



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
MISCELLANEOUS APPLICATION 337 OF 2011

MARK OLE KARBOLO

KEPHAR TANDE

TITUS

NAIKUNI.....APPLICANTS

KENNETH KAMISH

WOOLER KEITH

VERSUS

**ACTING MINSITER MINISTRY OF INDUSTRIALIZATION.....1ST
RESPONDENT**

**PERMANENT SECRETARY MINISTRY OF INDUSTRIALIZATION.....2ND
RESPONDENT**

AND

**EAST AFRICAN PORTLAND CEMENT COMPANY.....1ST INTERESTED
PARTY**

**CEMENTIA HOLDINGS LIMITED.....2ND INTERESTED
PARTY**

**ASSOCIATED CEMENT INTERNATIONAL.....3RD INTERESTED
PARTY**

**BAMBURI (NOMINEES).....4TH INTERESTED
PARTY**

**NATIONAL SOCIAL SECURITY FUND.....5TH INTERESTED
PARTY**

JUDGEMENT

The application for my determination is the Notice of Motion dated 4th January 2012 seeking the following orders:

- 1. An ORDER OF CERTIORARI do issue to remove into this Honourable court and quash the decisions and/or orders of the Acting Minister for Industrialization (“the Acting Minister”) to suspend the Board of Directors of East African Portland Cement Company Limited (“EAPCC”) and require it to hand over all outstanding issues of the Board to the Permanent Secretary, Ministry of Industrialization with immediate effect, which decisions, directions and/or orders are contained in the Acting Minister’s letter dated 22nd December 2011.**
- 2. An ORDER OF CERTIORARI do issue to remove into this Honourable Court and quash the decisions, directions and/or orders of the Permanent Secretary in the Ministry of Industrialization (“the Permanent Secretary”) to suspend the Managing Director of EAPCC and require him to hand over to Peter Korir, which decisions, directions and/or orders are contained in the Permanent Secretary’s letter dated 22nd December 2011.**
- 3. An ORDER OF CERTIORARI do issue to remove into this Honourable Court and quash the decision of the Permanent Secretary to unilaterally appoint Peter Korir as the acting Managing Director of EAPCC, which decision is contained in the Permanent Secretary’s letter dated 22nd December 2011.**
- 4. An ORDER OF PROHIBITION do issue to prohibit interference and meddling in the management of EAPCC and the making of decisions, directions and/or orders regarding the management of EAPCC by the Acting Minister, the Permanent Secretary and the Government of Kenya and/or their servants, agents or person(s) acting under their instructions and/or on their behalf, except in accordance with the provisions of the Articles of Association of EAPCC, the Companies Act (Cap.486 of the laws of Kenya) and other laws permitting their lawful participation in the affairs of EALPCC.**
- 5. The costs of this application be borne by the Respondents.**

The application is based on the following grounds;

- 1. The Acting Minister and the Permanent Secretary are illegally and unlawfully interfering in the legitimate management of EALPCC, a public limited liability company listed on the Nairobi Stock Exchange.**
- 2. By a letter dated 22nd December 2011, the Acting Minister has illegally and unlawfully purported to suspend the entire Board of Directors of EAPCC and required them to hand over all outstanding issues to the Permanent Secretary;**
- 3. The Acting Minister has no power whatsoever under the Articles of Association of EAPCC, the Companies Act (Cap.486 of the law of Kenya) or any other law applicable to EAPCC to suspend a Director or the entire Board of Directors of EAPCC.**
- 4. By a letter dated 22nd December 2011, the Permanent Secretary has illegally and unlawfully purported to suspend the Managing Director of EAPCC and required him to hand over to Peter Korir, who is employed by EAPCC as its Head of Strategy and Performance Improvement.**
- 5. The Permanent Secretary has no power whatsoever under the Articles of Association of EAPCC, the Companies Act (Cap.486 of the Laws of Kenya) or any other law applicable to EAPCC to suspend the Managing Director or any other Director of EAPCC.**
- 6. By another dated 22nd December 2011, the Permanent Secretary has illegally and unlawfully purported to unilaterally appoint Peter Korir as the acting Managing Director of EAPCC.**

7. **The Permanent Secretary has no power whatsoever under the Articles of Association of EAPCC, the Companies Act (Cap.486 of the laws of Kenya) and any other law applicable to EAPCC to unilaterally appoint a person as the Managing Director of EAPCC.**
8. **The Acting Minister and the Permanent Secretary have no power whatsoever to interfere in the legitimate management of EAPCC and to make the decisions and issue the orders and directions contained in the three letters dated 22nd December 2011, as they have purported to do.**
9. **The actions of the Acting Minister and the Permanent Secretary are unlawful, illegal, *ultra vires*, unfair, irrational and contrary to the provisions of Section 47 of the Constitution.**
10. **The actions of the Acting Minister and the Permanent Secretary demonstrate impunity and utter disregard for the legitimate governance of EAPCC.**
11. **The Applicants have a compelling case for relief in the form of the prerogative orders of certiorari and prohibition on the grounds more particularly set out in the Statement filed herewith and the facts set out in the accompanying Verifying Affidavit of Kephah Tande.**
12. **It is just and equitable to grant the relief sought as the Applicants have substantial and meritorious grounds for grant of the substantive orders of judicial review by way of certiorari and prohibition sought in this application.**

By a letter dated 22nd December 2011 the Acting Minister of Industrialization suspended the entire Board of Directors of EAPCC. The letter states:

“Mr. Mark Ole Karbolo

Chairman

Board of Directors

EAPCC

ATHI RIVER

Dear Mr. Karbolo,

RE: SUSPENSION OF THE BOARD OF DIRECTORS, EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED

The Government has received serious allegations touching on malpractices at EAPCC that may have led to huge losses and the continued poor performance of the Company.

