



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

PETITION NO. 111 OF 2012

IN THE MATTER OF: KENYA AIRWAYS LIMITED

AND

IN THE MATTER OF: THE COMPANIES ACT (CAP 486)

AND

IN THE MATTER OF: AN APPLICATION UNDER SECTION 211 OF THE COMPANIES ACT

AND

IN THE MATTER OF: PRAKASH KANTILAL GADANI

PRAKASH KANTILAL GADANI PETITIONER

VERSUS

KENYA AIRWAYSRESPONDENT

RULING

1. On 30th March, 2012 the petitioner filed an application under **Section 211** of the **Companies Act Cap 486 of the Laws of Kenya** and **Order 40 rules 1, 2, Order 51** of the **Civil Procedure Rules, 2010** and **Sections 1A, 1B and 3A** of the **Civil Procedure Act**.

2. The application seeks the following orders:

“1. That this application be certified urgent, deserving priority herein and ex parte in the first instance.

2. That a temporary injunction be and is hereby issued restraining the Board of Directors of Kenya Airways from offering the shares of the Company for the Rights Issue, listing them at the Nairobi Stock Exchange or in any way dealing with the shares of the Company by way of a renounceable Rights Issue of 1, 477, 169, 549 new ordinary shares (“new shares”), at a price of Kshs.14.00 per KQ Ordinary Share (“Rights Issue Offer Price”) pending the hearing of this application inter partes.

3. That a temporary injunction be and is hereby issued restraining the Board of Directors of Kenya Airways from offering the shares of the Company for the Rights Issue, listing them at the Nairobi Stock Exchange or in any way dealing with the shares of the Company by a renounceable Rights Issue of 1,477,169, 549 new ordinary shares (“new shares”), at a price of Kshs.14.00 per KQ Ordinary Share (“Rights Issue Offer Price”) pending the hearing and determination of this application *inter partes*.

4. That a temporary injunction be and is hereby issued restraining the Board of Directors of Kenya Airways from offering the shares of the Company for the Rights Issue, listing them at the Nairobi Stock Exchange or in any way dealing with the shares of the Company by a renounceable Rights Issue of 1,477,169, 549 new ordinary shares (“new shares”), at a price of Kshs.14.00 per KQ Ordinary Share (“Rights Issue Offer Price”) pending the hearing and determination of this suit.

5. **Costs of this application be provided for.”**

3. The aforesaid application was filed together with a petition by the petitioner, a minority shareholder of Kenya Airways Limited, hereinafter referred to as “**the Company**”. The petitioner holds **201,604 shares** in the Company.

4. In the petition the petitioner is seeking the following orders:

“1. A permanent injunction restraining the Board of Directors of Kenya Airways from offering the shares of the Company for the Rights Issue, listing them at the Nairobi Stock Exchange or in any way dealing with the shares of the Company by way of a renounceable Rights Issue of 1,477,169,549 new Ordinary shares) at a price of Kshs.14.00 per KQ Ordinary Share (Rights Issue Offer Price).

2. **Costs of this petition.**

3. **Or that such other order may be made in the premises as shall be just.”**

5. The petition was supported by an affidavit filed on the same day by the petitioner and which basically consists of the facts that are stated in the petition.

6. The nominal capital of the Company is Kshs.10 Billion divided into two billion shares of Kshs.5 each. The resolution to increase the share capital to that sum was made on 14th October, 2011.

7. The Company intends to raise **Kshs.20,680,373,686/=** by way of a renounceable Rights Issue of **1,477,169,549 new Ordinary shares** at a price of **Kshs.14.00 per share**.

8. The petitioner stated that the Rights Issue Offer Price represents a discount of 32.2% to the Volume Weighted Average price of the Company’s shares in the Nairobi Stock Exchange for the past 90 trading days upto and including 29th February, 2012, being the date the Board approved the Rights Issue terms. It was resolved that the Company shareholders will have the right to subscribe for 16 new ordinary shares for every 5 ordinary shares held as at 19th March, 2012. The new shares when allotted will rank *pari passu* with the existing issued ordinary shares in respect of the financial year ending 31st March, 2012. It is expected that admission of the new shares on the official list of the Nairobi Stock Exchange will become effective on 12th June, 2012.

