Akha Khan Education Services Kenya V Republic Exparte Self [2004] e KLR** provides useful guidance as to what is expected of this court at the leave stage. The Court of Appeal stated:

***“We think both Mr Inamdar and Mr Kigano are generally agreed in the principles of how applicable in those matters. They are agreed that in order to enable a judge to grant leave under Order 53, there must be prima facie evidence of an arguable case and for that proposition both counsel relied on this court’s decision in the matter of an application by Samuel Muchiri Wanjuguna & 6 Others and in the matter of the Minister for Agriculture and the Tea Act, CA 144/2000 in which the court approved and applied the principles to be found in the English case of Republic V Secretary of State, Exparte Herbage[1978] 1 ALL ER 324 where it was stated:***

***“ It cannot be denied d that leave should be granted, if on the material available, the court considers without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the respondent under the inherent jurisdiction of the court, to the judge who granted leave to set aside such leave- See Habbury’s Laws of England, 4<sup>th</sup> Edition, VOL 1 (1) paragraph 167 at page 1276.”***

***So once there is an arguable case, leave is to be granted and the court, at the stage, is not called upon to go into the matter indepth.”***

115. The above principle is the same that was espoused in the authorities cited by Mr Kanjama

counsel for the applicant, and there is no contrary opinion.

116. In other words, once the court is satisfied, on the material placed before it by the applicant, whether the application is *ex parte* or argued *inter partes* as was in this case, that a *prima facie* arguable case has been established, then leave to apply for Judicial Review should be granted.

117. In the instant case, the respondents and third party raised an important issue as to whether this court can grant leave to apply for Judicial Review orders against private individuals or bodies as is the case herein pitying private individuals and private companies.

118. The response by the applicant is that the position which existed long before the 2010 Constitution that Judicial Review orders could only issue against public authorities no longer holds and he cited Articles 23,47 of the Constitution and the Fair Administrative Action Act No. 4 of 2015, as well as Article 165(6) and (7) of the Constitution.

119. Under Article 23(3) (f) of the Constitution, Judicial Review is one of the remedies that can issue for enforcement of and upholding of the Bill of Rights and under Article 23(1), it is the High Court which is vested with jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights.

120. Article 20(1) of the Constitution is clear that the Bill of Rights applies to all law and binds all state organs and all persons 20(2) every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

121. The right to Fair Administrative Action is enshrined in Article 47 of the Constitution as implemented by the Fair Administrative Action Act No. 4 of 2015 which came into operation on 17<sup>th</sup> June 2015 before institution of these proceedings.

122. That being the case, this court cannot give a blind eye to the provisions of Fair Administrative Action Act. Section 2 thereof ***defines ‘administrator’ means*** “ a person who takes an administrative action or who makes an administrative decision.” The definition in the Act does not define a person to mean a public body. Furthermore, Section 3(1) of the Act is clear that the Act applies *to all state and non state agencies, including any person exercising administrative authority; performing a judicial or quasi –judicial function under the Constitution or any written law; or whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.*”

123. In the instant case, the impugned decisions were taken by the private companies and individual in the names of the respondents herein. It was not denied that the respondents were exercising administrative authority. In addition, the applicant claims that those decisions taken by the respondents affect his right to fair administrative action and the right to a fair hearing and that the decisions were made without jurisdiction and that they were abuse of power and unreasonable and breached his legitimate expectations.

124. With the above allegations, whether merited or not, the court finds that the High Court has the jurisdiction to entertain Judicial Review proceedings brought against the respondents herein who are private entities/person who made the impugned decision in the exercise of their administrative powers, and which decisions the applicant claims affect his legal rights and interests.

125. Having so found that the respondents are properly cited, and without delving into the depths of the merits of the disputed facts in the matter, the next question, therefore, is whether the applicant has a *prima facie* arguable case for this court to grant leave to apply for Judicial Review orders sought.

126. The applicant claims that the 3<sup>rd</sup> respondent had no jurisdiction to hear and determine a petition concerning the academic qualifications of the applicant as that jurisdiction is unknown in law. The court notes that the 3<sup>rd</sup> respondent is the Company Secretary for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and that

in making the decisions that he made including hearing and determination of petition and issuing notices for applications for fresh elections following the disqualification of the applicant, he signed all those decisions under his name and as Group Company Secretary, not on the order of the Board of Directors.

127. In my view, that point alone raises an arguable issue as to whether the 3<sup>rd</sup> respondent acted ultra vires or whether he abused his powers or usurped jurisdiction of the Board in making those determinations. Further, it is arguable as to whether the powers of the Secretary as contemplated in the Articles and Memorandum of Association of the two companies include hearing and determining petitions relating to election of directors.

