



**Lubanga v Wesonga & 4 others; Sewon Enterprises Limited (Nominal Respondent) (Petition E010 of 2024) [2025] KEHC 9907 (KLR) (Commercial and Tax) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9907 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
COMMERCIAL AND TAX  
PETITION E010 OF 2024  
BK NJOROGE, J  
JULY 10, 2025**

**BETWEEN**

**LYDIA LUBANGA ..... PETITIONER**

**AND**

**HELENE MASAKHALIA WESONGA ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH MASAKHALIA NANDIEKI ..... 2<sup>ND</sup> RESPONDENT**

**ROBERT MASAKHALIA ..... 3<sup>RD</sup> RESPONDENT**

**PHILES VWENDE MUSEVE ..... 4<sup>TH</sup> RESPONDENT**

**REGISTRAR OF COMPANIES ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**SEWON ENTERPRISES LIMITED ..... NOMINAL RESPONDENT**

**JUDGMENT**

1. On 12<sup>th</sup> November, 2024 Honourable Justice A. Mabeya made the following observations in this matter.

“I have considered the representations by Learned Counsel on the record. It is clear that the Respondents are not willing to have this matter finalized.

I note the intention of Prof. Sifuna J. to have the matter determined expeditiously. The Respondents have not responded to the Petition. They are in an advantageous position which they want to exploit. To the extreme prejudice of the Petitioner.

In view thereof I vary my directions of 4/11/2024 as follows: -



- a. Let the Respondents file and serve their response to the Petition within 7 days i/d the Petition to be deemed as undefended.
  - b. Highlighting before Njoroge J on 20/11/2024.”
2. Come the 20/11/2024 when this matter came up for highlighting, the Court was informed that the Respondents were yet to file a response to the Petition. The 1<sup>st</sup> to 4<sup>th</sup> Respondents had filed a Notice of Preliminary Objection dated 19<sup>th</sup> November, 2024. Mr. Okwamba Counsel for the 1<sup>st</sup> to 4<sup>th</sup> Respondents and also for the Nominal Respondent informed the Court that his clients’ response to the Petition was by way of the Notice of Preliminary Objection. Miss Kiiura Counsel for the 5<sup>th</sup> Respondent confirmed having filed their Replying Affidavit.
3. This Court now duly seized of the matter made the following orders;

“The Petitioner to file written submissions to the Preliminary Objection dated 19<sup>th</sup> November, 2024. The 5<sup>th</sup> Respondent to file submissions to the Preliminary Objection if need arises. The 5<sup>th</sup> Respondent to serve the 1<sup>st</sup> to 4<sup>th</sup> Respondents’ Advocates with their submissions to the Petition. The Petition shall proceed for hearing by way of highlighting on 3<sup>rd</sup> December, 2024. The Preliminary Objection dated 19<sup>th</sup> November, 2024 shall be treated as the 1<sup>st</sup> to 4<sup>th</sup> Respondents response to the Petition. The Submissions to be exchanged within 10 days. Highlighting on 3<sup>rd</sup> December, 2024.

The interim orders extended by consent.”
4. On 3<sup>rd</sup> December, 2024, Counsel attended Court and highlighted their respective submissions. There was no response filed by the 1<sup>st</sup> to 4<sup>th</sup> Respondents in opposition to the Petition, save for the Preliminary Objection.

#### DIVISION - The Petition

5. This judgment relates to the Petitioner’s petition dated 10th June 2024, brought pursuant to Sections 103, 114, 138, 139, 142, 495, 497, 498, 780, and 782 of the Companies Act, No. 17 of 2015. Through the said Petition, the Petitioner seeks the following reliefs:
  1. A declaration pursuant to Article 5 and 13 of the Articles of Association of Nominal Respondent, the Petitioner is a director by virtue of holding shares in the company.
  2. A declaration that the removal of the Petitioner from the register of directors and shareholder of the Nominal Respondent by the 5th Respondent was prejudicial, oppressive, unprocedural and illegal.
  3. A declaration that the Nominal Respondent’s affairs are being conducted in a manner that is oppressive and unfairly prejudicial to the Petitioner.
  4. A declaration that the appointment of the 1st, 3rd and 4th Respondents as shareholders and directors of the Nominal Respondent was unprocedural and illegal.
  5. An Order revoking and cancelling the appointments of 1st 3rd and 4th Respondents as a director of the Nominal Respondent.
  6. An Order revoking and cancelling the appointments of 1st 3rd and 4th Respondents as a shareholders of the Nominal Respondent.