In order to pave way for independent forensic investigations into the allegations, it has been decided that the Board of Directors of EAPCC be suspended with immediate effect.

Consequently, you and other Directors are ordered not to carry out any duties on behalf of EAPCC until the investigations are over. Kindly hand over all outstanding issues of the Board to the Permanent Secretary, Ministry of Industrialization with immediate effect.”

The 1st respondent gave the reasons why he suspended the Board of Directors of the East African Portland Cement Company as serious allegations touching on malpractices at the Company which resulted in huge losses and poor performance of the Company. The 1st respondent directed the Chairman of the Board of Directors not to carry out any duties on behalf of the Company until the investigations are over. The 1st respondent also directed the Chairman to hand over all outstanding issues of the Board to the Permanent Secretary Ministry of Industrialization.

In a letter dated 22nd December 2011, the 2nd respondent also suspended the Managing Director of the Company. The letter states as follows:

“The Government has received serious allegations concerning malpractices at East African Portland Cement Company that may have led to huge losses and continued poor performance of the Company. As a result the Government will carry out forensic investigations of the operation at the Company in order to establish the facts. To pave way of these investigations it has been decided you be suspended from the position of Managing Director at EAPCC with immediate effect. You are therefore directed to hand over to Mr. Peter Korir Head of Strategy and Performance Improvement.”

It appears that was not the end of the story, as on the same day, the 1st respondent also addressed a letter dated 22nd December 2011 to the Managing Director which reads;

RE: SUSPENSION

As a follow up of my letter dated 22nd December 2011 to the Chairman of the Board of the Board of Directors, this is to inform you that I have suspended you as Managing Director East African Portland Cement Limited with immediate effect. You are therefore directed to hand over to Mr. Peter Korir Head of the Strategy and Improvement.”

Again on the same day, the Minister addressed a letter dated 22nd December 2011 to **Mr. Peter Korir** which states as follows;

RE: APPOINTMENT AS ACTING MANAGING DIRECTOR, EAPCC

I am pleased to inform you that you have been appointed as Acting Managing Director EAPCC with immediate effect. This appointment will be in force until the issues concerning the suspension of the Managing Director Mr. Kephah Tande are resolved.

By a copy of this letter you are requested to take over from Mr. Tande with immediate effect.”

It appears the PS was not left behind and in a letter dated 22nd December 2011 he also appointed **Mr. Peter Korir** as a Managing Director of the Company. The letter states as follows;

RE: APPOINTMENT AS ACTING MANAGING DIRECTOR, EAPCC

I am pleased to inform you that you have been appointed as Acting Managing Director EAPCC with immediate effect. This appointment will be in force until the issues concerning the suspension of the Managing Director Mr. Kephah Tande are resolved.

By a copy of this letter you are request to take over from Mr. Tande with immediate effect.”

What are the reasons for the suspension of the entire Board and the Managing Director? It is clear the Board of Directors of the East African Portland Cement Company consists of the following:

- 1. Chairman appointed by the President.**
- 2. Permanent Secretary Ministry of Finance.**
- 3. Permanent Secretary Ministry of Industrialization.**
- 4. Government nominee to represent Public interest.**
- 5. Nominee appointed by NSSF.**

6. 2 nominees appointed by Lafarge Group

7. Managing Director of the company.

The 1st respondent contends that upon detailed evaluation of complaints that he had received and after due consultation he decided to suspend the Board of Directors so that investigations could take place. The 1st respondent contends that the Board committed malpractices and misdeeds giving rise to his decision, directions and orders contained in the letters dated 22nd December 2011. The Minister gave the following reasons in his replying affidavit as a basis of suspending the entire Board and Managing Director;

- (1) An allegation that the Board of Directors of EAPCC had caused EAPCC to suffer a price increase of approximately Kshs.74 Million by awarding Sanghi Industrial Limited a price increase for delivered and yet-to-be delivered products;**
- (2) An allegation that between 15th August 2011 and 30th November 2011, EAPCC, without using a competitive tendering process, purchased goods and services worth in excess of KShs.1 Billion;**
- (3) An allegation that approximately KShs.13 Million had been overpaid to the Chairman and the members of the Board of EAPLCC;**
- (4) An allegation that there was “pillage” of public funds at EAPCC.**

In a letter dated 27th December 2011 addressed to the Secretary Efficiency Monitoring Unit of the Office of the Prime Minister, the 2nd respondent gave 14 grounds as the basis for suspending the Board and seeking investigations.

The letter states as follows;

“FORENSIC INVESTIGATIONS AT EAPCC

This is a follow up to our letter to the Permanent Secretary, Office of the Prime Minister, dated 22nd December on the above matter.

As you are aware the Minister for Industrialization suspended the Board of Directors and the Managing Director of EAPCC to safeguard public interest following allegations of massive malpractices at the Company.