9. The urgency of the application was however informed by the fact that the closing date for acceptance and payment of the new shares is 3.00 p.m., Friday 27th April 2012.

10. The petitioner further stated that the Net Asset Value per share as at 30th September, 2011 was Kshs.42/= and therefore the Rights Issue Offer Price of Kshs.14.00 is a discount of 66%. That means an existing shareholder who cannot take up his rights offer in full stands to lose 66% of the value of his

shares which amounts to Kshs.28 per share.

11. The petitioner further stated that:

- **Failure of Kenyans (individuals and corporate) to take up the Rights may reduce their stake in the Company to below 51% shareholding thus invalidating the Company's status as a flag carrier.**
- **Existing shareholders who are unable to take up their full allocation of rights will be disadvantaged by the sale of shares at a substantial discount to other shareholders.**
- **The period between the publication of the Abridged Information Memorandum (28th March 2012), the publication of the Information Memorandum (30th March, 2012) and commencement of the trading of the rights (2nd April, 2012) does not provide sufficient time for existing shareholders to review and analyse the rights offer.**
- **Current shareholders had not had the chance to question the Board of Directors to explain the logic behind selling the shares at Kshs.14.00 when their Net Asset Value is Kshs.42.00 per share.**
- **That the price of the Company's shares keeps falling as investors anticipate a cheaper Rights Issue.**

12. For the aforesaid reasons the petitioner submitted that the affairs of the Company are being conducted in a manner oppressive to a part of its shareholders, including himself, and sought the order of injunction as stated hereinabove.

13. The petitioner's application for interlocutory injunction was supported by affidavits sworn by the petitioner and two other minority shareholders, **Rakesh Prakash Gadani** who holds **150,000 ordinary shares** and **Subodh Kantilal Gadani** who holds **306,260 shares**.

14 The Company opposed the petitioner's application and filed grounds of opposition which are as follows:

- “1. The petitioner has another remedy, namely to sell his shares.**
- 2. A winding up petition is not in the circumstances of the case an appropriate remedy.**
- 3. The petition is brought in bad faith and for an ulterior purpose.**
- 4. The petition is an abuse of the process of the court.**
- 5. No grounds have been made out for the grant of an injunction. In particular:**
 - (a) There is no prima facie case of oppression shown,**
 - (b) Damages are easily quantifiable and would be an adequate remedy,**
 - (c) The balance of convenience is against the grant of an injunction.**
- 6. The affairs of the Company are not being conducted in a manner that is burdensome, harsh and wrongful to the petitioner or any other members of the respondent.**
- 7. There has been no invasion of the legal rights of the petitioner to justify the grant of an injunction.**

8. **The directors of the respondent have conducted the Rights Issue strictly in accordance with the wishes of the members.**

9. **The offer period for the Rights Issue is 2nd to 27th April, 2012. The offer has already been made and there is no basis for stopping it.**

10. **The respondent's shareholders approved the Rights Issue and increase in share capital on 14th October, 2011. It is therefore a decision of the members and is not amenable to challenge in this way.**

11. **The petitioner is guilty of delay in the circumstances of the case."**

15. The respondent also filed a substantive application by way of a Notice of Motion seeking an order to strike out the petition herein. The application was brought under **Rule 7 of the Companies (Winding Up) Rules, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A and Section 63 (e) of the Civil Procedure Act.** The application was made on the grounds that:

"(a) The petitioner herein has presented and filed the petition herein in blatant disregard of the respondent's Articles of Association that stipulate the procedure for the governance of its operations.

(b) The Articles specifically stipulate that the procedure for approving the respondent's operations is by a resolution of the majority of the members attending a general meeting.

(c) The petitioner chose not to attend the general meeting held on 14th October, 2011 when the resolution approving the Rights Issue was passed and exercise his voting rights.

(d) The process that the petitioner seeks to stop is already ongoing having been approved by the majority members of the respondent.

(e) The filing of the petition herein is for an ulterior motive and is an abuse of the court process.

(f) The claims by the petitioner and stated to be the subject of this petition are strenuously disputed by the applicant.

(g) It is in the interest of justice that the dignity of the court be protected.