7. An Order directing the 5th Respondent to remove the 1st Respondent as a director and a shareholder from the register the Nominal Respondent.
8. An Order directing the 5th Respondent to reinstate the Petitioner to the register of the Nominal Respondent as the sole director and shareholder in the Nominal Respondent.
9. An Order directing the 5th Respondent to award the Petitioner damages for illegal removal from the register of the Nominal Respondent.
10. An Order compelling the 5th Respondent to issue a share certificate of the Petitioner as the sole shareholder in the Nominal Respondent.
11. An Order of permanent injunction against the 1st and 2nd Respondents from accessing and operating account number 001000010471 at Family Bank Kiambu Branch.
12. An Order of permanent injunction restraining the 1st and 2nd Respondents either by themselves or by any person claiming interest in the Nominal Respondent through the 1st Respondent from selling, charging, encumbering, selling, leasing, transferring, alienating or interfering with the Nominal Respondent's assets.
13. An Order directing the Manager of Family Bank Limited Kiambu Branch to revoke and cancel the 1st and 2nd Respondent as the signatories of account number 001000010471 in the name of the Nominal Respondent.
14. An Order directing the Manager of Family Bank Limited Kiambu Branch to register the Petitioner as the sole signatory of Nominal Respondent's account number 001000010471.
15. An Order directing the Nominal Respondent's tenants to cease paying rent for plots number Kajiado/Kaputei North/11267 and Kajiado/Kaputei North/30108 in cash to the 1st and 2nd Respondent or their servants, agents, employees or any other party who may seek to be paid the money and such monies to be deposited in account number 001000010471 at Family Bank Limited Kiambu Branch.
16. An Order directing that all the rental income collected from the Nominal Respondent's assets in Nairobi property L.R No. 6845/3171 and L.R No. 6845/1412 continue to be paid in account number 001000010471 at Family Bank Limited Kiambu Branch.
17. An Order directing the 1st and 2nd Respondent to disclose all other bank accounts opened in the name of the Nominal Respondent and to further provide a certified up to date copies of the bank statements therefor for scrutiny by the Petitioner.
18. An Order directing the 1st and 2nd Respondents to provide to the Petitioner the income and expenditure accounts for the period between 2022 to date of this Order for purposes of scrutiny and auditing.
19. An Order directing the 1st and 2nd Respondent to inform the Court and the Petitioner of the net proceeds of the Nominal Respondent and declare any distribution of the profits or payment of dividends to the shareholder(s) since 2022 to 2024.
20. An Order of permanent injunction restraining the 1st and 2nd Respondents, their servants, agents, employees or any other party which may act from appointing directors, auditors and company secretaries for the Nominal Respondent.



21. An Order of permanent injunction restraining the 1st and 2nd Respondents, their servants, agents, employees or any other party which may act from engaging in any capital expenditure or taking any loans or banking facilities from any financial institution.
  22. An Order of permanent injunction restraining the 1st and 2nd Respondents, their servants and/or agents or otherwise howsoever from managing, running or carrying out, operating or engaging in the name of the Nominal Respondent.
  23. An Order of permanent injunction restraining the 1st to 2nd Respondent, their servants and/or agents or otherwise howsoever from collecting rents due and payable, debts owing and payable, or undertaking any transaction whereby money is payable on behalf of the Nominal Respondent or paying credits due and payable by the Nominal Respondent and all other transactions on its behalf.
  24. An Order of permanent injunction barring the 1st to 4th Respondent, their servants and/or agents or otherwise howsoever from disposing of, mortgaging, charging, assigning, diminishing, transferring, disposing, alienating, operating and/or otherwise interfering and/or dealing with any of the Nominal Respondent's assets.
  25. Such other consequential orders, declarations and directions as this Honourable Court may consider appropriate for the purpose of enforcing and securing the rights of the Petitioner.
  26. The costs of this Petition be borne by the 1st to 5th Respondent.
6. The Petition is supported by the affidavit of Lydia Lubanga, duly sworn on 10th June 2024. Therein, the deponent avers that she is the co-founding shareholder and the first director of the Nominal Respondent, Sewon Enterprises Limited, having subscribed to 100 shares alongside the 2nd Respondent at incorporation on 23rd May 2003. She states that the company was established for purposes of engaging in real estate business, and to this end, she made substantial financial and capital contributions, including the purchase of immovable assets in Nairobi, Kajiado and Busia, and acquisition of two motor vehicles — all registered in the name of the Nominal Respondent.
  7. Ms. Lubanga further avers that she deposited funds into the company's account at Family Bank Kimathi Branch, account number 001000001471, and that these contributions were drawn from her personal income, savings, and loan facilities — specifically a Kshs. 10.5 million loan from Letshego (K) Ltd, which she continues to service personally at a monthly rate of Kshs. 300,000, despite no longer being recognised as a shareholder or director.
  8. According to the Petitioner, although both she and the 2nd Respondent were formally recorded as directors and shareholders, she was solely responsible for the financial sustenance and operational continuity of the company. She recounts that due to the demands of her employment with the Ministry of Lands, she allowed the 2nd Respondent to handle the daily administrative duties of the company, while she continued to play a co-director role where possible. However, without her knowledge or consent, the 2nd Respondent — in collusion with the 3rd and 4th Respondents, and with the facilitation of the 5th Respondent — orchestrated her removal from the directorship and shareholding of the company.
  9. She vehemently denies ever resigning or transferring her shares to the 3rd Respondent, asserting that the documentation presented to that effect is fraudulent and inconsistent with her known signature. She further claims that no valid or conclusive documentation exists to support the changes reflected in the company register, and that such actions contravene Articles of the company's constitution and key provisions of the [Companies Act](#), including Sections 114, 138, 139, 142, 495, 497, and 498.