The purpose of this letter is to request you to immediately launch forensic investigations in alleged malpractices that tough on but not limited to the following areas;

- 1. Flawed procurement of bauxite**
- 2. Flawed procurement of kiln protective bricks**
- 3. Flawed procurement of clinker purchased from competitor**
- 4. Flawed procurement process involving spare parts and inputs**
- 5. Irregularities in outsourcing of quarry equipment and transport causing serious financial losses. Clinker price variation against Tender Committee’s advice that caused the company an estimated loss of Kshs.74 million.**
- 6. Clinker price variation against Tender Committee’s advice that caused the company an estimated loss of Kshs.74 million.**

7. **Contract for Coal handling, grinding and dozing facility that caused the company a loss of Kshs.1.3 billion.**
8. **Use of alternative procurement methods e.g. between 15th August to 30th November 2011, the company procured Kshs.1.1 billion worth of goods without authority from PPOA.**
9. **Interference by the Board in tender processes, a case in point is the recent visit by Board to Korea for the kiln upgrade project. The Board was about to sign a contract for the substandard kiln from LPOSCO Korea despite the advice against it by the EAPCC Technical Committee.**
10. **Misuse of company vehicles and office facility by the Chairman of the Board causing the company an estimated loss of Kshs.6 million.**
11. **Overpayment of Chairman and Directors during Board meetings causing the company a loss of Kshs.13 million and an estimated payment to Chairman of the Board of approximately 900,000.00 for unscheduled meeting.**
12. **Bamburi Cement directly supplying EAPCC while they are Board Directors thereby providing a serious conflict of interest.**
13. **Mr. Keith directly supplying legal services to company while he sits in the Board and thereby creating a conflict of interest.**
14. **Collusion of the Board to dilute GoK shares without involving GoK. According to MD, NSSF reported transfer of shares on 15th December 2011. Yet in the Annual report and financial statements circulated in mid November 2011, the issue of EAPCC not being a state corporation is communicated as a resolution to shareholders (page 85 bullet 11). This is a serious economic crime considering that this information was not factual and was communicated to shareholders.**

Due to the public interest in this matter, we shall be pleased to receive your report by 31st January 2012. Kindly feel free to contact me for any information that will help fast track your investigations.

By a copy of this letter, the Acting Managing Director is directed to provide you with all the support and cooperation.

It is the position of the applicant and the Interested Parties that the 1st and the 2nd respondents have no powers to suspend the Board of Directors as there is no legal basis in law to do so. It was submitted by **Mr. Omondi** learned counsel for the applicants and **Mr. Aden** for the company that, the Company is governed by the Companies Act Cap 486 Laws of Kenya, the Capital markets Act Cap 485A and any other written law applicable to the affairs of the Company. It was submitted that the decisions of the Acting Minister and the PS was made without any authority or jurisdiction at all or for want of jurisdiction.

It is the position of the applicants that East African Portland Cement Company is not a State Corporation. Section 2 of the State Corporations Act defines State Corporations to include;

- (a) **A body corporate established before or after the commencement of the Act by or under an Act of Parliament or other written law but not a Company incorporated under the Companies Act which is not wholly owned or controlled by the Government or by State Corporation.**
- (b) **A bank or a financial institution licensed under the Banking Act or other company incorporated under the Companies Act, the whole or the controlling majority of the shares or stock of which is owned by the Government or by another State Corporation.**

Mr. Omondi submitted that, a plain reading of the provisions of Section 2 of the State Corporations Act reveals that for EAPCC to be a State Corporation,

- (1) It must be wholly owned or controlled by the Government or
- (2) It must be wholly owned or controlled by a State Corporation or
- (3) The whole or controlling majority of its shares or stock must be owned by the Government or
- (4) The whole or controlling majority of its shares or stocks must be owned by State Corporation.

He also submitted that the company is a Limited liability company incorporated under the Companies Act way back in 1933 and its shares is listed on the main investment market of Nairobi Securities Exchange.

The submissions of **Mr. Oyatsi** learned counsel for the 2nd, 3rd BS 4th Interested Parties supported the position of **Mr. Omondi** and **Mr. Aden**. The learned counsel submitted that the purported suspension of the Board of Directors of the Company by the Minister is contrary to written provisions of the law as contained in the Companies Act and the Capital Markets Act. The advocate further submitted that the Board of Directors was not informed of the nature of the malpractices, the alleged involvement if any, and were condemned for various allegations or breaches without being notified of the same let alone being heard.

Mr. Okoth learned counsel for the 5th Interested Party submitted that his client holds 27% of the shares in the Company, therefore, is the single largest share holder in the said Company. **Mr. Okoth** urged this court to try and find a permanent solution to the wrangles which appears to be between the management of the Company and the respondents.

Mr. Ngatia learned counsel for the respondents submitted that there is a substantial dispute as to the legal status of the Company in particular whether it is a State Corporation or it is s a company under the Companies Act. He submitted that until October 2011 three efforts were put in place to show the Company is not a State Corporation, namely to have a reduced share holding of NSSF to reduce it to 23% and where it was stated that NSSF had transferred 4% shares to its staff pension scheme. It was argued that since the Government holds 25.3% shares and NSSF holds 23% shares, the combined shares would be 48.3% shares which is less than the 50% threshold to make the Company a State Corporation. **Mr. Ngatia** submitted that that position became untrue beyond argument when NSSF filed an affidavit in which they say their shareholding is 27%.