(h) There has been a failure to comply with the Companies (Winding Up) Rules."

16. The respondent's application was supported by affidavits sworn by **Alex Mbugua**, the Group Finance Director of the Company, duly authorized by the Company's Board of Directors and **Amish Gupta**, a Senior Manager with Standard Investment Bank Limited, the lead sponsoring stock broker in the Rights Issue.

17. I will revert to the depositions in the two affidavits at a later stage.

18. In reply to the affidavits sworn in support of the petitioner's application the respondent filed replying affidavits sworn by **Job Kihumba**, the Executive Director-Corporate, Finance and Research, Standard Investment Bank Limited.

19. In the replying affidavit sworn by Alex Mbugua he set out the reasons for the Rights Issue, the steps that were taken by the Company before commencement of the Rights Issue and thereafter and the reasons why the petitioner's application ought not to be allowed.

20. He stated, inter alia, that the Company operates one of Africa's leading airlines and has enjoyed

tremendous growth over the last decade. But like any other international airline, it faces significant competition with respect to routes, fares, passenger capacity, aircraft, size of operations and strategic partnerships from regional, international and global airlines. There was therefore need to expand its fleet as a way of responding to the competition in order to continue to grow its profitability.

21. The main reasons for the Rights Issue are set out in the Information Memorandum, page 25, and they are as follows:

- **“To assist in funding the pre-delivery to aircraft manufacturers in connection with the acquisition of nine (9) Boeing 787 Dreamliner aircraft and ten (10) Embraer 190 aircraft for which the Company has placed firm orders;**
- **To assist in funding the pre-delivery payments to manufacturers in connection with acquisition of other aircraft for which the Company may in future place orders; and**
- **To finance KQ’s capital expenditure requirements related to the additional aircraft and equipment such as hangars and engines.”**

22. Mr. Mbugua further explained that at a meeting of the directors held on 12th September, 2011 it was resolved to recommend a Rights Issue and an increase of the share capital to the shareholders. By a notice dated 13th September, 2011 issued pursuant to **Articles 50 – 52** of the respondent’s Memorandum and Articles of Association, shareholders were invited to an annual general meeting on 14th October, 2011.

23. At the annual general meeting members resolved to have a Rights Issue and an increase in share capital.

24. Pursuant to resolutions passed at the said meeting, on 18th October, 2011 **Fiona Fox**, the Company Secretary, filed a statement of increase of nominal capital, special resolution and notice of increase in nominal capital.

25. Mr. Mbugua further deposed that Rights Issues are usually a common way of raising capital from existing shareholders globally. The discount on existing price is immaterial because the offer is made to existing shareholders and if an existing shareholder is not happy to have a Rights Issue made he is at liberty to raise an objection at the general meeting at which the issue is sought to be approved. Once a resolution is passed to have a Rights Issue by a majority of the members a dissatisfied shareholder is free to offer his shares to the market for sale if he does not wish to take them up.

26. He further explained that Rights Issues are ordinarily issued at a discount because the offer is made to existing shareholders. The level of discount is decided by the Board and in Kenya it varies from as low as 10% to about 50%.

27. Regarding the procedure of a Rights Issue, the same is guided by the **Capital Markets Act** and the Regulations made thereunder. The Capital Markets Authority oversees the process. In this case, the Capital Markets Authority approved the Company’s rights offer, as it had met the laid down procedure. The Company has also received approvals for the Rights Issue in Tanzania and Uganda.

28. The deponent further stated that in the public announcement made on 12th March, 2012 all the key features of the offer were announced including the fact that the Abridged Information Memorandum would be posted to shareholders on 28th March, 2012. It was also stated that the Information Memorandum will be on the Company’s website from that day and that all authorized selling agents will have the same from that day as well.

29. It is also important to note that the Company has approximately **74,066 shareholders** and to issue the orders sought by the petitioner will not be in the interest for the majority of the shareholders, the

deponent stated. No complaints have been received from any other shareholder and it will therefore be unjust to stop the Rights Issue, Mr. Mbugua stated. He added that there is no intention to water down the shareholding of Kenyan shareholders, including the Government of Kenya and Kenyan institutions, as alleged by the petitioner.