10. She explains that in July 2020, she was misled into signing a Specific Power of Attorney, which she later discovered was used to appoint her as a mere agent of the Nominal Respondent while sidelining her as a director. Her discovery that she was no longer listed as a director arose when, in June 2022, she attempted to withdraw funds from the company account. She then learned that the 1st Respondent had replaced her as a signatory and was now the sole director and shareholder.
11. The Petitioner alleges that the actions of the 1st to 4th Respondents constitute a fraudulent and oppressive scheme designed to oust her from the company and usurp the benefits of her capital investment and efforts. She faults the 5th Respondent, the Registrar of Companies, for recording and endorsing these changes despite material gaps and irregularities in the lodged documentation, thereby legitimising an illegality.
12. She now seeks the Court's intervention to rectify the company register, restore her as a shareholder and director, remove the 1st Respondent, and prevent the continued abuse of the company structure to her prejudice. Relying on Sections 780, 782, and 1003 of the *Companies Act*, the Petitioner contends that the company's operations, as currently structured, are oppressive, unfairly prejudicial, and contrary to law. She urges the Court to grant the reliefs sought in the Petition in order to preserve her legal and equitable interests and prevent further injustice.
13. The 1st to 4th Respondents' case, as presented through the replying affidavit of Helene Masakhalia Wesonga, duly sworn on the 5<sup>th</sup> September 2024, is that the Applicant has no legal standing to institute or maintain the present proceedings. Helene Masakhalia, who is the sole director and shareholder of the Nominal Respondent, deposes that the Applicant is neither a director nor a shareholder of the Nominal Respondent, and is therefore a stranger to its internal affairs. In the alternative, and without prejudice to the foregoing, it is contended that even if the Applicant was once a member or director, she voluntarily and willingly ceased to be such and cannot now purport to act in that capacity.
14. The 1st to 4th Respondents assert that the dispute between the parties is governed by the internal mechanisms provided for under the Nominal Respondent's Articles of Association. In particular, Article 31 contains a binding arbitration clause which requires that any dispute relating to the interpretation, application or breach of the Articles — or any matter relating to the affairs of the company — be referred to arbitration. The Respondents maintain that the Applicant has failed to comply with this mandatory dispute resolution mechanism and has instead improperly invoked the jurisdiction of this Honourable Court without first exhausting the agreed forum. Accordingly, they argue that the entire Petition and the accompanying applications are premature, incompetent and ought to be dismissed for failure to comply with the doctrine of exhaustion.
15. The 1st to 4th Respondents further argue that the Applicant actively participated in her removal from the company, and subsequently accepted to act merely as an agent by executing a power of attorney dated 29 July 2020. The effect of this document, it is contended, is to confirm that the Applicant was aware she no longer held any capacity as director or member, and required express authority to act on behalf of the Nominal Respondent. Consequently, the Respondents argue that she is estopped from denying that she relinquished her role and from questioning the legality of a process she knowingly participated in.
16. It is also denied that the Applicant's removal was tainted by fraud or collusion. The Respondents contend that any such allegations are unsubstantiated and the Applicant is put to strict proof thereof. They maintain that if there were any irregularities in the removal process — which is denied — the Applicant cannot benefit from them, having acquiesced to the same.



17. Finally, the 1st to 4th Respondents point to the familial relationships that underlie the dispute. The Applicant is the mother of the 3rd Respondent and former mother-in-law of the 4th Respondent, and was formerly married to the 2nd Respondent. The 1st Respondent, Helene Masakhalia Wesonga, is the mother of the 2nd Respondent. It is the Respondents' position that the Applicant is using the current proceedings to ventilate issues relating to matrimonial property under the guise of a corporate dispute. They assert that this Honourable Court is not the proper forum to determine matrimonial property issues and should not be drawn into what is essentially a domestic dispute presented in corporate form.
18. The 1st to 4th Respondents pray that the Petition and all associated applications be dismissed forthwith and the Applicant be referred to arbitration in accordance with the Articles of Association. They urge the Court to uphold the doctrine of exhaustion and decline jurisdiction over matters contractually committed to an arbitral process.
19. The 5th Respondent's case, as articulated in the Replying Affidavit of Sarah Wainaina, an Assistant Registrar of Companies and duly authorized officer, duly sworn on the 20<sup>th</sup> November 2024, is that Sewon Enterprises Limited was incorporated on 23rd May 2003, with a nominal share capital of Kshs. 100,000 divided into 1,000 ordinary shares of Kshs. 100 each. The initial subscribers at incorporation were Joseph Masakhalia and Lydia Lubanga (the Petitioner), each holding 100 shares.
20. It is deponed that from the official records maintained by the 5th Respondent, the company filed a Form 203A (Notification of Change of Directors and Secretaries) dated 4th August 2009. The document indicated that the Petitioner resigned as a director effective 10th June 2009. Further that Robert Masakhalia (the 3rd Respondent) was appointed as a director on the same date. In support of this transition, the Petitioner also swore an Affidavit of Transfer of Shares on 10th June 2009, wherein she stated that she had voluntarily transferred her 100 shares to the said Robert Masakhalia.
21. However, the 5th Respondent clarifies that no supporting documentation such as board minutes, Form D, signed share transfer forms, or special resolutions were lodged to accompany this purported transfer or directorship change. Such would be standard procedure under the [Companies Act](#). Moreover, while the interim annual return as at 10th June 2009 reflects that the Petitioner held zero shares and that both Joseph and Robert Masakhalia held 100 shares each, there remains no evidence of a properly executed share transfer form, nor any stamping thereof, to conclusively demonstrate the lawful transfer of shares from the Petitioner to the 3rd Respondent.
22. It is further noted that the signature on the Affidavit of Transfer dated 10th June 2009 appears inconsistent with the Petitioner's signature as it appears in the incorporation documents, suggesting possible irregularity. In light of this, the 5th Respondent affirms that while the company's filings reflect a transfer and resignation by the Petitioner, the underlying documentation is incomplete, and therefore the accuracy of those filings cannot be independently verified or authenticated by the Registrar.
23. The 5th Respondent further outlines that the manual company records were migrated to the eCitizen digital platform following an application lodged on 8th January 2018 by Joseph Masakhalia, and approved on 27th January 2018. At that time, Joseph Masakhalia and Robert Masakhalia were listed as the directors/shareholders. Subsequently, the records indicate that both Joseph and Robert resigned on 14th March 2018, transferring all their shares to Helene Masakhalia Wesonga (the 1st Respondent), who was also appointed as the sole director of the company.
24. As it stands, the 5th Respondent's official records indicate that Helene Masakhalia Wesonga is the current and sole director and shareholder of Sewon Enterprises Limited, holding 1,000 shares in total.
25. The 5th Respondent maintains that it has no personal or proprietary interest in the dispute and merely seeks to clarify and confirm the official record. Any question as to the validity or propriety of the