128. It is equally arguable as to whether or not the applicant who presented his defence in writing and was not called upon to make any oral presentation of his defence and or to be represented by an advocate at the hearing was afforded a fair hearing as stipulated in Article 50(1) of the Constitution.

129. It is evenly arguable as to whether applicant's allegation of denial of legal representation amounted to denial of access to justice as stipulated under Article 48 of the Constitution and therefore whether this court should accord the applicant an opportunity to ventilate his grievances.

130. It is also arguable as to whether the 3<sup>rd</sup> respondent had the jurisdiction and mandate to declare the applicant unqualified to hold office of director; or whether he purported to remove the applicant from office and whether the 3<sup>rd</sup> respondent could declare that the KNEC's verification of 9(nine) fail at '0' level is not a qualification for purposes of Article 88(2) of the Articles and Memorandum of Association of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

131. This court also finds that there was no mention of whether there existed any internal review or appeal mechanism within the 1<sup>st</sup> and 2<sup>nd</sup> respondents which the applicant could revert to as stipulated in Section 9(2) of the Fair Administrative Action before seeking for Judicial Review.

132. For the above reasons, I find that the applicant has established that he has a prima facie arguable case to warrant indepth consideration at the substantive stage. An arguable case, however is not necessarily one that must succeed, but that at this stage, the court finds that the exparte applicant's intended Judicial Review proceedings sought to be instituted are not frivolous or vexatious or that prima facie, they appear to be an abuse of the court process. This is the very reason why I have attempted to outline above some of the arguable issues which in my view is a filtering process to weed out a case that would otherwise be hopeless at this nascent stage in order to save the court's time and that of the parties by ensuring that futile claims do not process.

133. That is the principle enunciated in **Matiba Vs Attorney General Nairobi HCC Miscellaneous Civil 790/1993** and **Republic V County Council of Kwale & Another Exparte Kondo & 57 others Mombasa HCC Miscellaneous Application 384/95**. In the latter case, the court held:

*“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.*

134. The yardstick for the grant of leave was however set by the Court of Appeal in **Mirugi Kariuki Vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

*“The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power...the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter... It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the person’s legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant’s legal rights or interests were affected. The applicant’s complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant’s interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers... In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a prima facie case. For that, he should have been granted leave to apply for the orders sought.”*

135. In **Republic Vs Communication Commission of Kenya & 2 Others Exparte East Africa Television Network Ltd [2000] KLR 82**, the Court of Appeal held that leave to apply for Judicial Review order should be granted if, on the material available, the court considers without going into the matters indepth that there is an arguable case for granting leave.

136. See also in **Re Bivac Internationale SA (Bureau Veritas) [2005] 2 EA 43**. Where the court stated:

*“Application for leave to apply for orders of judicial review are normally ex parte and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court’s discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him.... Like the Biblical mustard seed which a man took and sowed in his field and which the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stemmed from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. One can safely state that the growth of judicial review*

*can only be compared to the never-ending categories of negligence after the celebrated case of Donoghue vs. Stephenson in the last century. Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of John vs. Rees [1970] Ch 345 at 402. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration.”*

137. For the above reasons I find that the application for leave to apply for Judicial Review orders sought in prayers 2-7 of the chamber summons dated 18<sup>th</sup> November 2016 is merited and I proceed to grant such leave to apply as prayed. The substantive motion to be filed and served within 10 days from the date hereof.

138. On the prayer that leave so granted do operate as stay, it is worth noting that under Order 53(4) of the Civil Procedure Rules, where the court grants leave to apply for Judicial Review order of certiorari and prohibition, it can order that such leave do operate as stay of implementation of the decision sought to be quashed or action to be prohibited.

139. The principles that guide stay of the impugned decision(s) from being implemented are now established. Courts have held that in considering whether, even where leave is granted, it should operate as stay of enforcement of the impugned decision, the court has to be careful in what it says lest it touch on the merits of the main application for Judicial Review and that where the application raises important points deserving determination by way of Judicial Review it cannot be said to be frivolous. (See **Jared Benson Kangwana Vs Attorney General Nairobi HCC No 446 of 1995.**)

140. It has also been held that it is only where the imminent outcome of the decision challenging is likely to render the success of the Judicial Review nugatory or an academic exercise that the court would stay the said proceedings, the strength or otherwise of the applicant’s case notwithstanding. In **Taib A. Taib Vs Minister for Local Government & Others Mombasa HC Miscellaneous Application No. 158/2006** Maraga J (as he then was) held that:

*“As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the Court should always ensure that the ex parte applicant’s application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited....The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”*

141. And in **Re- Median Medical Centre HC Miscellaneous Application 363 of 2013**, it was held that:

*“.....it is only where the imminent outcome of the decision challenged is likely to render the success of the Judicial Review nugatory or an academic exercise that the court would stay the said proceedings the strength or otherwise of the applicant’s case notwithstanding. It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor.”*

142. In the **Taib A. Taib case** (supra), the court was clear that the purpose of stay order in Judicial Review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made.

