



Republic v Registrar of Companies & another; Lubeto & 9 others (Interested Parties); Music Copyright Society of Kenya (Exparte) (Judicial Review E178 of 2024) [2024] KEHC 14418 (KLR) (Judicial Review) (20 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14418 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E178 OF 2024
JM CHIGITI, J
NOVEMBER 20, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**REGISTRAR OF COMPANIES 1ST RESPONDENT
DIRECTOR GENERAL OF BUSINESS REGISTRATION SERVICE 2ND
RESPONDENT**

AND

**JASPER ODHIAMBO LUBETO INTERESTED PARTY
VICTOR WANGILA WAMBEO INTERESTED PARTY
BRAMWEL NABWELA BARASA INTERESTED PARTY
PETER SIKU KARISA INTERESTED PARTY
FLORENCE MUNANYE MUNYITHYA INTERESTED PARTY
EMPHATUS WAHOME KAMAU INTERESTED PARTY
PAMELA MAYEKU BINALE INTERESTED PARTY
TOM MBOYA KODIYO INTERESTED PARTY
COLNERIOUS MACHARIA GICHUKE INTERESTED PARTY
GEORGE MAINA WAHOME INTERESTED PARTY**

AND

MUSIC COPYRIGHT SOCIETY OF KENYA EXPARTE



RULING

1. On 25th September, 2024 the Interested Parties filed an application wherein they sought the following orders;
 1. This Application be certified extremely urgent and be heard Exparte at the first instance and on priority basis, and service there at be dispensed with;
 2. The Honourable Court be pleased and strike out and/or expunge of the record the application dated 28th August, 2024 filed by the firm of Musyoki Musango & Co. Advocates, and all the proceedings and directions/orders issued in relation to the same Application on the 20th September, 2024 before any further steps are taken by any party pursuant to the said Orders;
 3. Upon granting prayer 2 above, this Honourable Court be pleased to stay order 4 of its orders issued on the 16th August, 2024 before the hearing and determination of this Application;
 4. This Honourable Court be pleased to stay order 4 of its orders issued on the 16th August, 2024 before the hearing and determination of this suit.
 5. This Honourable Court be pleased to vacate order 4 of its orders issued on the 16th August, 2024 before the hearing and determination of the Substantive Judicial Review filed by the Exparte Applicant dated 23rd August, 2024;
 6. Any other Orders deemed fit by the Court.
 7. Costs of this application.
2. On its part the Respondent filed a Notice of Preliminary Objection dated 20th August 2024 on the following grounds;
 - i. That this court lacks the competent jurisdiction to preside over this matter.
 - ii. That the application is an appeal disguised as a judicial review application seeking a merit review of the impugned decision which jurisdiction this court lacks by dint of the provisions of section 3 of the *Companies Act* as read together with practice issued by the Chief Justice on the 18th November, 1997.
3. The court directed that it would hear and determine the Notice of Preliminary Objection and the Interested Parties' application together and the two form the subject of this ruling.

The Respondent's submissions in support of the notice of Preliminary Objection;
4. It is the Respondents' case that this Honorable Court as the court has no jurisdiction to handle this suit.
5. The Applicant is seeking to challenge the directive of the Registrar of Companies which was done in accordance with the provisions of the Act. This case according to the Respondent revolves around issues of the *Companies Act* No 17 of 2015 (herein after referred to as the Act), practice directions issued by the Chief Justice on the 18th November, 1997 (herein after referred to as the directions).



6. Reliance is placed in the case of Mukisa Biscuit Manufacturing Co. Limited vs. West End Distributors Limited[1969]EA 696,Newbold,V.P,wherein the court observed as follows;

“ 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase cost and, on occasion, confuse issues. This improper practice should stop.”

7. Section 3 of the "Act" states; "the Court" means (unless some other court is specified) the High Court. The practice directions dated 18th November, 1997 and which are reproduced hereunder provide as follows;

“The following matters shall be deemed to be Commercial matters, suitable for trial by the Commercial Division of the High Court situated in New Milimani Commercial Courts, Upper Hill Nairobi.