corporate changes referred to in the Petition—particularly regarding the Petitioner’s resignation and share transfer—should be addressed through appropriate legal proceedings with the relevant parties and not through allegations against the Registrar. This is because the Registrar merely reflects what has been filed and recorded in accordance with existing documentation.

### **The Notice of Preliminary Objection**

26. There is also a Notice of Preliminary Objection dated 19<sup>th</sup> day of November 2024. It is filed by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and Nominal Respondents. It seeks that the Petitioner’s suit be struck for want of jurisdiction on the following grounds: -
1. The Petition as filed herein is time barred as it has been filed beyond the limit of ten (10) years provided for under Section 106 of the *Companies Act* Cap 486.
  2. Article 31 of the Articles of Association of the Nominal Respondent has an arbitration clause that provides for the resolution of disputes by way of arbitration. The presentation of this Petition is in violation of Section 6(1) of the *Arbitration Act*.
27. The Petitioner opposes the Notice of Preliminary Objection. In response, the Petitioner has filed a Replying Affidavit dated 28th November 2024. The Petitioner objects thereto on the following grounds:
28. The reliance on Section 106 of the *Companies Act* is legally misplaced and does not support the striking out of the Petition. The said provision is being invoked in a manner that introduces confusion and serves no purpose other than to delay the hearing and determination of this matter. Specifically:
  29. Section 106 of the *Companies Act* provides a limitation period of ten (10) years within which a person may bring a claim relating to any act or omission concerning entries or deletions in the register of members of a company.
  30. The provision applies only to legally undertaken acts or omissions. It does not offer protection or limitation to acts that are fraudulent or illegal.
  31. Parliament intended that entries or deletions in the register of members be lawful, and where they are not, such unlawful or fraudulent acts cannot benefit from the limitation period under Section 106.
  32. The deletion of the Petitioner’s name from the register of members and directors of the Nominal Respondent was illegal and fraudulent. Accordingly, such deletion cannot be deemed to have occurred within the contemplation of Section 106, and thus the provision does not bar this Petition.
  33. Article 31 of the Articles of Association of the Nominal Respondent binds the company and its members or their assigns. As the Petitioner’s membership status is contested and central to this dispute, it would be impossible to initiate or sustain any arbitration proceedings under Article 31.
  34. The arbitration clause cannot be invoked where the sole shareholding director, the 1st Respondent, whose authority is disputed, purports to act on behalf of the Nominal Respondent. The legitimacy of the 1st Respondent’s position is in contention and is alleged to have been acquired through illegal means.
  35. Arbitration under these circumstances would be fundamentally flawed, as the neutrality and legitimacy of the process would be compromised.
  36. The Petitioner is advised by Counsel that in *Euromec International Limited v. Shandong Taikai Power Engineering Company Limited* (Civil Case No. E527 of 2020 [2021] KEHC 93 (KLR)), the Court held that the term “incapable of being performed” in reference to an arbitration agreement refers to



more than inconvenience or delay; it requires an insurmountable obstacle that prevents performance, even where parties are otherwise willing and able.

37. It is paradoxical and inconsistent for the Respondents to rely on Article 31 of the Articles of Association — which applies only to members — while simultaneously denying that the Petitioner is a member of the Nominal Respondent.

### **Issues For Determination**

38. This matter coming up for judgment, the Court reiterates that only the Petitioner has filed written submissions in respect of the main Petition, the said submissions being dated 15th October 2024 and duly filed.
39. Nevertheless, the Court has and carefully analysed the pleadings on record, and duly considered the responses and replies filed by the Respondents. The Court accordingly determines that only two (2) issues arise for determination:
- a. Whether the Notice of Preliminary Objection is merited.
  - b. Whether the removal of the Petitioner and the appointment of the 1st, 3rd, and 4th Respondents as directors and shareholders were irregular, unlawful, and should be nullified.

