



**Republic v Kirui & 7 others; Soi & 2 others (Exparte Applicants) (Judicial Review E005 of 2024) [2025] KEHC 2576 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2576 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
JUDICIAL REVIEW E005 OF 2024**

**JK SERGON, J**

**MARCH 13, 2025**

**IN THE MATTER OF ARTICLE 19 (3)A, 20(3)B,20(4)B, 22,  
23(1), 35(2), 47(1),(2)& 50(1) OF THE CONSTITUTIONAND**

**IN THE MATTER OF SECTION 3(A),(C),4 AND 7(A)  
& 10 OF THE FAIR ADMINISTRATION ACTAND**

**IN THE MATTER OF CIVIL PROCEDURE ACT AND RULESAND**

**IN THE MATTER OF THE COMPANIES ACT, CHAPTER 486 OF THE  
LAWS OF KENYA (NOW REPEALED BY ACT NO. 17 OF 2015)AND**

**IN THE MATTER OF MEMORANDUM AND ARTICLES OF  
ASSOCIATIONS OF NENYON COMPANY LIMITEDAND**

**IN THE MATTER OF SECTION 1,9 & 14 OF THE MEMORANDUM AND  
ARTICLES OF ASSOCIATION OF NENYON COMPANY LIMITED AND**

**IN THE MATTER OF NENYON COMPANY LIMITED CERTIFICATE NO.106592.**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DICKSON KIPYEGON KIRUI ..... 1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF COMPANIES ..... 2<sup>ND</sup> RESPONDENT**

**HON ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**EVERLINE CHEBWOGEN ..... 4<sup>TH</sup> RESPONDENT**

**BRENDA CHEPKOECH ROTICH ..... 5<sup>TH</sup> RESPONDENT**

**DAVID KIPRONO ROTICH ..... 6<sup>TH</sup> RESPONDENT**

**PAUL KIPROTICH SIGEI ..... 7<sup>TH</sup> RESPONDENT**



**KIPKETER JULIUS KOSKE ..... 8<sup>TH</sup> RESPONDENT**

**AND**

**SIMEON KIMUTAI SOI ..... EXPARTE APPLICANT**

**KIBET ELIJAH ARAP SOI ..... EXPARTE APPLICANT**

**BETTY CHEMUTAI KOSITANY ..... EXPARTE APPLICANT**

### **RULING**

1. Pursuant to leave granted on 3rd October, 2024 to institute judicial review proceedings, the Applicants herein filed a substantive motion for judicial review. Therefore the application coming up for determination is a notice of motion dated 23rd October 2024 seeking the following orders;
  - (i) That this Honorable Court may be pleased to issue an order of mandamus directed at the Registrar of Companies together with Business Registration Service to remove and bring to this Honourable Court its decision to strike out and/or change the registration of the name Nenyon Company Limited to Nenyon Investment Company Limited under certificate No.C106592.
  - (ii) That this Honorable Court may be pleased to issue an order of mandamus directed at the Registrar of Companies together with Business Registration Services to accordingly reinstate in its register the registration of the name Nenyon Company Limited under certificate No.C106592.
  - (iii) That this Honorable Court may be pleased to issue an order of mandamus directed at the Registrar of Companies together with Business Registration Service to remove and bring to this Honourable Court its decision to remove the names of the Applicants from its register as the directors of Nenyon Company Limited under certificate No.C106592.
  - (iv) That this Honorable Court may be pleased to issue an order of mandamus directed at the Registrar of Companies together with Business Registration Services to accordingly reinstate the names of the Applicants in its register as directors of the Nenyon Company Limited under certificate No.C106592.
  - (v) That this Honorable Court may be pleased to issue an an order of certiorari directed at the Registrar of Companies together with Business Registration Service to remove and bring to this Honourable Court its decision to register the names of the 4th 5th 6th 7th & 8th Respondents as directors of Nenyon Company in place of the names of the Applicants in execution of the the impugned resolution and without notice to the Applicants.
  - (vi) That this Honorable Court may be pleased to issue an order of certiorari to remove and bring to this Honourable Court and quash the entire proceedings and minutes of the Special General Resolution of the Nenyon Company Limited held on the 2nd April 2024.
2. The application is based on grounds and matters set out in the statutory statements and the affidavit of Simeon Kimutai Soi the 1st Exparte Applicant verifying the facts necessitating the filing of this suit with the consent of the 2nd and 3rd Exparte Applicant.
3. He avers that a notice dated 2nd February 2024 was duly served upon the Ex Parte Applicants to convene a Special General Meeting of Nenyon Company Limited on the 2nd April, 2024.