1. All proceedings in which an injunction is sought to restrain the realization of securities whether debentures or charges.
2. All company matters and applications including winding-up, excluding cases in which a Company is suing or being sued as an entity.
3. All Bankruptcy matters.
4. All matters relating to arbitration other than enforcement of awards; excluding any matter relating to land affected by the Land Control Board.
5. All intellectual property matters.
6. All claims for the recovery of unsecured debts (but including claims against guarantors) due to a bank or other financial institution in which a defence is filed. On the filing of the defence the matter to be automatically transferred to the Commercial Court.
7. Such matters as are certified by a Judge of the Commercial Court as being suitable for determination in the Commercial Court having regard to the amount involved; the need for a speedy hearing and the nature of the case. It was felt that in considering the nature of the case the Judge could be guided by the wording similar to the definition of a commercial action in the English Order 72 Rule 1 (1), namely: arising out of the ordinary transactions of merchants and traders and, without prejudice to the generality of the foregoing words, any cause relating to the construction of a mercantile document, the export or import of merchandise, affreightment, insurance, banking, mercantile agency and mercantile usage.

8. Matters touching on the affairs of the company, the High Court Commercial and Tax Division has jurisdiction to hear and determine the disputes.



9. It also relies on the case of Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others, Application No.2 of 2011 [2012] eKLR, the Supreme Court pronounced itself on jurisdiction thus;

“(68) A Court's jurisdiction flows from either the constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the constitution. Where the constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”(Emphasis provided).

10. The Respondent submits that Parliament in its wisdom conferred jurisdiction to resolve disputes pertaining to companies to the High Court. Therefore, this court's jurisdiction is limited by statute and therefore it has no jurisdiction whatsoever to proceed with the matter.
11. The supreme Court in an extensive analysis of the issue of its own jurisdiction quoted with approval the oft cited case of Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya)Limited [1989] KLR 1 in the first advisory opinion rendered by the Court in The Matter of the Interim Independent Electoral Commission where the Court stated: -

“(29) Assumption of jurisdiction by Courts in Kenya is a subject regulated by the constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel "Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”(underlining supplied)

- (30) The Lillian 'S' case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.



In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the constitution.”

12. It submits that the Jurisdiction of the court is set out in the Companies Act and further clarified by the practice directions of 1997 which emphasizes that the Commercial division should be the best forum in the first instance to preside over the complaints against the Registrar of Companies arising from the duties performed in exercise of his duties.
13. In Republic v Attorney General & 2 others Ex-parte Xplico Insurance Company Limited [2014] eKLR JR Case 261 of 2014 (Ruling No.2 delivered on 4th day of September, 2014 while dismissing a similar matter made a finding;

“It is apparent that the core issue herein is a vicious fight for the heart and soul of Xplico Insurance Company Limited. I do not know what the company will look like at the end of the looming battle but I think that judicial review being limited in its reach may not be the appropriate tool for resolving such a dispute. However, it is upon the parties to decide on the most appropriate course of action”.

14. The Respondent submits that the matters raised in the application are matters that substantively require a merit review a function which the judicial review court cannot embark on as judicial review largely concerns itself with the decision making process.
15. In Republic v Registrar of Companies & 2 others Ex-parte Waterfront Outlets Limited 2023 KLR JR E059 of 2022 the Learned Judge A.K Ndung'u stated;

“.

119 Suffice to note that even with the expanded scope of judicial review under the new constitutional dispensation, judicial review still remains a special jurisdiction that is majorly restricted to examination of whether an administrative decision conforms to the requirements of legality, rationality and procedural propriety. It is opportune to add that the judicial review process cannot be a substitute to statutorily provided for jurisdiction of other courts or bodies and the judicial review court cannot and should not assume jurisdiction where statute clearly places jurisdiction at the door of another court or body

(22) Further, it flows from the facts of the case that the application naturally invites the court to venture into a merit review of the decision of the registrar of companies. The exercise would of necessity involve an analysis of whether the registrar complied with the provisions of the Companies Act. The judicial review court, as earlier noted, is restricted in so far as merit review is concerned and the court with the necessary wherewithal under the Act and the Hon Chief Justice' practice directions is the commercial division of the High Court.”