### **Analysis**

40. The Court proceeds to analyse the two issues framed in seriatim.

#### **(a) Whether the Notice of Preliminary Objection is merited.**

41. The leading decision on Preliminary Objections is the case of Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696. It states as follows;

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

42. On the efficacy and purpose of Preliminary Objections, the Court refers to the Supreme Court decision in Independent Electoral & Boundaries Commission v Cheperenger & 2 others (Civil Application 36 of 2014) [2015] KESC 2 (KLR) (15 December 2015) (Ruling. It was stated as follows; -

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits... In the instant matter, we consider the objector to have moved her motion, more as a sword



than a shield. Such a course is not to be permitted, as it is apt to occasion an injustice to the applicant, and indeed, to the wider public interest.”

43. The Court notes that the Notice of Preliminary Objection challenges the jurisdiction of this Honourable Court. The Court refers to the case of the Owners of the Motor Vessel “Lillian S v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989) [1989] KECA 48 (KLR) (17 November 1989) (Judgment). The Court of Appeal stated as follows;

“A question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter was then obliged to decide the issue right away on the material before it. Jurisdiction was everything. Without it, a court had no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downed tools in respect of the matter before it the moment it held the opinion that it was without jurisdiction. A question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It was immaterial whether the evidence was scanty or limited. Scanty or limited facts constituted the evidence before the court. A party who failed to question the jurisdiction of a court may not be heard to raise the issue after the matter was heard and determined. There were no grounds as to why a question of jurisdiction could not be raised during the proceedings. As soon as that was done, the court should hear and dispose of that issue without further ado.”

44. It has also been pronounced by the Courts that jurisdiction is everything. The Court cannot move even an iota, without jurisdiction. Therefore, once the issue of jurisdiction is raised, it falls upon the Court to determine it at the earliest. See the case of Benjamin Leonard Mcfoy v United Africa Company Limited (1961) ALL ER 1169.

“If an act is void then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order to set aside. It is automatically null and void and without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.....”

45. The Notice of Preliminary Objection is premised on the statutory limitation period governing claims arising from entries in the register of members, as provided under Section 106 of the [Companies Act](#). The relevant provision stipulates as follows:

106. Time limit for claims arising from entry in register

(1) Liability incurred by a company—

(a) from making or deleting an entry in the register of members; or

(b) from failing to make or delete any such entry, is not enforceable more than ten years after the date on which the entry was made or deleted, or the failure first occurred.

(2) Subsection (1) does not affect the application of a shorter period of limitation that would apply apart from this section.

46. According to the records held by the office of the 5th Respondent, the company lodged Form No. 203A—Notification of Change of Directors and Secretaries or their Particulars—dated 4th August 2009. The said form indicates that Lydia Lubanga (the Petitioner herein) resigned as a director of



the company with effect from 10th June 2009. Further that Robert Masakhalia (the 3rd Respondent herein) was appointed as a director with effect from the same date. Additionally, there is on record an Affidavit of Transfer of Shares sworn by the Petitioner on 10th June 2009. She attested to having voluntarily transferred her one hundred (100) shares to the 3rd Respondent, Robert Masakhalia, on the same date.

47. The relevant entries—namely, the resignation of Lydia Lubanga as a director and the appointment of Robert Masakhalia as a director, as well as the purported transfer of shares—are reflected as having occurred on 10th June 2009. They were formally recorded through the filing of Form No. 203A on 4th August 2009. The present Petition was, however, filed more than ten (10) years after these events.
48. The Applicant submits that the claim is statute-barred pursuant to Section 106 of the *Companies Act*. That therefore this Court lacks the requisite jurisdiction to entertain the merits of the Petition or to grant any orders for rectification under Section 863 of the Act. That the Section empowers the Court to direct the Registrar to rectify the register only in circumstances where it has declared an entry to be invalid, ineffective, factually inaccurate, or forged.
49. The Court notes that Section 106 limits the liability in damages that would accrue or arise against a Company were it not for the limitation.
50. The Court does not read into the Section an interpretation that a claim or proceedings cannot be brought after Ten (10) years to rectify the company's Register. To this Court proceedings to rectify the Register would still lie, but the Company would not be liable in damages if the errors or defects were attributable to it.
51. Section 103 which precedes Section 106 of the *Companies Act*, sets out the various powers of the Court to rectify a company register as follows;

103. Power of Court to rectify register

- (1) If —
  - (a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or
  - (b) the cessation of membership of a person who has ceased to be a member of the company has not been entered in that register, the person affected, or the company or any member of the company, may apply to the Court for rectification of the register.
- (2) On hearing an application made under subsection (1), the Court shall either refuse the application or order rectification of the register and payment by the company of any damages sustained by any party affected by the error or is failure.
- (3) On hearing such an application, the Court may—
  - (a) decide any question relating to the title of a person who is a party to the application to have the person's name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand; and
  - (b) generally decide any question that it considers should be decided in order to rectify the register.



- (4) In the case of a company required by this Act to lodge a list of its members with the Registrar, the Court, when making an order for rectification of the register, shall by its order direct notice of the rectification to be given to the Registrar, who shall on receipt of the notice make such adjustments to the Register as the Registrar considers appropriate.
52. These powers donated by Section 103 are not limited by Section 106, except to limit the issue of damages. Had the drafters of Section 106 wanted to limit the filing of claims or cases for rectification after a passage of Ten (10) years, nothing would have been easier to say than to state so expressly in the statute.
53. Consequently, all the Court will state it that it is not persuaded that the Notice of Preliminary Objection is well taken, on the issue of limitation or time bar under Section 106 of the *Companies Act*.
54. The Court is not also not persuaded that a Preliminary Objection on account of an Arbitration clause is well taken. The Respondents have already submitted to the Petition and hence submitted themselves to the jurisdiction of the Court. This is by taking substantial steps to defend this litigation. In any event they did not file an application to stay these proceedings, to enable the matter proceed for Arbitration.