143. In other words, stay is meant to prohibit the continuation of the decision-making process where the process is still ongoing. Where, however, the decision had been made, the implementation thereof can still be stayed where the same is yet to be implemented.

144. However, where the decision made had already been implemented, to grant stay would be meaningless where the effect is to maintain status quo if the status quo would be that the decision remains in force. And where the stay is granted after the decision has already taken effect, its upshot may well be to reverse the decision made by a respondent.

145. Traditionally, injunctions would not issue in Judicial Review proceedings but with the enactment of Section 11 1 (b) of the Fair Administrative Action Act No. 4 of 2015, the court can grant any order that is just and equitable including; restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant; granting temporary interdict or other temporary relief.

146. The effect of the orders of stay would be to temporarily nullify the decision made by the administrator pending the hearing and determination of Judicial Review proceedings.

147. In the instant case, respondents contend that if stay is granted, it will ground their operations and that in any event, the prayer for stay is not clear as to what is to be stayed.

148. In response, Mr Kanjama submitted that the prayer for stay is clear from paragraph 8 of the statutory statement.

149. In my humble view, the applicant having challenged the decisions of the 1<sup>st</sup> respondent as per its letter dated 14<sup>th</sup> November 2016, the 3<sup>rd</sup> respondent's letter dated 15<sup>th</sup> November 2016 and the advertisement for applications dated 16<sup>th</sup> November 2016, it cannot be said that the respondents do not know or understand what is specifically sought to be stayed.

150. The letter dated 15<sup>th</sup> November 2016 is what declares the disqualification of the applicant from holding the position or office of director in the 2<sup>nd</sup> respondent company, after he had been elected and given a certificate of election. The same letter declares the applicant's office vacant.

151. In my humble view, that decision is capable of being stayed by way of an order that the applicant continues to hold the position that he held as director of the 2<sup>nd</sup> respondent until these proceedings as commenced are heard and determined. Clearly, it was not demonstrated as to what prejudice the respondents would suffer if stay of implementation of that decision is granted.

152. In addition, the advertisement dated 16<sup>th</sup> November 2016 calling upon candidates to submit applications for nomination for the position of director as occupied by the applicant by 5<sup>th</sup> December 2016 can be stayed by way of an order suspending the implementation of the advertisement and restraining the 3<sup>rd</sup> respondent from receiving any applications and or conducting any elections to fill the "vacant" position as declared by him and or prohibiting him temporarily from advertising the position of director as held by the exparte applicant.

153. It is also possible to stay any action by the 1<sup>st</sup> respondent of appointing any person or nominee director to replace the applicant as the board member of the 1<sup>st</sup> respondent company at their future annual general meeting until this matter is heard and determined.

154. In the prayer for stay, the applicant has carefully omitted any mandatory orders.

155. The court notes that the authorities relied on by the interested party focus on the merits of the Judicial Review proceedings as they are both judgments determining Judicial Review applications hence those decisions, however relevant they may be to Judicial Review proceedings, cannot be applied to determine the question being raised in this application for leave and for leave to operate as stay of the impugned decisions of the respondent.

156. The respondent's authorities too, are relevant but are judgments of the court and therefore they do not exclusively address issues of leave and leave to operate as stay.

157. On the whole, the useful decisions relied on by the respondents and the interested party can be relied on at the hearing of the substantive motion stage since at this stage the court is only limited to determining whether there is established a prima facie arguable case and whether if stay of the impugned decisions is not granted, the applicant shall be a mere pious explorer in the judicial process if at the conclusion of the main judicial review proceedings, he is successful in his bid.

158. In **R(H) vs Ashworth Authority [2003] WLR 127 page 138** Dyson L.J. held:

*“The purpose of a stay in a Judicial Review is clear, it is to suspend the proceedings that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid in Judicial Review process and make it more effective. It will ensure, so far as possible, that is a party is ultimately successful in his challenge, he will not be denied the full benefit of his success.*

*In Aron, Glidewell, L.J. said that the phrase ‘stay of proceedings’ must be given wide interpretation so as to enhance the effectiveness of the Judicial Review jurisdiction. A narrow interpretation such as that which appealed to the Privy Council in vehicle and supplies, would appear to deny jurisdiction even in case A. That would indeed be regrettable and, if correct, would expose a serious shortcoming in the armoury of powers available to the court when granting permission to apply for judicial review. Thus it is common ground that ‘proceedings’ includes not only the process leading up to the making of the decision but the decision itself. The administrative court routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried into effect, or fully carried into effect.*