30. In his view, the petition and the application have been brought with ulterior motive. That position was supported by **Mr. Amish Gupta** who stated in his affidavit that he was surprised by the petition herein because the petitioner's representative had approached him intending to take up the Rights Issue and seeking a way how to raise finance for the same. Mr. Gupta put the petitioner in touch with a bank but is now surprised that the petitioner has brought this application. Mr. Gupta believes that the petition is intended to delay the Rights Issue. He also supported Mr. Mbugua's contention that the Company shares were being offered to the existing shareholders at a discount.

31. Mr. Job Kihumba has considerable experience in matters relating to shares. Apart from being the Executive Director, Corporate Finance and Research at Standard Investment Bank Limited, he is also his employer's representative in the Kenya Association of Stock Brokers and Investment Banks and served in its Board as Treasurer for two years until 2009. He is also a past Chief Executive of the Nairobi Securities Exchange and is a director of the Central Depository and Settlement Corporation Limited. He has also participated as a Technical Leader in several Rights Issues of major companies in Kenya.

32. Mr. Kihumba denied the petitioner's allegation that the share price as a Rights Issue is based on the Net Asset Value of the shares of any Company and stated that the share price can be determined in various ways for different purposes. One way is by deriving it from the share trading price at the Nairobi Securities Exchange. Further, listed companies have no power to determine the share trading price. The same is determined by market forces of demand and supply. He added that the offer price in a Rights Issue is largely determined by looking at the share trading price at the Nairobi Securities Exchange.

33. He further stated that shares offered through a Rights Issue are ordinarily issued at a discount because the offer is made to existing shareholders. The level of the discount is decided by the Board of Directors of the issuing Company.

34. The deponent disagreed with the allegation made by Rakesh Prakash Gadani that an existing shareholder who cannot exercise his rights offer in full stands to lose 72% of the value of the shares or Kshs.36.00 per share. He further denied that the rate of discount of the Company shares herein is 66% or 73% and that the share price for the Rights Issue has been devalued.

35. In a further affidavit, Mr. Kihumba stated that the Capital Markets Act and Regulations set strict timelines which have to be adhered to and those timelines are very important in a Rights Issue.

36. He further stated that stopping the Rights Issue will have catastrophic consequences for the respondents, its shareholders and the general public. He said it would probably lead to, *inter alia*, the following things:

- “a. The share price would collapse badly hurting more than 75,000 shareholders.**
- b. Many other securities would most likely be affected, impacting negatively on millions of Kenyans.**
- c. The respondent would be required to pay many parties for non-completed work, incurring hundreds of millions of shillings.**
- d. The long term viability of the respondent as Kenya's national carrier would be irreparably damaged and with it delay many of Kenya's development strategies: tourism, opening up new markets for our exports, transport development, to mention just a few.**

- e. **Hundreds of interested shareholders would require that their funds already submitted be refunded back at huge cost to the Company.**
- f. **In future it would be extremely difficult to pick the broken shards and the expansion dream to become the most vibrant airline in Africa would possibly be lost for ever.**
- g. **This case would become a precedent to be used by vexatious and frivolous individuals hell bent to destroy companies wishing to raise capital by means of a Rights Issue.**
- h. **The currently planned Rights Issues in the market would be possibly withdrawn for fear of similar fate.**
- i. **The Nairobi Securities Exchange reputation as the capital market hub of the region would be irreparably damaged.”**

37. In response to the respondent’s application to strike out the petition, the petitioner filed grounds of opposition which are as hereunder:

- “1. That the application lacks merit and is meant to guillotine the petition and interlocutory relief sought in the application dated 30th March, 2012.**
- 2. That the respondent’s Memorandum and Articles of Association are not superior to the Companies Act.**
- 3. That the Memorandum and Articles of Association that ought to guide the respondent in the conduct of its operations and discharge of the Board of Director’s fiduciary duties cannot be used to oppress the shareholders.**
- 4. That the petition has not offended any stipulation in the Memorandum and Articles of Association and none has been cited.**
- 5. That the petition is still alive as the event sought to be stopped is coming up on 27th April 2012 among other events subsequent to the said date.**
- 6. That the petition is grounded on Section 211 of the Companies Act and is brought by a petitioner with sufficient interest as a minority shareholder. He has also been supported by other shareholders.**
- 7. That the grounds are strenuously defended by the respondent and the petition is legitimate and should be allowed to stand.**
- 8. That the petition has complied with the Companies (Winding Up) Rules.”**

38. **Mr. Gitonga Muriithi** appeared for the petitioner while **Mr. Kiragu Kimani** appeared for the respondent. Counsel filed written submissions and lists of authorities which I have carefully considered. Counsel also highlighted their respective submissions.