**b. Whether the removal of the Petitioner and the appointment of the 1st, 3rd, and 4th Respondents as directors and shareholders were irregular, unlawful, and should be nullified.**

55. It is well established in law that a director owes a fiduciary duty to the company. A director is required to act in good faith, in the best interests of the company, and for a proper purpose. This fiduciary duty is owed strictly to the company itself, and as such, only the company has the locus standi to complain of or sue for any breach of these fiduciary duties.
56. It is not disputed that the Petitioner was one of the initial subscribers to the Memorandum and Articles of Association of the Nominal Respondent and held 100 shares alongside the 2nd Respondent. The certificate of incorporation and Form CR12 support this position. The Petitioner's capital contributions and continued engagement with the Nominal Respondent through financial investments, operational responsibilities, and banking mandates are equally undisputed.
57. Upon allotment of shares to the Petitioner, proprietary rights immediately vested in her, which are protected both under the *Companies Act* and Article 40 of the *Constitution* of Kenya, which guarantees the right to property. Such proprietary interests could only be divested through lawful processes, including voluntary transfer, court-sanctioned cancellation, or other procedures expressly provided for under the Articles of Association and the *Companies Act*. Once shares are allotted, they become the property of the shareholder and cease to be part of the company's assets. They cannot be arbitrarily redistributed, revoked, or extinguished through unilateral or clandestine actions by other directors or members, as appears to have occurred in this case.
58. According to the records held by the office of the 5th Respondent, the company lodged Form No. 203A—Notification of Change of Directors and Secretaries or their Particulars—dated 4th August 2009. The said form indicates that Lydia Lubanga (the Petitioner herein) resigned as a director of the company with effect from 10th June 2009, and that Robert Masakhalia (the 3rd Respondent herein) was appointed as a director with effect from the same date. Additionally, there is on record an Affidavit of Transfer of Shares sworn by the Petitioner on 10th June 2009, wherein she attested to having voluntarily transferred her one hundred (100) shares to the 3rd Respondent, Robert Masakhalia, on the same date. The relevant entries—namely, the resignation of Lydia Lubanga as a director and the appointment of Robert Masakhalia as a director, as well as the purported transfer of shares—are



reflected as having occurred on 10th June 2009 and were formally recorded through the filing of Form No. 203A on 4th August 2009.

59. However, the 5th Respondent observed a discrepancy between the signature of the Petitioner as it appears on the Affidavit of Share Transfer dated 10th June 2009, and her signature on the Memorandum and Articles of Association filed at the time of the company's incorporation. Furthermore, the affidavit confirms that there is no stamped share transfer form on record to support the alleged transfer of one hundred (100) shares from the Petitioner to the 3rd Respondent. Notwithstanding these observations, Form No. 203A was nevertheless lodged, indicating the resignation of Lydia Lubanga as a director and the appointment of Robert Masakhalia as a director, both effective 10th June 2009. The 5th Respondent further states that, in accordance with standard procedure, a valid share transfer should be evidenced by a duly signed and stamped share transfer form executed by both the transferor and transferee.
60. The law on the limitation of actions in cases involving fraud is set out under Section 26 of the [Limitation of Actions Act](#), which provides as follows:

Where, in the case of an action for which a period of limitation is prescribed, either-

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.

61. This Court aligns with and adopts the reasoning expressed in the case of *Jubilee Insurance Company Limited v Nyaema & 4 others* (Civil Appeal E124 of 2022) [2024] KEHC 6803 (KLR) (Commercial and Tax) (16 May 2024) (Judgment), where the Court observed as follows:

- (23) It was never the intention of the legislature to condone fraud. However, plaintiff must be vigilant on their claims. Sometimes parties just sit on their claims until it is stale. In other times, it is the potential defendants who conceal fraud. The legislature was aware of such temptation. This is where, unlike tort rescission of limitation is limited to one year after. In *Gathoni vs. Kenya Co-Operative Creameries Ltd* [1982] KLR 104, Potter, JA at page 107 expressed himself thus:

“The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

- (25) Fraud is criminal in nature. There must be discovery of not only the actions but the actors. Even the discoverer is an actor in the whole scenario. If we believe that mere suspicion by the company is enough, then the officers of the company who perpetuated it can be said to have bound the company. Without understanding the factual interconnectedness of the fraud it is not possible to rely on suspicion alone. Discovery of fraud is a process. There could be mere suspicions. However strong those suspicions are, the fraud must be discovered. In the case of *R.G Patel -V-Lalji Makanji* [1957] EA 314 where the former Court of Appeal for East Africa stated doth: -:“Allegations of fraud must be strictly proved; although the standard of proof