Mr. Ngatia submitted that NSSF is created by an Act of Parliament, therefore under section 2(b) (v) it is a State Corporation under the State Corporations Act. For the NSSF to dispose of its assets it would require the concurrence and consent of the Minister of Labour and for finance consequently, it is a public body. **Mr. Ngatia** submitted that the common denominator between the Government and State Corporations are that they both hold assets for the benefit of the public. And there cannot be any difference between assets held by the Government and assets owned by State Corporation. The learned counsel also submitted that the Managing Director's recruitment was authorized by the 2nd respondent in a letter dated 5th August 2010 by way of competitive advertisement. The top three names were forwarded to the Minister and the Minister appointed the current suspended Managing Director. He also contended that the chairman was appointed by the President of the Republic of Kenya and if the Company was not a State Corporation, the President would not have any power to appoint a chairman for a company wholly regulated by the Companies Act. In short **Mr. Ngatia** submitted that the Minister had the powers to appoint the Managing Director and suspend the Board in accordance with his powers under the State Corporations Act. **Mr. Ngatia** invited this court to hold and find that the Company is indeed a State Corporation, the power to suspend arises from evidentiary material, the suspension was for a very brief period to facilitate the audit and that there is nothing punitive about the suspension of the Board.

I have considered the application, all the submissions, authorities and documents filed by all the parties.

The issues for my determination are as follows;

- (1) Whether East African Portland Cement Company is A State Corporation or a public company regulated solely by the Companies Act.
- (2) Whether the suspension of the Managing Director and the Board was justified in the circumstances of this case.
- (3) Whether what had taken place between the Minister and PS amounted to a valid exercise of a power(s) donated to them or exercisable as a result of the positions they hold.

It is not in dispute that the 1st and the 2nd respondents wrote various letters dated 22nd December 2011, which suspended the Managing Director of East African Portland Cement Company Limited and also the Board of Directors. It is also not disputed that the managing Director was appointed by the Minister for a term of three years commencing 16th November 2010 pursuant to an approval and competitive recruitment by the Board. No doubt the Managing director was suspended by the Minister and the P.S. in two different letters dated the same day. Another factor, which is not disputed is that East African Portland Cement Company was incorporated in 1933 under the Companies Act. The shareholding of the company is as follows:

(1) Government of Kenya	25.3%	
(2) NSSF	27%	
(3) Cementia Holdings Ltd.	14.6%	
(4) Associated Cement International	14.6%	Lafarge
(5) Bamburi	12.5%	
(6) Others	6%	

giving a total of 100 by all the shareholders.

It has been contended by the applicants that NSSF diluted its shares by selling 4% to its pension scheme. According to the affidavit of **Alex Kasongo**, NSSF Board of trustees owns 27% of East African Portland Cement Company. It is therefore a fact that by virtue of its 27% shareholding, NSSF is the single largest shareholding in the Company.

In addressing whether the Company is a State Corporation or a public listed company, it is important to understand the arguments of the rival parties. It is the applicants' submissions that the shares owned by the Government are held by the PS Treasury which is a body corporate and that the company does not fall within the definition of section 2 of the State Corporations Act. That having regard to the definition of State Corporations and shareholding structure, it is clear that neither the Government nor any State Corporation has sufficient shareholding in the Company to make it a State Corporation.

Mr. Aden learned counsel supported that position by contending that the Company was incorporated and is governed by its Memorandum and Articles of Association. **Mr. Aden** also submitted that the provisions of the State Corporations Act were exempted through legal Notice No.177 of 1997 by the then President of the Republic of Kenya, therefore the Company is not and cannot be categorized as falling within the meaning of section 2 of the State Corporations Act.

Mr. Ngatia learned counsel for the 1st and 2nd respondents submitted that NSSF is a State Corporation within the meaning of section 2 of the State Corporations Act. He also submitted that the combined shareholding of the Government in the Company and NSSF exceeds the threshold of 50%.

As was correctly stated by **Mr. Ngatia** NSSF, was created by an Act of Parliament and is within the meaning of section 2 (b) (v) of State Corporations Act. It is clear that NSSF cannot dispose of its assets without a consent and concurrence with the Minister of Labour and Finance. It is my position that the opinion expressed by the law firm of **Ochieng, Onyango Kibet and Ohaga** Advocates as to whether the shares of NSSF and Government could be combined so as to come within the provisions sections 2 and 3 of State Corporations Act is factually and legally wrong.

The Government of Kenya through the Permanent Secretary for the Ministry of Finance holds 25.3% of the issued share capital of the Company and NSSF hold 27% of the shares. It is not in dispute that EAPCC is a company incorporated under the Companies Act, I am not sure it was incorporated as a private limited liability company. But what is clear is that later the company was converted to a public company. It was the view of the law firm that section 2(b) (v) is clearly disjunctive because the sections provide that the Company in question either is wholly owned or controlled by the Government, or if wholly owned or controlled by a State Corporation. I think that position is incorrect. The reasons would become apparent.

I am in agreement with **Mr. Ngatia** that the word ‘or’ can be conjunctive. I am also in agreement with **Mr. Ngatia** learned counsel for the respondents that the former President had no powers to exempt or exclude NSSF from the State Corporations Act. The former used section 2 of the State Corporations Act to grant the alleged exemption. Section 2 is a definition section and does not give power to the President to exempt corporations from the provisions of the State Corporations Act. One of the arguments by the Company through **Mr. Aden** advocate is because the former President exempted the company from State Corporations Act then it cannot be dealt with under the said Act.

As stated the former President had no powers to grant an exemption and despite the exemption, the Company by deed and act, acted as State Corporations. It is therefore my decision that NSSF by virtue of being established by Cap 258 Laws of Kenya is a State Corporation under the State Corporations Act. Consequently, in real legal truth the two sets of shares by the Government and NSSF are shares held by two State Corporations.