39. Further to the complaints raised in the affidavits filed by the petitioner and the two other minority shareholders, Mr. Gitonga submitted that the Company’s Articles of Association clearly state that the Company may from time to time by a special resolution increase its share capital but in this case the decision to increase the share capital and to offer the Rights Issue was made as an ordinary resolution in the Company’s annual general meeting of 14th October, 2011. He referred to the notice of annual general meeting for the year 2011 which is annexed to the affidavit of Alex Mbugua.

40. However, I note that the notice clearly stipulated that apart from items of agenda listed as number 1 to

7 there was also special business to be transacted, the same is listed as numbers 8, 9, 10 and 11. The special business included increase in share capital of the Company, Rights Issue, change in share capital and alteration to the objects clause of the Memorandum of Association.

41. Another issue that was raised by Mr. Gitonga is the profit warning that was given by the Company subsequent to the holding of the annual general meeting. He submitted that it is a fundamental aspect that ought to have been disclosed to the Company's shareholders during the annual general meeting.

42. Further, counsel submitted that the Information Memorandum which is a key document was only posted on 28th March, 2012. There was an abridged Information Memorandum that had been issued earlier but the same did not contain sufficient information. In his view, the complete Information Memorandum was necessary to guide shareholders in deciding whether to take up the Rights Issue or pass them on.

43. In support of the petitioner's submission that the Rights Issue was prejudicial to the petitioner's interest in that it would have the effect of devaluing the shares and thus an injunction ought to be granted as prayed, Mr. Gitonga cited the case of **ISADOR KATZOWITZ v JACOB SIDLER ET AL, 24 NY.2D 512 (1969)**, Court of Appeals of the State of New York. In that case the court observed that when new shares are issued at a price far below fair value in a close corporation or a corporation with only a limited market for its shares, existing shareholders who do not want to invest or do not have the capacity to invest additional funds can have their equity interest in the corporation diluted.

44. However, it appears to me that the facts in the above cited case are different from the facts herein. In the American case, the shareholders were just three and its certificate of incorporation authorized it to have 1,000 shares of no par value stock for which the incorporators established a \$100 selling price. Each of the three shareholders invested \$500 and received five shares of the corporation stock. Inter-personal differences developed among the shareholders and two of them decided to replace the third one as a director and a meeting was called for that purpose. The director who was sought to be removed sought a temporary injunction to prevent the meeting until his rights could be judicially determined. A temporary injunction was granted to maintain the status quo until trial. The order was eventually affirmed by the appellate division.

45. In the petitioner's case herein, Kenya Airways is not a close corporation. It has over 74000 shareholders. The Rights Issue is limited to existing shareholders.

46. Mr. Gitonga further submitted that the timetable of principle events that are set out in the Information Memorandum at page 25 are not cast in stone, they can be changed.

47. Mr. Gitonga submitted that the petitioner has made out a case for grant of an interlocutory injunction. In his view, the petitioner cannot quantify the extent of the loss which he is likely to suffer if the orders sought are not granted. He added that damages will not be sufficient compensation for such loss. He denied that the petitioner had brought the petition with ulterior motive.

48. On the part of the respondent, in addition to its written submissions, Mr. Kimani added that the orders sought in the interlocutory application are more or less the same as the orders sought in the petition. Although the prayers are couched in negative language the effect of their grant would be to compel the respondent to cancel the Rights Issue. The court should therefore treat the matter as one where a mandatory injunction is being sought. It is improper for the court to grant interlocutory orders which would have the effect of disposing of the entire petition, counsel stated. He cited the case of **KENYA BREWERIES LIMITED v OKEYO [2002] 1 E.A. 109**. In that appeal the Court of Appeal held that a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction is directed at a single and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff.