may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

- (26) Pray, if fraud is suspected but not discovered, is there fraud”. To discover requires a process of uncovering the acts that the perpetrators wished kept in the dark. Before the faces are put to the fraudsters, fraud has not been discovered. This includes the extent and depth. Reckless disregard by the discoverer or failure to exercise diligence cannot be covered in non- discovering the fraud.
- (27) As a general rule suspicions is the gravamen for many of the safeguards companies put in place. Mere suspicion cannot found a claim of fraud. The law cannot be based on paranoia or suspicion. Discovery must include proper finding of the fraud. The entire complex details may not be found. Nevertheless, when the defendants are unknown, time cannot run. The court treated all appellants as one. It could turn out in evidence that each respondent carried their own fraud. For example, a cheque that was issued but unbanked by the time the fraud was discovered, can still be subject of the fraud, given that the fraudulent deposit had not been completed.”
62. Similarly, this Court aligns itself with the holding in *Paragon Electronics Limited v Maersk (K) Limited* (Civil Appeal E262 of 2022) [2024] KEHC 5883 (KLR) (Civil) (24 May 2024) (Judgment), where the Court held as follows:
- “Section 26 of the *Limitation of Actions Act* provides that the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”
63. The same principle was emphasized in *Joseph Mwaniki Muchira v Godfrey Muchangi* [2018] eKLR, where the Court stated:
- “This is to say that time starts to run when the plaintiff discovers the fraud. So, where fraud committed and does not come to the notice or is not known by the party who is affected by it and who would be entitled to sue as a plaintiff time does not run. Time starts to run when the would-be plaintiff becomes aware of the fraud.”
64. On the evidentiary standard required in fraud claims, this Court is guided by the pronouncements in *County Government of Nyeri v Nabaki Africa Constructions (K) Limited* (Civil Appeal E023 of 2021) [2024] KEHC 5810 (KLR) (17 May 2024) (Judgment), where the Court stated:
- “ 55. In the case of *Vijay Mojaria -VS- Nansingh Madhusingh Darbar & Another* [2000] eKLR. Hon. Justice Tunoi T/A (as he then was) stated as follows –“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts” [Own emphasis]
56. The standard of proof required to prove allegations of fraud was set out in the case of *Kinyanjui Kamau -vs- George Kamau* [2015] eKLR as follows:-“.....It is trite law that any allegations of fraud must be pleaded and strictly proved..... since the Respondent was making a serious change of



forgery or fraud the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases”

65. Having now determined that fraudulent actions indeed occurred, this Court is guided on the question of when time began to run by the decision of the Court of Appeal in *Waswa v Nyongesa (Civil Appeal No. 49 of 2018)* [2023] KECA 794 (KLR) (23 June 2023) (Judgment). In that case the Respondent argued that the Appellant had knowledge of the alleged fraudulent acts as early as 1987. In the circumstances the suit, filed in 2001, was therefore time-barred under the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya. The Appellant disputed this position, asserting that in 1995, a meeting was convened at the suit property through the offices of the Chief Land Registrar in Nairobi and the Land Registrar in Bungoma. This led to the matter being referred to the Director of Criminal Investigations for further inquiries. The Appellant contended that the investigations revealed that the transfer documents for the suit property had been forged. Accordingly, the Appellant maintained that time began to run from 1995, the point of discovery of the fraud, and thus his suit was not time-barred. The Trial Court rejected this argument, holding that if the Appellant suspected fraud, the cause of action would have arisen on or before August 1987. The Court concluded that the statutory limitation period of twelve years expired on or about 30th August 1999, and since the suit was filed on 16th March 2001, it was time-barred. The Trial Court accordingly struck out the suit for having been filed out of time.
66. On Appeal, the Court of Appeal in *Waswa v Nyongesa (Civil Appeal No. 49 of 2018)* [2023] KECA 794 (KLR) (23 June 2023) (Judgment) disagreed with the High court's reasoning and held as follows:
- “The foregoing evidence compellingly shows that investigations into the alleged fraud began in the year 1995 and in the year 1997 the fraud was ascertained by an expert, a document examiner. The apparent fraud having been established in the year 1997, it is evident and I so find, that time started running the same year in view of section 26 of the *Limitation of Actions Act*. The 12-year limitation period for a suit for recovery of land pursuant to section 7 of the *Limitation of Actions Act* had not therefore lapsed when the appellant instituted the suit in 2001. This would be so whether time were reckoned from 1995 at first discovery of the illegal transfer, or 1997 when the fraud was conclusively established. It is, to my mind, inconceivable that time would be held against the appellant respecting a period when he was unaware that he had been dispossessed of the land. Consequently, the learned Judge fell into error by holding that the suit was statute barred and striking it out.”
67. The Petitioner contends that on or about 24th June 2022; while attempting to withdraw funds for the benefit of the Nominal Respondent, it came to their attention that the 1st Respondent had been added as a signatory to the Nominal Respondent's bank account. Upon further inquiry, the Petitioner discovered that they had been unlawfully removed as a shareholding director of the Nominal Respondent without their knowledge or consent.
68. This Court need not say more than to affirm that it is inconceivable, in the mind of this Court, that time could be deemed to run against the Petitioner during a period when she was unaware that she had been dispossessed of her shares and directorship. Guided by the reasoning of the Court of Appeal in *Waswa v Nyongesa (Civil Appeal No. 49 of 2018)* [2023] KECA 794 (KLR) (23 June 2023) (Judgment), this Court finds that time began to run on 24th June 2022, being the date when the Petitioner discovered the fraudulent dispossession. The conduct of the 1st to 4th Respondents, particularly their filing of irregular and unsupported company returns purporting to remove the Petitioner as a director and



shareholder, amounts to unlawful deprivation of property, contrary to Sections 495, 497, and 498 of the *Companies Act*, 2015. Furthermore, the action by the Registrar in rectifying the company records without proper supporting documentation was irregular and cannot serve to validate acts that are otherwise null and void.