Before I move to the next issue, I feel it is prudent to comment on an issue that may have triggered this dispute, that is the Annual General Meeting of the Company which took place on 15th December 2011. At Minute No.10/2011, an extraordinary resolution was passed, where it was unanimously resolved;

“That this company not being a State Corporation, the Board is hereby directed to henceforth comply with the provisions of the Companies Act Cap 486 and the Articles of Association of the Company as amended from time to time to the exclusion of any other law not otherwise lawfully regulating the conduct and operations of a Kenyan Public Limited Liability Company listed on the Nairobi Stock Exchange.”

I think the Board was not right to make such a resolution in view of the combined shareholding of the Government of Kenya and N.S.S.F. **Mr. Ngatia** learned counsel for the respondents submitted that the Government has no business in having shares and regulating a company in the form suggested by the Board of Directors and shareholders on 15th December 2011. I think that is the correct position in law. The Company should adopt a hybrid system in order to participate meaningfully in the emerging trends in the cement industry. The company cannot run away from a particular shareholder whose strengths is on shares and in coercive powers of the State.

The second issue for my determination is whether the Minister and the PS had powers to suspend the Board and the Managing Director of the Company. In determining that question it is important to look at three issues;

- (1) The composition of the Board of Directors
- (2) The reasons advanced for the suspension of the Board of Directors

(3) Whether the Minister and/or the Permanent Secretary possess statutory powers to act the way they acted.

On composition, the Board comprised of the following;

- (1) Mr. Kephah Tande -Managing Director of the Company
- (2) Mark Ole Karpolo -Chairman of the Board of Directors
- (3) Joseph Kinyua - PS Treasury or his alternate
- (4) Dr. Kibicho Karanja - PS Ministry of Industrialization or his

Alternate

- (5) Alex Kazongo - Representing NSSF
- (6) Hamisi Keith - Lafarge Group
- (7) Titus Naikuni - Lafarge Group

Ordinarily a Company or a State Corporation is run through its Board of Directors. In this case, the Government was represented in the Board by the PS Treasury and PS Ministry of Industrialization. It is also clear that NSSF was represented in the Board by its Managing Trustee. Another important factor is that the Government had appointed the Chairman and one other director who was supposed to represent the interests of the public. There is no evidence to show that the Government was excluded from the Board meetings that was conducted before the dispute arose. There is also no evidence to show that any party used any unlawful means to achieve or to sanction an issue which was prejudicial to the interests of any of the shareholders. All the shareholders were represented in the various Board meetings and deliberations. It is basic that the business and affairs of the Company shall be directed by the Board of Directors with minimum outside interference or control. In a Company where there are divergent and distinct shareholding interests, it is fair and just to manage its affairs through the Board of Directors. The strength and the weakness of a particular shareholding interest can only be expressed, sanctioned and determined through Board resolutions.

In the letter of suspension of the Board of Directors dated 22nd December, 2011 the Minister suspended all the Board from carrying out their duties and functions on behalf of the Company until the investigations are over. In the same letter the Minister directed the Chairman Board of Directors to hand over all outstanding issues of the Board to the Permanent Secretary Ministry of Industrialization. As stated earlier, the Board members represent different shareholders and interest groups. In suspending the whole board, the Minister made a decision on behalf of Lafarge Group, NSSF and other minority shareholders. It is also clear that in suspending the operation of the Board, the Minister removed the PS Treasury and PS Ministry of Industrialization. In essence, the letter dated 22nd December 2011 suspended the entire Board. In suspending the entire Board, the Minister also suspended the representatives of the Government in the Board of the Company. The Minister did not retain the PS Treasury and PS Ministry of Industrialization. It is difficult to understand how the Board Chairman could hand over the operation of the Company and/or issues outstanding to the PS Ministry of Industrialization who was also suspended together with other members. It is also difficult to understand how the PS Ministry of Industrialization could suspend the Managing Director when he himself was suspended as a board member.

What are the reasons advanced by the Minister and the PS in suspending the Board and the Managing Director of the Company. The basis of the Minister suspending the Board is that the Government had received serious allegations touching on malpractices that may have led to huge losses and poor performance of the Company. It is clear in my mind the basis and the reasons for suspending the entire Board is alleged malpractices which was committed within unspecified period of time. It is not clear from the letter when the serious allegations of malpractices were committed. It is also not clear

who among the Board members committed serious allegations of malpractices and continues to be responsible for the poor performance of the Company. It means the Minister was accusing the entire Board. The Government is represented in the Board by at least four members. Of prominence and importance are the PSs Treasury and Ministry of Industrialization.

The Minister stated that the suspension was made to pave way for an independent forensic investigations into the allegations that may have been committed or omitted by the Board members. Essentially, the Minister was also accusing the PSs Treasury and Industrialization to have been part of a commission or omission where serious allegations of malpractices were committed at East African Portland Cement Company. The Minister was also accusing two senior Government officials of having contributed to malpractices that may have led to huge losses at the Company. The Minister was also saying that their presence at the Board of Directors of East African Portland Cement Company resulted or continued to result in poor performance of the company. He nevertheless directed the Board Chairman to hand over all outstanding issues of the Board to a person who was not fit to be a Board member of the Company. The point I am making is that in the letter dated 22nd December 2011 the Minister made serious and grave allegations against the entire Board.

In paragraph 5 of the Minister's replying affidavit filed on 4th January 2012, he averred as follows;

“Upon detailed evaluation of complaints that I had received and after due consultation, I suspended the Board of Directors so that investigations could take place.”