49. Regarding the timetable of events, Mr. Kimani submitted that a Rights Issue has to be done in

accordance with the regulations issued by the Capital Markets Authority under the **Capital Markets (Securities, Public Offers, Listing and Disclosures) Regulations, 2002**, and in particular Regulations 11 and 18. Any change in the timelines would have very far reaching ramifications to the Rights Issue.

50. Regarding the petitioner's objection to the Rights Issue, Mr. Kimani submitted that the shareholders of the Company had in the annual general meeting held on 14th October, 2011 passed a special resolution authorizing the same. The way to challenge such a resolution is by an ordinary suit not by way of a petition under **Section 211** of the **Companies Act**. In support of that submission counsel cited **RAI & OTHERS v RAI & OTHERS [2002] 2 E.A. 537**.

51. Counsel further submitted that the petition herein had been brought in a manner that was not in compliance with the provisions of the **Companies (Winding Up) Rules Rule 25**. The rule states that:

“Every petition shall be verified by an affidavit, which shall be sworn by the petitioner, or by one of the petitioners if more than one, or, where the petition is presented by a corporation, by a director, secretary or other principal officer thereof, and shall be sworn and filed within four days after the petition is presented, and such affidavit shall be prima facie evidence of the contents of the petition.”

52. Further, the petitioner had not established a prima facie case that the Company's affairs were being conducted in a manner that is oppressive to him as a minority shareholder as required under **Section 211** of the **Companies Act**.

53. Mr. Kimani further submitted that the petitioner had not satisfied the other conditions for grant of an interlocutory injunction in that he had not demonstrated that he stands to suffer irreparable loss if the orders sought are not granted and that the balance of convenience was in his favour.

54. He added that if the orders sought are granted there would be disproportionate loss to the Company and to the over 74000 shareholders.

55. It appears to me that the genesis of the dispute between the petitioner and the Company is the notice of the annual general meeting for the year 2011 which was sent out to all the shareholders of the Company. The notice clearly stated that the 25th annual general meeting of the Company would be held at the Bomas of Kenya on Friday 14th October, 2011 at 11.00 a.m. to conduct the business as set out thereunder. Of the special business that was to be transacted was consideration of increase in the share capital of the Company. Under special business, agenda number 8 was worded as follows:

“To consider and, if approved, pass the following Ordinary Resolution

“That the authorized share capital of the Company be and is hereby increased from Kenya Shillings five thousand million (K.Shs.5,000,000,000/=) divided into one thousand million (1,000,000,000) ordinary shares of Kenya Shillings five (Kshs.5/=) each; to Kenya Shillings ten thousand million (K.shs.10,000,000,000/=)divided into two thousand million (2,000,000,000) ordinary shares of Kenya shillings five (Kshs.5/=) each, by the creation of one thousand million (1,000,000,000) new ordinary shares of Kenya Shillings five (Kshs.5/=) each to rank *pari passu* in all respects with the existing ordinary shares of the Company.”

56. Agenda number 9 concerned the passing of an ordinary resolution regarding the Rights Issue and the same was worded as hereunder:

“To consider and, if approved, pass the following Ordinary Resolution: -

“That subject to the Company receiving all regulatory approvals, including but not limited to the approval of the Capital Markets Authority and the Nairobi Stock Exchange, and the approvals of

any other regulatory authority, that:

(i) the Directors be and are hereby authorized and directed

such number of ordinary shares of Kenya Shillings five (K.Shs.5/=) each in the capital of the Company as the Directors may decide on, be offered by way of rights to the holders of ordinary shares in the Company registered at the close of business on such date as shall be determined by the Directors, in such proportion (subject to the articles of association of the Company) to existing ordinary shares held by the shareholders of the Company as the Directors shall determine, and at such price that the Directors shall determine, and

(ii) the Directors be empowered to dispose of the shares not taken up by any shareholders or the shares not issued by reason of fractions of a share being disregarded, as they may consider expedient; and

(iii) the Directors be and are hereby authorized to issue such shares and pursue the listing of such shares upon issue on the Nairobi Stock Exchange, the Dar-es-Salaam Stock Exchange and the Uganda Stock Exchange and to do and effect all acts and things required to give effect to the above Resolutions.”