*In Republic Vs Secretary of State of Education & Science Exparte Aron County Council (NO. 2) CA [1991] 1 ALL ER 282 the Lord Justice Gladwell stated :*

*“An order that decision of a person or body whose decisions are open to challenge by Judicial Review shall not take effect until the challenge has been finally determined is, in my view, correctly described as a stay.”*

159. In **Econet Wireless Ltd Vs Econet Wireless Nigeria Ltd & Another [FHC] KD/CS/39/208** the Nigeria High Court in Kaduna stated.

*“ a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order of stay is granted, destroy the subject matter or foist upon the court... a situation of complete hopelessness or render nugatory any order of the court...or paralyse in one way or another the exercise by the litigant of his constitutional right ..... or generally provide a situation in which whatever happens to the case, and in particular even if the applicant succeeds.. there would be no return to the status quo.”*

160. In this case, the parties have invited the court to adjudicate a matter which they are disputing over and therefore the court ought not to create a situation where its decision would be worthless. And as was held in the persuasive Court of Appeal of Nigeria in **United Cement Company of**

**Nigeria Vs Dangote Industries Ltd and Minister of Solid Mineral Development [CA/A/165/2005],**  
the court ought to ensure that:

***“ appropriate orders are made to prevent acts which will destroy the subject matter of the proceedings or foist upon the courts a situation of complete helplessness or render nugatory any judgment or order.”***

161. In the instant case, there is a decision made by the 3<sup>rd</sup> respondent determining the petition filed by the interested party, which decisions declared that the applicant is unqualified from holding the position of director. It is that decision which is in the process of being implemented by the 1<sup>st</sup> and 2<sup>nd</sup> respondents through declarations of vacancy and advertisement for applicants to submit their documentation for consideration for the process of electing the applicant's replacement.

162. Those are the decisions or actions which are open to challenge before this court. In my humble view if the respondents are not prevented from implementing or continuing to implement their decisions as aforesaid, then the judicial review proceedings herein for which leave to apply has been granted will be rendered nugatory as the subject matter will have been destroyed.

163. In the end the order that commends itself for issue is that there shall be stay of implementation or enforcement of all of the decisions made by the respondents jointly and severally in furtherance of the 3<sup>rd</sup> respondent's decision made on 14<sup>th</sup> November 2016 which decision shall not take effect until the challenge herein has been fully and finally determined.

164. Consequently, I make the following orders:

- 1. The applicant herein is hereby granted leave to institute Judicial Review proceedings against the respondents and the interested party, in terms of prayers No. 2-8 of the chamber summons dated 18<sup>th</sup> November 2016.***
- 2. The substantive motion shall be filed and served upon the respondents and interested party within 10 days from the date hereof.***
- 3. The decision made by the 3<sup>rd</sup> respondent on 14<sup>th</sup> November 2016 regarding the qualifications of the applicant to hold the position of director in the 2<sup>nd</sup> respondent company and all the consequential actions taken by the 1<sup>st</sup> and 2<sup>nd</sup> and 3<sup>rd</sup> respondents in giving effect to the said decision shall not take effect and are hereby stayed pending hearing and determination of the Judicial Review proceedings.***
- 4. The 3<sup>rd</sup> respondent's letter dated 15<sup>th</sup> November 2016 on disqualification of Director and vacation of office addressed to the applicant herein giving effect to the decision of the 3<sup>rd</sup> respondent made on 14<sup>th</sup> November 2016 is hereby stayed and shall not take effect until the Judicial Review proceedings herein are heard and determined.***
- 5. The notification on submission of candidacy for directors- nominations notice dated 16<sup>th</sup> November 2016 and issued by the 3<sup>rd</sup> respondent to all founder shareholders/growers of Gikigie Electoral area of Chinga Tea Factory notifying them that the nominations for candidates for directorship of Gikigie Electoral area of Chinga Tea Factory will be carried out in the month of January 2017 following the disqualification and vacation of office of the sitting director with effect from 15<sup>th</sup> November 2016; and the issuance of election nomination notice scheduled for the month of December 2016 is hereby stayed and it shall not take effect until the hearing and determination of the Judicial Review proceedings.***
- 6. Costs of this application shall be in the main motion.***

Dated, signed and delivered at Nairobi this 25th day of November 2016.

**HON. R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr Kanjama for the exparte applicant

Mr Milimo for the respondents

Mr Milimo h/b Kibicho for the interested party

CA: Lorna