4. He avers that there was a Special General Meeting held at Tea Hotel Kericho on 2nd April, 2024 where an impugned resolution and/or decision was made and several persons including the 1st, 4th, 5th, 6th, 7th & 8th Respondents were in attendance.
5. He avers that soon after the meeting the 1st Respondent in execution of the duties of the office of the secretary of the interested party and acting without express instruction of the Ex- parte Applicants, caused to be filed with the office of the 2nd Respondent the impugned resolution.
6. He avers that the decision by persons three (3) namely; Stephen Cheruiyot Too, Charles Cheruiyot Mosonikand Paul Kiptotich Sigeito set in motion the process of and the subsequent removal of the Ex parte Applicants from office while serving as Directors of Nenyon Company Limited as contemplated under section 279(1) of the Companies Act No.17 of 2015 was ultra vires the provisions of the Companies Act and the Memorandum and Articles of Association.
7. He avers that save for Stephen Cheruiyot Toowho at the material time had capacity to act on behalf of the estate of Julius Kiptoo Kapticha deceased shareholder, all other persons present in the alleged Special General Meeting scheduled and convened for the Nenyon Company Limited on 2nd April, 2024 lacked capacity to act and/or represent the interests of any of the deceased shareholders, he attached a list of the minutes of the said meeting.
8. He avers that it was at the alleged Special General Meeting of Nenyon Company Limited as scheduled and convened on 2nd April, 2024 the names of the ex parte applicants as directors were resolved to be removed and replaced with names of the 4th, 5th, 6th, 7th & 8th Respondents as the directors.
9. He avers that there was no quorum to transact the affairs and business of Nenyon Company in the said meeting and consequently the proceedings and subsequent resolution to remove the Ex Parte Applicants from office as directors of Nenyon Company Limited is ultra vires the provisions of section 4 of the Articles of Association of the Company.
10. He avers that the alleged holding of the Special General Meeting on the 2nd April 2024 was an act of irregularity, illegality, and ultra vires the Articles of Association.
11. He avers that the 1st Respondent having lodged the impugned decision with the office of the 2nd Respondent, who in due execution of its official duties proceeded to cause the names of the Exparte Applicants to be removed and subsequently replaced from the register of the Interested Party without prior notice to the Ex Parte Applicants acted in total disregard of the Ex-parte Applicants' individual and/or collective right to be heard contrary to the principles of natural justice.
12. He avers that as a consequence of execution of the impugned decision, the 3rd, 4th, 5th, 6th & 7th Respondents in their alleged capacities as directors of Nenyon Company Limited have in the recent past and without the participation of the Ex-parte Applicants, who are the now surviving shareholders, unilaterally caused the company's change of name to Nenyon Investment Limited which decision is ultra-vires the Memorandum and Articles of Association of Nenyon Company Limited, he attached copies of Certificate of change of name and the amended form CR-12 respectively.
13. He further avers that 3rd, 4th, 5th, 6th & 7th Respondents in their purported capacities as directors of Nenyon Company Limited (now Nenyon Investment Company) have continued to commit acts of commission and omission by themselves and/or acting in connivance or collusion with the 1st Respondent and that unless the impugned decision is quashed forthwith the ex parte applicants and shareholders shall suffer loss and irreparable damage.