57. Agenda number 10 was in relation to change in share capital structure and it read as follows:

“To consider and, if approved, pass the following Special Resolution-

“That after the above increase of share capital, the Articles of Association of the Company be and hereby altered by substituting the following new Article for Article 8:

The share capital of the Company is Kenya Shillings ten thousand million (K.Sshs.10,000,000,000/=) divided into two thousand million (2,000,000,000) ordinary shares of Kenya Shillings five (K.Shs.5/=) each.”

58. The majority of the shareholders who attended the 25th annual general meeting of the Company passed ordinary resolutions in terms of agendas number 8 and 9 in the notice and a special resolution in terms of agenda number 10. In my view, there was full compliance with the requirements of **Article 9** of the **Company’s Articles of Association**.

59. Following the passing of that resolution the Company secretary filed the appropriate documents at the Companies registry. That being the case, the petitioner’s allegation that there was fundamental breach of the Company’s Articles of Association is without merit.

60. It is trite law that a corporate body may act by a majority vote given by shareholders at a meeting duly convened. There is no evidence that the petitioner attended the aforesaid annual general meeting and raised any objection to the proposed Rights Issue. I would therefore agree with the respondent that if for any reason he was not happy with the resolutions passed thereat for whatever reason, his remedy lay in filing an ordinary suit by way of plaint to challenge the same.

61. The petitioner’s submissions regarding the profit warning and late delivery of the Information Memorandum were not grounds raised in the petition. However, in the petitioner’s application he lamented that as at the date of filing the same the Information Memorandum had not yet been issued. The same was sent to shareholders shortly thereafter, that is on 2nd April, 2012. That notwithstanding, the petitioner did not sufficiently demonstrate to the court how the release of the Information Memorandum on the aforesaid date was oppressive to him as a shareholder. The Abridged Information Memorandum

that had been released to the shareholders, in my view, contained sufficient information to enable shareholders make an informed decision.

62. Regarding the allegation of dilution of the share value, there is sufficient authority that shares offered through a Rights Issue are ordinarily issued at a discount because the offer is made to existing shareholders. It is not the shareholders who determine the level of the discount. That is essentially a function of the Board of Directors and that is informed by several factors as explained by Job Kihumba of Standard Investment Bank Limited, the lead sponsoring broker in the Rights Issue.

63. But even assuming that it were true that the value of the shares will be diluted by the Rights Issue, that cannot be sufficient reason for granting the orders sought by the petitioner. In **LCB Gower Gower's Principles of Modern Law 4th Edition, (Stevenson & Sons, London 1979)**, the learned author at page 222 states that:

“There seems, no legal obligation to issue shares at the best price, thereby avoiding dilution of the value of existing shares so long as there is no breach of the directors’ fiduciary duties or fraud on the minority.”

Further, it is trite law that a company may increase its capital by issuance of further shares to its shareholders, but this need not be at a profit. Shareholders may have various reasons other than allocating dividends to its shareholders.

64. In **HIDLER v DEXTER [1902] AC 474** which was relied on in **LOWRY v CONSOLIDATED AFRICAN SELECTION TRUST [1940] AC 648**, it was held, *inter alia*:

“Upon the issue of shares the assets of the company are increased by the amounts obtained from the subscribers. These amounts are obviously not profits or gains of the trade, and they are not liable to be brought into the accounts for income tax. It may be said that these amounts are of the nature of capital, but I prefer for the present purpose to say that beyond all doubt they are not profits and gains arising or accruing from a trade.... What I have said is equally true whether the shares are allotted at par or at premium.”

In **LOWRY v CONSOLIDATED AFRICAN SELECTION TRUST (Supra)** at page 657, Viscount LC stated that:

“I am not aware of any law which obliges a company to issue its shares above par because they are saleable at a premium in the market. It depends on the circumstances of each case whether it will be prudent or even possible to do, and is a question for the directors to decide.”

65. In view of the foregoing, the petitioner’s contention that the Rights Issue has diluted or will dilute the value of the Company’s shares is not meritorious. The Company’s Board of Directors duly exercised its powers to issue the shares at a discounted price and that was in accordance with the Company’s Articles of Association.