16. Additionally, in Republic v Registrar of Companies & 5 others Ex-Parte Midlands Company Limited [2019] eKLR the court while faced with a similar matter and in dismissing the application held that;

“37. ... It is normally the case that the body whose decision is under challenge is the primary fact finder and decision maker, and the judicial review Court role is



limited to a review of the facts and decisions already made, and is not envisaged as the initiator of the said facts or decisions.

38. Secondly, there are alternative fora that are more appropriate to resolve the factual disputes raised in this application, such as the Civil or Commercial Division of the High Court, where no restrictions or limitations exist as those that arise in judicial review.”

17. For the foregoing reasons, the Respondent submits that the High Court Commercial Division is the right forum to hear matters relating to companies and this forum does not have the jurisdictional competence to preside over the matter in the first instance and as such prays that the court downs its tools and strikes out this matter.

The Exparte Applicant’s submissions to the Preliminary Objection:

18. In opposing the Preliminary Objection, reliance is placed in the case of *Mukisa Biscuits Manufacturing Ltd-vs-West End Distributors (1969) EA 696* which is notorious on the issue of what constitutes a preliminary objection where their Lordships observed thus:

“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 a contract giving rise to the suit to refer the dispute to arbitration.”

19. It is the Applicant’s case that it is trite law that a court of law derives its jurisdiction either from the constitution, statute or both as was stated by the Supreme Court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR*. A court cannot arrogate to itself jurisdiction exceeding that which is conferred by law. This Court derives its jurisdiction from Article 165(6) of the constitution which provides in verbatim:

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

20. It is further its case that in any event, the Preliminary objection by the Respondent is basically premised on practice notes that were published in the year 1997 as an administrative action. It is their case that Practice notes cannot supersede the provision of article 165 of the constitution which bequeaths this Honourable Court with the jurisdiction to hear such matters as is before your lordship.

21. A Judicial review as opined by the High Court in *Republic v Magistrates Court, Mombasa; Absin Synergy Limited (Interested Party) (Judicial Review E033 of 2021) [2022] KEHC 10 (KLR) (24 January 2022) (Judgment)* is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction-reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.



22. It argues that the application satisfies to be a judicial review as opposed to an appeal. The distinction between judicial review and an appeal is not a novel issue in our jurisdiction. In *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* [2002] eKLR, the Court of Appeal stated;

“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”

23. It is its case that that scope was aptly captured by the court in *Pastoli v Kabale District Local Government Council & Others* (2008) 2 EA 300 where the court held;

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

24. Reliance is placed in the case of *Nakumatt Holdings Limited vs Commissioner of Value Added Tax* [2011] eKLR, where the court held that it is permissible to review orders made by the Court in its judicial review jurisdiction; especially in situations in which the object is the implementation of the orders of the Court and the attainment of the ends of justice.

25. It is submitted that the application herein seeks to challenge the unlawful decision of the Respondents to change the directorship of the Respondent Company.

26. In the case of *Republic vs Director of Immigration Services & 2 others Exparte Olamilekan Gbenga Fasuyi & 2 others* (2018) eKLR it was held that:

“...It is common ground that the prayers sought are Judicial Review remedies and the rules governing grant of judicial review orders do apply. Judicial Review is about the decision-making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and the court should not attempt to adopt the forbidden appellate approach. Judicial Review is the review by a judge of the High court of a decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized



or invalid. It is referred to as supervisory jurisdiction-reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the courts is to uphold the fundamental and enduring values that constitute the rule of Law. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the process followed by the decision-maker are proper, and the decision is within the confines of the Law, a Court will not interfere.”

27. The objective of Judicial review was observed in Chief Constable of the North Wales Police VS Evans (1982)1 WLR where 1155 Lord Brightman noted:

“Judicial Review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power...Judicial Review, as words imply, is not an appeal from a decision but a review of the manner in which the decision was made.”

28. The Applicant submits that the application before this Honourable court satisfies the tenets of a judicial review and the preliminary objection is thus unmerited.

29. In opposing the application, the Ex-parte Applicant raised the grounds that;

1. The Application is scandalous, frivolous, incurably defective, vexatious, outrageous, incompetent, misconceived, bereft of merit and overall, it is an abuse of the process of this court.
2. The Applicants have advanced a multitude of disingenuous positions and raised every point conceivable and inconceivable without discrimination or rationality.
3. The Application seeks to delay the hearing of the substantive application dated 23rd August 2024 filed by the ex-parte applicant.
4. Apart from casting aspersions, innuendos and unsubstantiated allegations towards the ex-parte officials, the Application has not outlined any ground whatsoever to warrant the grant of any of the orders sought.