In my understanding, the Minister is saying is that he received serious and grave allegations of malpractices committed by the entire Board and after detailed evaluation, he came into conclusion that the entire Board ought to be suspended so that an investigation can be carried out and the allegations conclusively determined. In doing so, the Minister did not spare any Board member in so far as the malpractices and poor performance of the company is concerned. There is no evidence to show that any particular director was implicated or responsible for the allegations contained in the Minister's letter dated 22nd December 2011 and that of the PS dated 27th December 2011. The letter of suspension and the allegations leveled against the Board of Directors did not exonerate any particular member, therefore the Minister was raising suspicion and complaints against the entire Board of Directors.

In paragraph 13 of the Minister's replying affidavit, he avers as follows;

“THAT the Applicants do not dispute that critical complaints and issues have been made against the suspended board and EAPCC. Without jeopardizing the forensic audit which is being undertaken by government, I tabulate as examples the following misdeeds;

(a) By an agreement made on 13th July 2009 between EAPCC and Sanghi Industrial Ltd, and important input in the manufacture of cement called “clinker” was to be purchased by EAPCC at an agreed sum of US\$58.90 per ton. This agreement was for 140,000 metric tons. After Supplying 67,000 tonnes, the supplier requested a price increase which was rejected by the Tender Committee of EAPCC. Remarkably, the suspended board in a meeting held on 28th June 2010 overruled the Tender Committee and awarded a price increase for the delivered products as well as the further products to be delivered. As a consequence, a price increase of approximately Shs.74 million was effected by the suspended board.

(b) Between 15th August 2011 and 30th November 2011, EAPCC without using competitive tendering process which it is statutorily required to do, purchased goods and services worth in excess of Shs.1 billion. Those purchases were made by direct procurement and/or restricted tendering. These processes were not authorized by the Public Procurement Oversight Authority.

(c) Kenya National Audit Office has raised an audit query on the suspended board's expenditure of approximately Shs.13 million which constitute overpayment made to the Chairman and the suspended directors. I produce copy of letter dated 27yth October 2011 and 25th October 2011

marked "AJK-9".

By his letter dated 22nd December 2011, and with the contents of his replying affidavit, the Minister was accusing the entire Board for having not protected the interests and the rights of all the shareholders and the entire public.

On the other hand, he was telling the Board chairman to hand over to the PS Ministry of Industrialization who was a sitting member. It is contended by the applicants that by doing so, the Minister acted in excess of his jurisdiction and without authority. In my understanding the reasons advanced for the removal of the Board appears to have no basis in law. The Minister attempted to explain the decision made and directions in three letters dated 22nd December 2011. It is the case of the applicants that the reasons and explanations by the Minister and the PS amounts to utter disregard for due process and the legitimate management of the Company.

In a letter dated 27th December 2011 the Permanent Secretary Ministry of Industrialization requested the Efficiency Monitoring Unit to investigate allegations of malpractices against the Board of Directors of the Company. He listed various issues and allegations to be investigated and determined. In the said letter the PS accused the Board of Directors of giving false information to shareholders and colluding to dilute Government of Kenya shares. However he was aware that a task force established by his own Ministry to make recommendations for the review of the State Corporations Act had made a report.

It is also surprising to note that whilst the PS is a member of the Board of Directors, he did not raise any queries or table complaints about the management of the Company at any of the Board of Directors or shareholders meetings. Nothing was brought to my attention as to whether the PS objected or raised queries on any of the allegations that were raised by him in his letter dated 27th December 2011. I do not understand how the PS who is a member of the Board of Directors would accuse the Board of any malpractices when there is evidence that he participated either personally or through his alternate all board meetings and resolutions.

Having compared the contents of the letters by the Minister with the letters by the PS, it is apparent that the decisions, directions and orders made thereunder are oppressive, unreasonable and arbitrary. Whilst the Minister purported to suspend entire board of Directors of the Company which includes the Permanent Secretary, Industrialization and Treasury, he required the duties of the Board to be handed over to a person whom he had purported to suspend. The Acting Minister purported to suspend the entire board of Directors whilst in paragraph 4 of his replying affidavit, he averred that Lafarge is a shareholder and entitled to nominate two persons to be directors of the Company.

It therefore means the Minister could not possibly have been entitled to sustain or remove from office Directors nominated and representing other shareholders who have substantial stake in the management and control of the Company.

Perhaps it is also important to note whilst the Permanent Secretary is a member of the Board of Directors of the company and was purportedly suspended by the Minister, he purported to exercise some kind of power/authority to unilaterally suspend a fellow Board member, the Managing Director of the Company. In my view the PS did not possess such powers when the Minister suspended him as a Board member of East African Portland Cement. On the same breadth the Minister did not have powers to suspend the Managing director of the Company. The Minister and PS could not validly and legitimately remove, suspend, all or any person as a Board member of the Company. The Minister was not the appointing authority of any of the Board Members and could not therefore purport to suspend any member of the Board from running the affairs and the management of the Company.

It is also clear in my mind that the PS was not the appointing authority of any members of the Board and could not legally and morally purport to suspend and remove any member of the Board. Indeed the PS to whom the Minister expected the Board of Directors to hand over their duties participated either by himself or through his alternate in all the decisions of the Board of Directors since he joined the Board in the year 2010. It means the Minister was deliberately or inadvertently accusing the PS Ministry of

Industrialization and Treasury of having participated or condoned misappropriation and misuse of public funds. The Minister condemned the entire board for being involved or committing malpractices without any caution or care to the individual Board members. The Minister did not accuse any particular member or grant an opportunity to respond to the serious and damaging allegations to any members of the Board. In my view the decision, determination, direction and orders of the Minister were without any legal basis.