14. Some of the respondents in the suit namely Dickson Kipyegon Kirui, Everline Chebwogen, Brenda Chepkoech Rotich, David Kiprono Rotich, Paul Kiprotich Sigei and Kipketer Julius Koske the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents respectively filed a notice of Preliminary Objection dated 29th November, 2024 based on the following ground; That this suit offends the provisions of Section 6 of the Civil Procedure Act as it is sub judice the suit Kericho HCCC/E003/2024 Everlyne Chebwogen And Kipterer Julius Koske And 7 Others VS Betty Chemutai Kositany And Kibet Elijah Arap Soi And 1 Other. They therefore urged this court to stay the judicial review proceedings pending the hearing and determination of the said suit. The said respondents have since abandoned the notice of preliminary objection and filed the following grounds of opposition;
  1. The Application is fatally defective, misconceived, frivolous and an abuse of court process as the same contravenes the same provisions of law it is premised on.
  2. The Application lacks merit and the prayers sought have no basis in law.
15. This Court directed the parties to file their written submissions in respect to the judicial review application and the preliminary objection.
16. The Applicants complied with the directions of this court, the applicants contended that they have established a case for the grant of the judicial review orders sought. They reiterated that the special general meeting convened as well as the proceedings of the meeting and subsequent resolution to remove them from the office of directors was a nullity from the onset in light of the fact that the participants who amongst them the 1st, 4th, 5th, 6th, 7th and 8th Respondents were not shareholders of the company. They argued that the distinction between judicial review and an appeal is not a novel issue, it is a well trodden path, they cited the case of Municipal Council of Mombasa v Republic & Umoja Consultants Ltd [2002] eKLR, where the Court of Appeal stated that; "Judicial review is concerned with the decision making process, not with the merit itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether the in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters... The court should not act as a court of appeal over the decider which would involve going into the merits of the decision itself- such as whether there was or there was not sufficient evidence to support the decision."
17. The Applicant cited the case of Republic v Public Procurement Administrative Review Board & 2 Others Ex Parte Rongo University [2018] eKLR where the court held that the grant of orders of certiorari, mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.
18. The Applicant argued that in light of the undisputed facts they urged the court to find that the Applicants have met the threshold for the orders sought in the Notice of Motion dated 23rd October, 2024.
19. The Respondents complied and filed their submissions and contended that from the court record, the judicial review Application herein was commenced vide a Chamber Summons Application dated 2.10.2024 which was filed on the next day, Wednesday, the 3.10.2024 exactly 185 days after the impugned Special General Meeting Resolution of Nenyon Company Limited passed on 2.4.2024, five (5) days outside the prescribed six (6) months limitation period prescribed by law on filing of applications for prerogative orders and that no application has been made and allowed by this court to extend the time said time limit and Order 53 rule 2 of the Civil Procedure Rules is a mandatory provision prohibiting the grant of an order of certiorari unless the application is made not later than



six months after the date of the proceedings against which it is to be issued. They relied on the decision of, Waki, J in Republic v County Council of Kwale & another ex parte Kondo & 57 others [1998] KEHC 3 (KLR) where the learned judge held that: “The applicants made a conscious decision to challenge actions ascribed to an Act of Parliament which are amenable to orders of certiorari. Whether such actions arise from Acts of Parliament which leave limitation periods open or not the provisions of the Law Reform Act are applicable. In this particular case I find that the Act was not complied with. There has been no attempt to explain the delay in filing the proceedings in this matter and the affidavit in support is evasive on certain dates when the applicants became aware of the infringement of their rights.”