Exparte Applicant's Submissions

30. On 16th August 2024 this court issued the following order;

“That the leave granted shall operate as a stay restraining/barring the Interested Parties, either by themselves, their agents, assignors, assignees from assuming directorship, leadership and/or Management and in any manner whatsoever transacting business on behalf of Applicant Company.”

31. The Interested Parties are aggrieved by the said Stay Order. Reliance is placed in Republic v Vice Chancellor Moi University & 3 others Ex-Parte Benjamin J. Gikenyi Magare [2018] eKLR where the court held as follows:

“Certainly, judicial review is about fair treatment, and whether leave granted to commence such proceedings should operate as stay is a judicial discretionary function. I will not attempt to re-invent the wheel regarding the issue of setting aside stay orders issued when leave has



been granted to operate as stay. I say so because a host of judicial decisions have now settled the position that setting such stay orders would only be merited if:

- a) There is non-disclosure of material facts
- b) Concealment of material documents
- c) Misrepresentation.”

32. In *Bahadurali Ebrahimji Shamji v Al Noor Jamal & 2 Others, Civil Appeal No.210 of 1997*, the Court of Appeal held as follows with regards to the duty of full and frank disclosure in ex-parte applications:

“It is perfectly well-settled that a person who makes an ex parte application to the court-that is to say, in the absence of the person who will be affected by that which the court is asked to do- is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts-facts, not law. He must not misstate the law if he can help it-the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement...”

33. Reference is made to the holding in the case of Bahadurali Ebrahimji Shamji(supra), in considering whether or not there has been relevant non-disclosure and what consequences the court should attach to any failure to comply with the duty to make a full and frank disclosure, this Honourable Court should be guided by the following factors:

- i. The duty of the applicant is to make full and fair disclosure of the material facts.
- ii. The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers.
- iii. The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries.
- iv. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including:
 - a. the nature of the case which the applicant is making when he makes the application,
 - b. the order for which the application is made and the probable effect of the order on the defendant, and
 - c. the degree of legitimate urgency and the time available for the making of the inquiries.
- v. If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage by that breach of duty.



- vi. Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
34. It submits that the Interested Parties are not claiming that there is material non-disclosure. Their core case is that the Ex-Parte Applicant's Chief Executive Officer, Dr. Ezekiel Mutua has alleged selfish interests.
35. According to the Exparte Applicant, Paragraph 13 and 14 of the grounds in support of the Application (as well as the entire Paragraphs 39 (a-kk) of the Supporting Affidavit) is where their gravamen is laid out as follows:
- “(13). This case was filed by persons who knowingly and with subtlety represented and arrogated themselves a falsified locus standi, on behalf of the Exparte Applicant for selfish interests that are prejudicial to the Exparte Applicant:
- (14). The said Order 4 is in reality serving the hidden selfish interests of one Ezekiel Mutua, an employee of the Exparte Applicant, who has taken advantage of his position and is steering the Exparte Applicant; a company Limited by guarantee in an illegal and offensive manner, contrary to law and the rights and interests of the members of the said company.”
36. It submits that the depositions under paragraph 39 (a-kk) of the Affidavit of Ephantus Wahome Kamau are scandalous, without substantiation, and offends the provisions of Order 18 Rule 1 of the Civil Procedure Rules.
37. Further it submits that, the facts or information that the Ex-Parte Applicant has allegedly not disclosed are themselves not stated or exemplified. Instead, the Interested Parties are making unsubstantiated claims that the Applicant's CEO has some unknown "selfish" interests. It is the Ex-Parte Applicant's case that a court cannot set aside an order on the basis that the Applicant has some alleged "selfish" interest. At the very least, the Interested Parties ought to have showed the facts that were withheld.
38. It argues that it made a full disclosure and laid down materials before this Court. It submits that it is the Interested Parties in contravention of the Articles of Association purported to conduct an election and the Respondents who were notified of the infractions of the Interested Parties proceeded to effect changes to the Companies Register.
39. It submits that Part C of the Statutory Statements dated 16th August 2024 contains the various grounds relied upon in making that Application. Paragraph 4 & 5 states as follows:
- (4) Whereas the Applicant was scheduled to hold elections for its Directors on 15th April 2024, the said elections did not proceed as scheduled because of conservatory orders issued by different courts in:
- a. Milimani CHR Petition No. E185 of 2024, Stephen Maina Kiongo v Music Copyright Society of Kenya;