The last issue is whether the Minister and/or the PS had statutory power to act in the way they did. In all the letters authored and signed by the respondents, they did not indicate the source of their powers to suspend the entire Board of Directors of the Company. The Minister did not say he was acting on any particular provision of the law. **Mr. Ngatia** learned counsel for the respondents submitted that the Minister exercised the powers in order to protect and preserve public interest. That may sound appealing and interesting to a bystander who is not possessed with the factual and legal position existing and prevailing at the time the said powers were purportedly exercised.

Mr. Ngatia submitted that the suspension made by the Minister was only for a limited period and to allow the audit to be completed. He submitted that it is quite likely that if the audit is allowed to continue unhindered, certain persons shall be arraigned in court for economic crimes and/or charges of misappropriation, therefore the Minister's act was in public interest. The Minister for Industrialization is not a shareholder and did not act on behalf of the Government of Kenya. The Minister does not mention the source of his power and under which law that entitles him to act in the way he did. In my view the Minister cannot be heard to say that his decision is based on public interest. This court cannot allow the Minister and the PS to take over the Company in complete disregard of the law. The minister had no authority to suspend the Board of Directors as there are no powers conferred upon him by any statute. Even if the Minister was acting on public interest, the court cannot disregard the rights and interests of the other shareholders. It is not justifiable for a shareholder having 25.3 shares to suspend and remove directors appointed by other shareholders. It is therefore my decision that there has been a usurpation of jurisdiction which the law does not permit resulting in denial of justice.

In my view, the exercise of a statutory or executive power has to be invoked properly to avoid a party becoming unruly horse. That is meant to safeguard against arbitrariness and unreasonable exercise of statutory and executive powers. It is obvious to me that the reasons given for the suspension was totally irrelevant to the powers the Minister exercised. The Minister did not disclose grounds and/or basis for the suspension of the entire Board solely and singularly attributable to the applicants. As we know and I take judicial notice, that Government Ministers are not angels and we cannot expect them to act like angels even remotely. One can hardly say or assume the exercise of executive powers is for the benefit of the public. Instances of misuse and abuse is usually abundant and of monumental magnitude. Often times they exercise executive powers for political gains, expediency and to achieve ulterior or extraneous considerations. The way the Minister and PS acted is a clear testimony of use of powers in a coercive and/or oppressive manner.

I am in no doubt that the original intent or desire behind the suspension of the entire Board was to subvert and substantially alter and redesign the direction, control, operation and management of the company. Let me say at this stage that possession of executive powers essentially entails the possibility to lord over others in a tyrant manner. By suspending the entire Board without proper grounds and giving the functions and the powers of the Board to the PS who was suspended together with the entire Board and who took part in all the deliberations and resolutions of the Company, the Minister subverted the machinery of the Company through undesirable political interference which has no basis in law and in fact.

As stated earlier a shareholder should effectively communicate its demands, articulate his interests and to be bound by the decision and the resolution of the entire Board. By overstepping the proper machinery of the Company the Minister and the PS created confusion and uncertainty in the management of the Company. Consequently the need for the courts to rule and watch over the exercise of the executive powers to avoid instances of abuse and misuse. It is quite apparent in the circumstances of this case. In my view the rule of law empowers the court to intervene where there is manifest and apparent misuse of

executive powers in a manner detrimental or prejudicial to the rights and interests of parties who are interested in the exercise of such powers. The rule of law requires regularity, predictability and certainty in Government dealing with the public. In this case the way the Minister and the PS exercised their perceived and/or purported powers is vitiated by the inference of extraneous consideration and lack of jurisdiction and/or authority.

The question now is whether the applicants having passed the first hurdle that the Minister had no powers to suspend the entire Board and the Managing Director, are entitled to the orders sought. **Mr. Omondi** learned counsel for the applicants submitted that an order of certiorari is desired to remove into the High Court proceedings and acts by administrative orders or tribunals for purposes of the same being investigated and found wanting on the grounds inter alia *ultra vires*, unreasonableness, error in law, abuse of power or breach of principles of natural justice to be quashed. **Mr. Omondi** Advocate also submitted that an order of prohibition is sought when it is desired of the High Court, to direct an inferior tribunal, an administrative body or Government officials to cease the conduct of proceeding and/or acts that are *ultra vires*, abuse of powers or in contravention of the rules and principles of natural justice. It is sought to stop or prohibit bodies or persons from continuing to engage in such acts or proceedings. On the other hand **Mr. Ngatia**, learned counsel for the respondents submitted that the orders sought are discretionary and as a result of the conduct of the applicants, the same ought to be declined.

The purpose of the orders sought by the applicants is to ensure justice and fair treatment to individuals who are subjected and/or affected by the exercise of an executive authority or decision. In my understanding an order of certiorari will issue if the decision by administrative tribunal is made without or in excess of jurisdiction or where there manifest illegality or arbitrariness. It is also my view an order of prohibition is available to curb or forbid the Minister, PS and/or any other government official from interfering or meddling in the management, control and operation of the Company.

The Minister and the Permanent Secretary are Government officials and are obliged by law to exercise certain powers and functions in accordance with the law. It is clear the Minister and the PS made certain decisions and issued directions contained in various letters dated 22nd December 2011 and 27th December 2011 in their respective capacities as Government officials. The effect of the decisions by the Minister and PS was to dismantle and uproot the basic structure of the Company in which the Government is a shareholder and is adequately and properly represented in the Board of Directors. In my view there has been a usurpation of jurisdiction which entitles the applicants to the orders sought. The action and the omission of the Minister and the PS infringed upon the applicants and the shareholders they represent in the Board of Directors of the Company.