20. The Respondents argued that from the grounds in support of the said Application, it is obvious that it also seeks to review the merits of said Decision(s) of the Registrar of Companies and or the Business Registration Service. This will require more than Affidavit evidence and can only be subject of an ordinary civil suit and that it is trite law that Judicial Review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Without evidence of the proceedings culminating in the said decision renders the Application subject hereof fatally defective, misconceived, frivolous and an abuse of court process.
21. The Respondents laid out the basis for the orders for mandamus and cited In Republic v County Secretary, The County Government of Bungoma & 5 others; Kenya County Government Workers Union Bungoma County Branch Ex parte Applicant) (Judicial Review E001 of 2022) [2022] KEELRC 3869 (KLR) (7 July 2022) (Judgment) [2022] KEELRC 3869 (KLR) where Justice, J.W Keli held at para. 17 of his judgement as follows:-

“The Courts agrees with the position taken by Justice Mativo (supra) at paragraph 11 that the role of the court in judicial review is supervisory. It is not an appeal. In exercise of judicial review jurisdiction this court cannot purport to review or upset the decision rendered by a court of equal jurisdiction.”

He went on to hold at para. 26 that:-

“The court is persuaded by the decision of Mativo J ( supra) cited by 2<sup>nd</sup> Respondent where in paragraph 24 agreed with the test of mandamus as set out in Apotex Inc vs Canada(Attorney General) (23) the court set out the 8 factors that must be present for the writ of mandamus to issue being:-

- i. There must be a Public Legal Duty to act.
- ii. The duty must be owed to the Applicants:-
- iii. There must be a clear right to the performance of the duty, meaning that:- a. The Applicants have satisfied all conditions precedent, and b. There must have been a prior demand for performance. – an express refusal or implied refusal through unreasonable delay c. No other adequate remedy is available to the Applicants d. The order sought must be of some practical value or effect. e. There is no equitable bar to the relief sought f. On a balance of convenience, mandamus must lies” The Respondents contended that the Applicants herein have not complied with the above preconditions for this court to grant them the orders of mandamus sought.”

22. The Respondents contended that the resolution that was subject to the instant judicial review application was passed in accordance with the dictates of Section 139 of the Company Act and the



applicants having declined the invite to attend the subject meeting as above notified, the applicants cannot as a matter of fact give evidence demonstrating how the impugned decision was arrived at. As such it is impossible, due to their deliberate absence from the Special General Meeting of 2.4.2024, for them to be able to tell whether in the course of making the impugned decision, due process of law was followed or there was any procedural defect and or breaches of rules of natural justice to warrant the orders of certiorari above sought. They further contended that the Applicant's grievance on change of the subject company name, that section 62 (a) of the Company Act provides that a company may change its name, as was done in respect of the subject company, "by special resolution or as may be provided for by the articles of the company". There was nothing ultra vires the subject company did to this effect.

23. The Respondents contended that the purpose of Judicial Review is set out in the case of *Municipal Council of Mombasa v Republic, Umoja Consultants Ltd*, Nairobi Civil Appeal No 185 of 2007[2002] eKLR, where the Court of Appeal held that: "The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such a court is not entitled to act as a Court of Appeal over the decider. Acting as an Appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review."
24. The Respondents submitted that the affidavit verifying the facts sworn by SIMEON KIMUTAI SOI, the 1<sup>st</sup> Applicant, on 13.8.2024 has no annexures attached to it, as such the facts deposed to have not been proved by the documentary evidence supposedly attached thereto. The Respondent contended that the Applicants feebly attempted to adduce evidence in support of their Application by separately filing some documents that they marked "SKS - 1(b)", "SKS - 2(e)", "SKS - 3" and "SKS - 16 (f)" and that the same have not been signed and stamped by a Commissioner for Oaths if at all they were meant to be part of the Affidavit Verifying the Facts sworn by Simeon Kimutai Soi but were unfortunately separately filed. The Respondents cited the case of *Des Raja Sharma v Reginam* (1953) 19 EACA 310, where the court held that:- "There is a distinction between exhibits and articles marked for identification; and that the term 'exhibit' should be confined to articles which have been formally proved and admitted in evidence." The Respondents argued that the affidavit and the annexures or the exhibits attached to it constitute evidence; they are not separate from each other and where exhibits to an affidavit have not been authenticated by a Commissioner for Oaths, the Oath and the Affidavit is fatally defective.
25. The respondents reiterated that the application lacks merit, fatally defective and is an abuse of court process and should therefore be dismissed with costs to the Respondents.
26. This Court having considered the application, responses and submissions by the parties finds that the sole issue for determination is whether this court can issue an order of certiorari, mandamus or prohibition arising from the proceedings and decision of the Special General Resolution of the Nenyon Company Limited held on the 2nd April, 2024.
27. Having considered the circumstances that led to filing of the instant application more so the grounds in support of the said application, it is obvious that the application seeks to review the merits of the proceedings and decision of the Special General Resolution of the Nenyon Company Limited held on the 2nd April, 2024 and the decision of the Registrar of Companies and/ or the Business Registration Service and this will require more than affidavit evidence and can only be subject of an