- b. Kisumu, CHR Petition No. 006 of 2024, Timonson Jairus Agiver Bwanah v Music Copyright Society of Kenya.”

The suits with the conservatory orders have since been determined hence paving way for an election of the Board of Directors and their confirmation by the members.

It argues that one of the Interested Party has an active suit in court being Milimani HCCRPET/E224/2024 Victor Wangila Wambeo vs MCSK wherein he seeks to have the scheduled election process by the Applicant stalled.

40. It is its submission that the Interested Parties in their Application clearly misunderstood the Ex-parte Applicant's position.
41. It was apparent from the Application dated 16th August 2024 that the Ex-parte Applicant's only grievance was that the manner in which the Interested Parties had been appointed as directors was contrary to its Memorandum and Articles of Association.
42. The allegation that the CEO was in cahoots with other directors to ensure that the members are denied a fair chance of electing their officials is false. It was expected that the Interested Parties would lay down materials to substantiate that averment but they have not.
43. The Interested Parties core case is that the orders continue to affect the operations of the Ex-Parte Applicant and that the urgency of this Application is therefore founded on the reasons that the orders granted by the court on factual misrepresentation have barred a legitimate and duly elected directorship to continue with their duties of office. And per the applicant, the Exparte Applicant has no office bearers hence her operations have completely stooped.”
44. The Ex Parte Applicant submits that it has a secretariat headed by the Chief Executive Officer that is responsible for the day to day running of the organization. It further submits that, the Ex Parte Applicant's general membership voted to let its two (2) directors in office to pave way for elections that were scheduled for 18th April 2024 but were suspended by the Court.
45. Reliance is placed in the case of *Ashmore v Corp of Lloyds* [1992] 2 ALL ER 486 493, through Lord Templeman, the House of Lords held as follows:

“The parties and particularly their legal advisers in any litigation are under a duty to cooperate with the court by chronological, brief and consistent pleadings which define the issues and leave the judge to draw his own conclusions about the merits when he hears the case. It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner. In nearly all cases the correct procedure works perfectly well. But there has been a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination.”

The Interested Parties Case;

46. On the Preliminary Objection, the Interested Parties herein submit that this Court lacks jurisdiction in this matter. It is their case that the cause of action in this suit flows from the issue touching on the duties performed by the Respondents in exercise of its statutory duties, which can be best resolved at the commercial division of the High Court not the Judicial Review Division.