It has been argued that the Minister and the PS were acting on public interest. In my opinion that is utterly wrong. I do not see how it is possible for a non-existent body who had no control over the affairs of Board of Directors to purport to suspend or remove board members who were appointed and were representing distinct shareholders' interests. By doing so, the Minister brought the operation and the business of the Company to be at deadlock. The PS also purportedly exercised powers which he did not possess and which were not donated to him by any statute by suspending the managing director. It is curious to note that the Managing Director was suspended by both the Minister and the PS. That situation has led to a dilemma and paradox. The dilemma is whether the Minister who had suspended the entire Board of Directors could grant one of the Directors powers to run the affairs of the Company. The paradox is what appears nonetheless from the letter by the PS suspending the Managing Director when he had no such powers and when he himself was suspended or removed as a Director of the Company. One may be tempted to ask, if the Minister and the PS suspended the entire board for malpractices, misappropriation of funds and misuse of power, can the same PS continue to hold the position of a Permanent Secretary in the Ministry of Industrialization? I am not in any way saying the PS in the Ministry of Industrialization has committed any offence or crime to make him not to hold or occupy the position of a permanent Secretary. What I am saying is that by suspending the entire Board, the Minister and the PS created a dilemma and a paradox which can undermine the offices which they occupy.

The conduct of the Minister and the PS is quite remarkably intriguing and contradictory and in law a person cannot be allowed to assume or take two contrasting positions. I sincerely think by their own

inadvertent omission, the Minister and the PS created a manifest legal dilemma and/or paradox in the way they conducted themselves in the affairs of the Company. They did not appreciate that by their own conduct they were subverting the cause of justice and putting themselves in a legal dilemma. Consequently the Minister and the PS failed to understand or appreciate the signification and ramification of their own actions. They wrongly failed to take into account certain relevant matters and gave excessive weight to others thereby frustrating the rights of the entire Board and the shareholders they represent. I am therefore wholly unpersuaded by the arguments that the Minister and the PS acted on public interest.

Mr. Ngatia learned counsel for the respondents submitted that the basis of suspension of the Board was to carry out a forensic audit so that public interest can be protected. With respect that was not a correct assessment of the position and the reasons advanced for the suspension of the Board. I fear I cannot agree. What the respondents have chosen to do in this case is to create a situation outside the machinery and the structure. I have difficulties in seeing how one shareholder is to be treated in any way differently from other shareholders. In my view, one Director cannot remove and/or suspend a fellow director representing a rival shareholder with separate and distinct rights. The fact that one shareholder is suspicious about the activities of the Board of Directors where he is adequately represented does not in my judgment deprive other shareholders of the power to retain and remove directors representing them in the Board of the Company. If Directors having certain powers are unable or unwilling to exercise them, within the structures of the Company, a purported agent of one shareholder cannot validly and legally circumvent the powers of the other shareholders.

The Government is represented in the Board of Directors and has the largest number of Directors which is not commensurate to its shareholding. It can therefore articulate its powers through resolutions passed by the Board of Directors. In law, the resolutions reached by majority of the Board members, bound the company and its members to the same extent as if they respectively had been signed and sealed by each member. What the Minister and the PS did was to circumvent the legal machinery of the Company in order to frustrate and disregard the wishes and the intentions of other shareholders. In my view that cannot be allowed to happen. There is therefore need for this Honourable court to issue the orders sought by the applicants.

Before, I conclude, I must comment on two issues: As this matter was pending, the Company filed HCC No.5 of 2012 in the Commercial Division of the High Court. The defendant in that case are the respondents herein and **Peter Korir** who was appointed to act in the office of Managing Director. As was rightly submitted by **Mr. Ngatia**, the prayers in the Judicial review proceedings and in private law case are the same and/or identical. In my view that conduct amounts to an abuse of juridical process. The person who instigated that suit were not entitled to do so. I think, it was filed in order to create confusion and contradiction in the administration of justice.

The second issue is that as this matter was pending for decision, the President of the Republic of Kenya published gazette notice NO.1608 dated 9th February 2012 by which he has purported to change the composition of the Board of Directors of the Company by removing the chairman **Mr. Mark Karbolo** (the 1st applicant herein) and in his appointing **Dr. Isaac Mpapuluu Ole Mapenay**. It is clear that on 19th January 2012 this Honourable court granted various orders and directions whose effect was to ensure that the operations of the company return to normal, assets protected and the composition of the Board of Directors to remain the same. The orders were extended from time to time. It is therefore, clear in my mind that gazette notice No.1608 dated 9th February 2012 was made in contravention of the law and in violation of the orders that were in place. Consequently there was no authority or power on the part of the President to make gazette notice 1608, consequently the said decision is automatically null and void and ought to be set aside. I hereby do.

In conclusion, it is my decision that the applicants are entitled to all the orders sought in the Notice of Motion dated 4th January 2012. It is also my decision that the Plaintiff in HCCC No.5 of 2012 was not entitled to file the said suit and seek the orders therein. Consequently, the Notice of Motion under my determination is allowed with no orders as to costs. It is also my decision that HCCC. No.5 of 2012 is hereby struck out with no orders to costs. It means each party shall bear his or her own costs. Orders accordingly.

Dated, signed and delivered at Nairobi this 20th day of April 2012.

M. WARSAME
JUDGE