ordinary civil suit and that it is trite law that judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. In the case of *Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison* [2007] 1 EA 354, the Court expressed itself as follows: “Section 8 of the *Law Reform Act* specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require viva voce evidence to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application... Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow viva voce evidence and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced...It may indeed be true that the notice that is impugned is irregular or unlawful and an order of certiorari would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being a discretionary remedy will only issue if it will serve some purpose. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles...So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of certiorari because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and viva voce evidence at another forum preferably the Civil Courts.” It is the finding of this court that the reliefs sought by the applicant are not the most efficacious in the circumstances, the issue on management of the affairs of Nenyon Company Limited still persists and would require to be heard and determined a more suitable forum.

28. This court is privy to the two schools of thought on judicial review, that were well laid out in the case of *M'mucheke v Land Adjudication Officer Igembe District & 3 others; Jeremiah (Interested Party)* (Judicial Review E006 of 2022) [2023] KEELC 21395 (KLR) (9 November 2023) (Judgment). The first school of thought being that since the promulgation of *the constitution*, 2010 judicial review had shifted from the “process only approach” to merit review in appropriate cases and the second school of thought being that judicial review proceedings involve a “process only approach” limited to the interrogation of the process and not the merits of the decision being challenged.
29. In *Daude & 3 others v Inspector General National Police Services & 5 others (petition 6 (E007) 4 (E005) & 8 (E010 of 2022)* (Consolidated) 2023 KESC 40 (KLR), the Supreme Court of Kenya held that a judicial review ought to carry out a merit review of a case when a party approaches it under the provisions of *the Constitution*. The court held that judicial review was no longer a strict Administrative Law remedy but also a Constitutional Fundamental Rights enshrined in *the Constitution*. The court further held that when a party approached a court under the provisions of *the constitution* then the Court ought to carry out a merit review of the case. However, if a party filed a suit under the provisions



of order 53 of the Civil Procedure Rules and did not claim any violation of rights or even violation of *the Constitution*, then the court could only limit itself to the process and manner in which the decision complained of was reached or action taken and not the merits of the decision.

30. Having perused the application herein. The same was brought under Order 53 Rule 1 of the Civil Procedure Rules and reliance placed on various articles of *the constitution*, however, the applicant merely cited the said provisions of *the constitution* and did not claim any violation of rights or even violation of *the Constitution*, and therefore under these circumstances this court can only limit itself to the process and manner in which the decision complained of was reached or action taken and not the merits of the decision.
31. In light of the foregoing the notice of motion dated 8th July, 2024 is hereby ordered struck out with each party bearing their own costs.

**DATED, SIGNED AND DELIVERED AT KERICHO THIS 13TH DAY OF MARCH, 2025**

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**J.K. SERGON**

**JUDGE**

In the Presence of:-

C/Assistant – Rutoh

Miss Koech for the Applicant

Ojwang for 3<sup>rd</sup> Respondent