47. They rely on the Practice Directions dated November 18, 1997 made by the Chief Justice entitled Classification of Commercial Matters 1997 which provide that;
- “The following matters shall be deemed to be Commercial matters, suitable for trial by the Commercial Division of the High Court situated in New Milimani Commercial Courts, Upper Hill Nairobi.
1. All proceedings in which an injunction is sought to restrain the realization of securities whether debentures or charges.
 2. All company matters and applications including winding-up, excluding cases in which a Company is suing or being sued as an entity.
48. The case is a company matter which does not fall within the exclusion in rule 2 above, hence it falls within what is categorized as company matters.
49. Section 3 of the *Companies Act* define "company" to mean a company formed and registered under this Act or an existing company and further defines the "Court" to mean (unless some other court is specified) the High Court.
50. Reliance is placed in the case of Republic v Registrar of Companies & 2 others; Waterfront Outlet Limited (C.147966) (Interested Party); Waterfront Outlets Limited (CPR/2015/214503) (Exparte) (Miscellaneous Application E059 of 2022) [2023] KEHC 227 (KLR) at paragraphs 19-23 and in the case of Republic v Resident Magistrate's Court at Kiambu Ex parte Geoffrey Kariuki Njuguna & 19 others [2017] eKLR paragraphs 27 and 2018.
51. The Interested parties vide an affidavit by Ephantus Wahome Kamau deponed that they supported the Application dated 28th August, 2024 but owing to the mistakes by the advocate whom they instructed to file the same, the said Application is not proper before this court.
52. That the said Application is not properly before this court for having been filed by an advocate who was not on record at the time of filing the same.
53. Further the Exparte Applicant served upon them the Application dated 16th August, 2024 and some of the interested parties engaged the firm of Musyoki Musango & Co. Advocates for legal advice and to take the necessary steps in compliance with the Orders issued by this Court.
54. That the said Advocate drafted the impugned Application and uploaded it on the Case Tracking System on 6th September, 2024 but did not pay for it.
55. They further argue that the said advocate advised them that they had duly complied with the orders of this court and sought confirmation on the filing of the response and provided them with screenshots of receipts marked as EXB-2.
56. They filed their response on 18th September, 2024 and subsequently appeared in court where according to the court records, the firm of Musyoki Musango & Co. Advocates is on record which is an illegality and fatal to the application as the firm did not file a memorandum to enter appearance.
57. The interested parties allege that the case herein was filed by persons who knowingly and with subtlety represented and arrogated themselves a falsified locus standi, on behalf the Exparte Applicant for selfish interests that, which interests are prejudicial to the Exparte Applicant.
58. The interested parties deponed that Exparte Applicant to be licensed by the Kenya Copyright Board, she must have rules and regulations prescribed under section 46(4) of the *Copyright Act*, which



emphasizes on the rights of its members and not the selfish interests of its employees and the same provides that;

- (4) The Board may approve a collecting society if it is satisfied that-
 - (c) its rules and regulations contain such other provisions as are prescribed, being provisions necessary to ensure that the interests of members of the collecting society are adequately protected;

59. They also provided the Memorandum and Articles of Association that govern the mode of appointment of its leadership, duties and responsibilities of all its resource providers.
60. It is their case that the Exparte Applicant and the Interested parties were elected by the members as the interim Governing Council in a Special General Meeting.
61. They refer to Article 51 of the Memorandum and Articles of Association provides for the retirement of directors and that it is evident that the Respondents mutilated the Exparte Applicant's Constitution and illegally purport to run the functions of the Exparte by taking leadership of the Exparte Applicant contrary to the wishes of the members.
62. The Interested Parties further argues that the Respondents are still under investigation by the DCI and EACC for having misappropriated the Exparte Applicants finances to the tune of more than Kshs 56 Million as evidence by annexure marked EX-20
63. They argue that through the misrepresentation of facts, this court granted orders which completely shut down the top operations of the Exparte Applicant's and the top functions that determine all other subordinate functions, and they advance a disproportionate illegality, not only against the Exparte Applicant, but also the entire public.
64. They argue that the Orders issued by this court should be set aside since they are not only anchored on a defective void Application, but also given that the Applicant approached this court with soiled hands, and shrewdly mislead this court.
65. It is their case that the Interest Parties did not take over the leadership function by force, but by a legal process conducted in conformity to the Applicants Articles of Association in a manner above board and foolproof.
66. They argue that the Respondents tenure of office has reached an end, however they devised means to stop the Interested Parties from assuming office, including use of police to keep out members from accessing their company office and insist that the CR12 was amended to keep them in office.
67. The Respondents proceeded to file a case no 158/2024 to obtain orders barring the Interested Parties from assuming office as they filed another matter Milimani case HCCC NO. E185 of 2024 filed on the 14-Aug-2024, Music Copyright Society of Kenya VS Peter Siku and George Gichuna and 25 Others.
68. The Interested Parties point out that they are aware that the elections scheduled for 15th April, 2024 were stalled by the court order issued by the Kisumu High Court in Petition Number E006 of 2024.
69. It is their strong persuasion that this court lacks jurisdiction to handle this matter given that the case invites the court to;
 - a. Determine the merits of the case as to whether the interested parties purported to forcefully take over the leadership of the Applicant by purporting to form an interim directorship or whether they merited to be elected and/or were duly elected by members.