69. The Court is satisfied that the Petitioner has demonstrated, on a balance of probabilities, that her removal as director and shareholder of the Nominal Respondent was unlawful, arbitrary, and in breach of her constitutional and statutory rights. In any event the Petition is undefended.
70. The Court of Appeal in *Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR (Civil Appeal 85 of 2006)*, had the following to say when the court was called upon to deal with a case where the Trial Court had failed to pronounce itself on the issue of costs; -

“Costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. See Section 27 (1) of the *Civil Procedure Act*.”

71. As to costs, the same follow the event. The same are awarded to the successful Petitioner to be borne by the 2<sup>nd</sup> Respondent.

### **Determination**

72. The Notice of Preliminary Objection dated 19<sup>th</sup> November, 2024 is hereby dismissed with costs.
73. Accordingly, the Court enters judgment in favour of the Petitioner and issue the following orders:
1. A declaration pursuant to Article 5 and 13 of the Articles of Association of Nominal Respondent, that the Petitioner is a director by virtue of holding shares in the company.
  2. A declaration that the removal of the Petitioner from the register of directors and shareholders of the Nominal Respondent by the 5<sup>th</sup> Respondent was prejudicial, oppressive, unprocedural and illegal.
  3. A declaration that the Nominal Respondent’s affairs are being conducted in a manner that is oppressive and unfairly prejudicial to the Petitioner.
  4. A declaration that the appointment of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents as shareholders and directors of the Nominal Respondent was unprocedural and illegal.
  5. An Order revoking and cancelling the appointments of 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents as directors of the Nominal Respondent.
  6. An Order revoking and cancelling the appointments of 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents as shareholders of the Nominal Respondent.
  7. An Order directing the 5<sup>th</sup> Respondent to remove the 1<sup>st</sup> Respondent as a director and shareholder from the register the Nominal Respondent.
  8. An order is hereby issued compelling the 5<sup>th</sup> Respondent, the Registrar of Companies, to rectify the register of Sewon Enterprises Limited forthwith and in any event within thirty (30) days of service of this judgment and or Orders to reflect the Petitioner, Lydia Lubanga, as a shareholder holding 100 shares and a director of the Nominal Respondent as at 3<sup>rd</sup> February 2011;
  9. An Order directing the 5<sup>th</sup> Respondent to reinstate the Petitioner to the register of the Nominal Respondent as a director of the Nominal Respondent.



10. An Order of permanent injunction restraining the 1st and 2nd Respondents either by themselves or by any person claiming interest in the Nominal Respondent through the 1st Respondent from selling, charging, encumbering, leasing, transferring, alienating or interfering with the Nominal Respondent's assets.
11. An Order directing the Manager of Family Bank Limited Kiambu Branch to revoke and cancel the 1st and 2nd Respondent as the signatories of account number 001000010471 in the name of the Nominal Respondent, pending a fresh resolution by the Nominal Respondent appointing fresh signatories.
12. An Order directing the Nominal Respondent's tenants to cease paying rent for plots number Kajiado/Kaputei North/11267 and Kajiado/Kaputei North/30108 in cash to the 1st and 2nd Respondent or their servants, agents, employees or any other party who may seek to be paid the money and such monies to be deposited in account number 001000010471 at Family Bank Limited Kiambu Branch.
13. An Order directing that all the rental income collected from the Nominal Respondent's assets in Nairobi property L.R No. 6845/3171 and L.R No. 6845/1412 continue to be paid in account number 001000010471 at Family Bank Limited Kiambu Branch.
14. An Order directing the 1st and 2nd Respondent to disclose all other bank accounts opened in the name of the Nominal Respondent and to further provide a certified up to date copies of the bank statements therefor for scrutiny by the Petitioner and or an Auditor duly appointed by the Nominal Respondent.
15. An Order directing the 1st and 2nd Respondents to provide to the Petitioner, the income and expenditure accounts for the period between 2022 to date of this Order for purposes of scrutiny and auditing by an Auditor duly appointed by the Nominal Respondent.
16. A permanent injunction is hereby issued restraining the 1st to 4th Respondents, whether by themselves, their agents, or any person acting under their authority, from transacting, voting, transferring, or in any way dealing with the shares originally allotted to the Petitioner;
17. Costs of the Petition and the Preliminary Objection are awarded to the Petitioner as against the 1st to 4th Respondents;
18. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS 10<sup>TH</sup> DAY OF JULY, 2025**

**NJOROGE BENJAMIN K.**

**JUDGE**

In the presence of

Miss Anyango Opiyo for the Petitioner.

Mr Okoth for the 1<sup>st</sup> to 4<sup>th</sup> Respondents and the Nominal Respondent.

N/A for Miss Kiiura for the 5<sup>th</sup> Respondent.

Luyai- Court Assistant.