66. In considering an application for an interlocutory injunction as sought by the petitioner herein, the tests that apply are the very same ones spelt out in **GIELLA vs. CASSMAN BROWN & COMPANY LIMITED [1973] E.A. 338**. The first one is that an applicant must demonstrate that he has a prima facie case with a likelihood of success. Secondly, the applicant must also show that he stands to suffer irreparable harm which cannot be adequately compensated by an award of damages in the event that the orders sought are not granted. Where the court is in doubt it will decide on a balance of convenience.

67. In **MRAO LIMITED v FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS [2003] KLR 125**, the Court of Appeal held that a prima facie case in a civil application includes but is not confined to a “genuine and “arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the other.

68. Having considered the petitioner's grounds for seeking the orders of injunction in respect of the Rights Issue herein, I am not satisfied that he has established a *prima facie* case with a likelihood of success.

69. I am also not satisfied that the petitioner will suffer irreparable loss that cannot be compensated with an award of damages if the orders sought are not granted. The petitioner holds 201,604 shares whose value can easily be quantified. If at all he were to suffer any loss I am sure such loss can be quantified and the Company would be able to compensate him if an order were to be made to that effect.

70. Turning to the issue of balance of convenience, I am persuaded that the same tilts in favour of the Company. The Company has so far invested heavily in the Rights Issue and if the same is stopped at this stage there would be far reaching consequences not only to the Company but also to many shareholders and other interested parties as was explained by Job Kihumba in his affidavit sworn on 24th April, 2012.

71. For all these reasons, the petitioner's application dated 30th March, 2012 cannot be allowed and is hereby dismissed with costs to the Company.

72. Turning to the application for striking out the petition, the petition was brought under **Section 211** of the **Companies Act. Subsection (1) and (2)** thereof state as follows:

“(1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) or, in a case falling within subsection (2) of Section 170, the Attorney-General, may make an application to the court by petition for an order under this section.

(2) If on any such petition the court is of opinion –

(a) that the company's affairs are being conducted as aforesaid; and

(b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts will justify the making of a winding-up order on the grounds that it was just an equitable that the company should be wound up,

the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purpose of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital or otherwise.”

73. For a petition filed under **Section 211** to be meritorious the petitioner has to show that the affairs of the Company are being operated in a manner that is oppressive to him and other shareholders. For the purposes of the said section “oppressive” means the company has exercised its authority in a manner burdensome, harsh and wrongful. Such conduct must go beyond what is required to make out a case for a winding-up order and must indicate some lack of probity or fair dealings towards one or more members of the company. See **HENRY NJAU KOIGI v ADAMA DIAWAR, Civil Appeal No. 297 of 2000 [2000] LLR 6270 (CAK)**.

74. The petitioner's complaint is basically that the Company proceeded to roll out the Rights Issue in a manner that is contrary to the provisions of the Company's Articles of Association and thereby he has been disadvantaged. That allegation was not proved at all as hereinabove explained. I am satisfied that the Company's Board of Directors acted in accordance with the Company's Articles of Association. I do not see any act that can amount to oppression.

75. From the affidavit of Mr. Gupta and which was not challenged by the petitioner, it appears to me that the petition herein was filed with an ulterior motive and that amounts to abuse of court process. In **BRAHMBHATT v DYNAMICS ENGINEERING LTD [1986] KLR 133**, the Court of Appeal held

that in an application to strike out a winding-up petition the court should consider whether on the evidence placed before it a plain and obvious case for striking out has been made and whether the petition is bound to fail. If the court is satisfied that a *prima facie* case has not been established, then the petition is bound to fail.

76. Having taken into consideration the petitioner's allegations in the petition and the response thereto by the Company, I am satisfied that the petitioner has not, *prima facie*, shown that the affairs of the Company are being conducted in a manner that is oppressive to him and the petition stands no chance of success. It is also an abuse of the court process as I believe it is intended to stall the Rights Issue. Consequently, I strike it out with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2012.

D. MUSINGA

JUDGE

In the presence of:

Alex – Court Clerk

Mr. Gitonga for the Petitioner

Mr. Fraser for Mr. Kimani for the Respondent