- b. Further to the above, that that the Ex parte Applicant's application is an appeal disguised as a Judicial Review application seeking a merit review of the impugned decision by the 1st Respondent to change the Company directorship upon listening to the members and evaluating the steps taken, which jurisdiction this court lacks by dint of the provisions of section 3 of the *Companies Act* as read together with practice issued by the Chief Justice on the November 18,1997.
- c. That the Ex parte Applicant complaints against the registrar of companies arising from the duties performed in exercise of his statutory duties can be best resolved at the commercial division of the High Court.
- d. that judicial review process cannot be a substitute to statutorily provided for jurisdiction of other courts or bodies and the judicial review court cannot and should not assume jurisdiction where statute clearly places jurisdiction at the door of another court or body.

Analysis and determination;

70. Upon perusing the interested Parties Application, The Notice of Preliminary Objection and the rival submissions of parties alongside the authorities cited by counsel, this court finds the following to be the issues for determination:
 1. Whether or not this court has Jurisdiction to hear and determine this suit.
 2. Whether or not the Interested parties/Applicant is entitled to the orders sought.
 3. Who should bear the costs.

The 1st issue: Whether or not this court has Jurisdiction to hear and determine this suit.

71. The Law on Preliminary Objection is well settled in the case of Mukisa Biscuit Manufacturing Co.Limited vs. West End Distributors Limited[1969]EA 696,Newbold,V.P,observed as follows;

“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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase cost and, on occasion, confuse issues. This improper practice should stop.”
72. The Respondent's Preliminary Objection raises the issue of the jurisdiction of this court. In the case of Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR, the supreme court pronounced itself on jurisdiction thus [paragraph 68]:

“(68) A Court's jurisdiction flows from either the *constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which Is conferred upon it by law. We agree with counsel for the first and second Jurisdiction to entertain a matter before it, is not one of mere procedural Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, Commission (Applicant), Constitutional Application Number 2 of 2011. Where they cannot expand its jurisdiction must operate within the constitutional limits. It confers power



upon Parliament to set the jurisdiction of a Court of law or tribunal, court or tribunal by statute law." (Emphasis provided) where it quoted with approval the oft cited case of Owners of Motor Vessel 'Lillian S' v Caltex In Re The Matter of the Interim Independent Electoral Commission where the Court stated: -

[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."(underlining supplied)

[30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the constitution."

73. In the instant suit the Applicant herein has filed this application principally seeking orders against the office of the Registrar of Companies.
74. Section 11(1) of the High Court (Organization and Administration) Act provides that for purposes of promoting effectiveness and efficiency in the administration of justice and promoting judicial performance, the Chief Justice may, where the workload and the number of judges in a station permit, establish any of the following divisions—
- a. the Family and Children Division;
 - b. the Commercial Division;
 - c. the Admiralty Division;
 - d. the Civil Division;
 - e. the Criminal Division;
 - f. the Constitutional and Human Rights Division;



- g. the Judicial Review Division; and
 - h. any other division as the Chief Justice may, on the advice of the Principal Judge determine.
75. Section 3 of the act defines court as "the Court" means (unless some other court is are reproduced hereunder provide as follows;

“The following matters shall be deemed to be Commercial matters, suitable for trial Courts, Upper Hill Nairobi.

1.
2. All company matters and applications including winding-up, excluding cases in which a Company is suing or being sued as an entity.

From a cursory reading of the pleadings, it is clear that this case touches on an issue of the change effected on the Companies register which removed the directors of Music Copyright Society of Kenya and replaced them with the names of other directors. This is clearly a company related dispute that involves the duties and powers of the Registrar of Companies.

The Exparte Applicants argument that the objection by the Respondents is basically premised on practice notes that were published in the year 1997 as an administrative action which cannot supersede the provision of Article 165 of the *constitution* which bequeaths this Honourable Court with the jurisdiction to hear such matters as is before this court is misplaced.

Given that The *Companies Act* came force in 2015 gave the High Court the jurisdiction to deal with Companies disputes under Section 3 of the Act.

Section 11(1) of the *High Court (Organization and Administration) Act* set up the various Divisions of the High Court. These pieces of legislation which came into force post the 2010 Constitution did not do away with the practice directions.

This court has looked at a couple of entries in the suit: According the Exparte applicant, the Interested Parties core case is that the orders continue to affect the operations of the Ex-Parte Applicant and that the urgency of this Application is therefore founded on the reasons the orders granted by the court on factual misrepresentation have barred a legitimate and duly elected directorship to continue with their duties of office.

On its part, the interested party/ applicant its case is that The Experte Applicant has no office bearers hence her operations have completely stooped.”

- 76. The Ex Parte Applicant submitted that it has a secretariat headed by the Chief Executive Officer that is responsible for the day to day running of the organization.
- 77. It further submitted that, the Ex Parte Applicant's general membership voted to let its two (2) directors in office to pave way for elections that were scheduled for 18th April 2024 but were suspended by the Court.
- 78. According to the Interested Parties; Order 4 is serving the hidden selfish interests of one Ezekiel Mutua, an employee of the Exparte Applicant, who has taken advantage of his position and is steering the Exparte Applicant; a company Limited by guarantee in an illegal and offensive manner, contrary to law and the rights and interests of the members of the said company;
- 79. The order is against the interests of the Exparte Applicant and her membership, the public at large.



80. It is very clear to this court that the dispute before it is related to a company dispute, its Memorandum of association and Articles of Association, elections, the CR 12, leadership, directorship and matters of membership inter alia.
81. The Registrar of Companies who is the custodian of the Company's records is dragged into the suit since there is an issue of change of directorship. Almost all the arguments that have been fronted by the litigants revolve around issues of the company on all fronts.
82. Without delving deep into the wrangles, this court is satisfied that the issues raised by the Ex parte Applicant herein are company matters that would be best resolved at the Commercial Division of the High Court.
83. In so finding, this court is guided by the finding in Republic v Registrar of Companies & 5 others Ex-Parte Midlands Company Limited [2019] eKLR where the court while faced with a similar matter and in dismissing the application held that;

“38. Secondly, there are alternative fora that are more appropriate to resolve the factual disputes raised in this application, such as the Civil or Commercial Division of the High Court, where no restrictions or limitations exist as those that arise in judicial review.”

84. This court is further guided by the findings in Republic v Registrar of Companies & 2 others; Waterfront Outlet Limited (C.147966) (Interested Party); Waterfront Outlets Limited (CPR/2015/214503) (Ex parte) (Miscellaneous Application E059 of 2022) [2023] KEHC 227 (KLR) (Judicial Review) (19 January 2023) (Ruling) wherein the court held;

“Suffice to note that even with the expanded scope of judicial review under the new constitutional dispensation, judicial review still remains a special jurisdiction that is majorly restricted to examination of whether an administrative decision conforms to the requirements of legality, rationality and procedural propriety. It is opportune to add that the judicial review process cannot be a substitute to statutorily provided for jurisdiction of other courts or bodies and the judicial review court cannot and should not assume jurisdiction where statute clearly places jurisdiction at the door of another court or body. To echo the words of the Supreme Court in Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others (supra), “A court’s jurisdiction flows from either the *constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.”

85. It is this court’s finding and I so hold that this court lacks the jurisdiction to determine this suit.

The 2nd issue; Whether or not the interested party/Applicant is entitled to the orders sought.

86. Having found that this court lacks jurisdiction this court cannot determine the 2nd issues and I so hold; I am guided by the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue



right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step." (underlining supplied).

The 3rd issue; Who should be the costs.

87. The general rule flowing from Section 27 of the Civil Procedure Act, Cap 21, Laws of Kenya is that costs should follow the event. That is to say, the successful party should be awarded its costs. This general rule is elaborated by Justice Kuloba in his book, *Judicial Hints on Civil Procedure*, Vol. 1 at p. 99 as follows:

“The first question is what is meant by “the event” in the proviso to subsection (1) of this section? The words “the event” mean the result of all the proceedings incidental to the litigation. The event is the result of the entire litigation. Thus the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action. (Emphasis provided).

88. The Exparte Applicant shall bear the costs of the suit.

Disposition:

89. This court lacks jurisdiction to determine this suit.

Order:

1. The Notice of Preliminary objection dated Notice of Preliminary Objection dated 20th August 2024 is upheld.
2. This suit is hereby transferred to the High Court Commercial Division.
3. Costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER, 2024.

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J. M. CHIGITI (SC)

JUDGE

