



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

COMMERCIAL PETITION NO. 001 OF 2021

LUCY MUTHONI NJORGE..... PETITIONER

VERSUS

THE CAPITAL MARKETS AUTHORITY.....1ST RESPONDENT

BOC HOLDERINGS.....2ND RESPONDENT

BOC KENYA PLC.....3RD RESPONDENT

CARBACID INVESTMENTS PLC.....4TH RESPONDENT

AKSAYA INVESTMENTS LLP.....5TH RESPONDENT

COMPETITION AUTHORITY OF KENYA.....6TH RESPONDENT

RULING

1. This Petition was initially filed in the Constitutional and Human Rights Division. On the 24th March, 2021 Hon. Justice A. C. Murima, *suo moto*, made an order transferring this matter to the Commercial & Tax Division. In so holding, in part, delivered himself as follows:

“I have considered the petition dated 24th March, 2021, the Notice of Motion dated 24th March, 2021, the affidavit in support signed by the petitioner on 21st March, 2021 and from the record, the main issue in dispute in this matter is the manner in which the 100% shares of BOCK are being acquired by some other entities. The petitioner is a minor shareholder. That being the case, the matter is a commercial one. The commercial Court will be better placed to interrogate the process and the court is also seized of the jurisdiction ...”

2. I have taken the liberty to restate the excerpt because the application before the court for determination is again seeking a transfer of this file from the Commercial & Tax Division to the Judicial Review Division. It is a Notice of Motion dated 22nd April, 2021 by the 2nd Respondent BOC Holdings. It is brought under Section 3A of the **Civil Procedure Act, Section 9 of the Fair Administrative Actions Act, 2015, Order 51 (1) of the Civil Procedure Rules and Article 165(6) of the Constitution of Kenya 2010**. The application is supported on the grounds on the face of it and a Supporting Affidavit by one Michael Divine an employee of Linde Inc. and Chief Transactions Counsel and Head Legal Integration of Linde Plc. and Linde Group of Companies.

3. At this juncture, I would wish to note that all other Respondents supported the application save for the Petitioner who opposed it. I will briefly in a few words highlight the pertinent grounds on which the 2nd Respondent seeks that the file be transferred to the Judicial Review Division. It suffices to note that the team on the Respondents’ side agreed that Mr. Oraro, Senior Counsel representing the 4th and 5th Respondents lead in submissions by virtue of his seniority.

4. The crux of the application is two main prayers in the Petition, being prayer numbers 3 and 6 which it was submitted are hinged on administrative actions, rendering the Petition and the Application supporting the Petition a Judicial Review matter. It is important that I duplicate the two prayers in this ruling. They are:

a. An order of Certiorari to bring into this Honourable Court for purposes of being quashed the decision of the Capital

Markets Authority the 1st Respondent herein, its agents, employees and/or servants granting approval of the Offer Document in respect of the Proposed Takeover Offer by Carbacid Investments Plc. and Aksaya Investments LLP to acquire up to 100% of the issued ordinary shares of BOC Kenya Plc. contained in a letter dated 28th December, 2020.

b. An order directing the Capital Markets Authority to conduct an inquiry and investigate the Proposed Takeover Offer by Carbacid Investments Plc. and Aksaya Investments LLP to acquire up to 100% of the issued ordinary shares of BOC Kenya Plc.

5. According to the Senior Counsel Mr. Oraro, the Petitioner has invoked the jurisdiction of the court under **Article 165 (6)(7) of the Constitution**. That however, a statutory remedy lies with the **Capital Markets Act, Cap 485A, Laws of Kenya** more specifically **Section 35A (4)**. He pointed out that under this provision, the statute permits the establishment of a Tribunal which can determine any issue arising out of the conduct of the Capital Markets Authority (CMA). He added that as at date, the Tribunal has not been constituted owing to a Court decision that the Minister (Treasury) has no powers to do so, a decision that is subject of an appeal in the Court of Appeal. It was his contention that for this reason, the Applicant has invoked **Section 4(1) of the Fair Administrative Actions Act** for relieve. He submitted that to the contrary, it is the Respondents who would be opposing the invocation of this court's jurisdiction in view of the fact that the Petition is hinged on an administrative action by CMA. That, that way, the parties shall be subjected to exhaust all statutory remedies available to them.

6. Learned Senior Counsel, Mr. Bowry vehemently opposed the application citing that the substratum of the Petition is a constitutional matter, being a grievance on abuse of constitutional rights of minority shareholder of the 3rd Respondent. That indeed, Judicial Review prayers in the Petition are not the substratum matter but merely Judicial Review reliefs which are in addition to other prayers the Petitioner seeks.

7. In the view of Mr. Bowry, there is only one question that this court will be required to answer which is; has the constitutional rights of the Petitioner been compromised, encroached or eroded by virtue of the Proposed Takeover Offer of the 3rd Respondent by the 4th and 5th Respondents. For this reason, he emphasized that it was the Constitutional Division which is empowered to safeguard such rights of a citizen. He however agreed with the 2nd Respondent that this matter is not commercial in nature.

8. Whereas senior counsel faulted the court that transferred this matter to this Division from the Constitutional and Human Rights Division, he was nevertheless agreeable that this court has jurisdiction to determine the dispute.

9. In rejoinder, Senior Counsel Mr. Oraro while emphasizing that the Constitutional and Human Rights Division had no jurisdiction over the reliefs sought, also agreed that this court could nevertheless hear the Petition.

Determination

10. I have considered the respective rival submissions and I take the following view of the application.

11. Broadly and on the face of it, the Petition is couched as a constitutional matter. Both the Petition as well as the application filed alongside it urge particularly the invocation of **Articles 10, 21(3), 27 (2)(3), 47(1) and 56 (a) and (b) of the Constitution**. The court is also urged to invoke **Section 11 of the Capital Market Act, Cap 485A, Laws of Kenya** and **Section 3.2.1 (b) of the Code of Corporate Governance Practice for Insurers of Securities to the Public, 2015**. The body of the Petition does also urge the court to pronounce itself on the violation of the Competitions Act.

12. That said, it is clear that the main dispute culminating into the Petition is a complaint by the Petitioner of the manner in which a 100% shares of the 3rd Respondent (BOCK) are being acquired by the 4th and 5th Respondents. The Petitioner is a minority shareholder in the 3rd Respondent whilst the 2nd Respondent is the majority shareholder. In her view, the 2nd Respondent has colluded with the 4th and 5th Respondents to ensure a 100% takeover of the 3rd Respondent's 100 per cent shares by the 4th and 5th Respondents. She also complains that such takeover has not taken into account the current market value of the shares and the net worth of the 3rd Respondent; implying that the 3rd Respondent is being put on offer at an under market value to the detriment of the minority shareholder.

13. In view therefore, the dominant cause of action is a commercial dispute between the minority shareholder on the one hand and the majority and intended offerors/purchasers on the other vis-a-vis the interest of a minority shareholder.

14. With that in mind, the court will have to have regard to the provisions of the **Companies Act, 2015** cushioning the rights of minority shareholder in a statutory body against oppressive conduct and unfair prejudice by the majority shareholder and other entities. As to the merit of that assertion, is a matter of determination by the court.

15. The Petitioner also complains of the laid back action of the Capital Markets Authority in failing to protect her interests as a minority shareholder in the process of the takeover of the 3rd Respondent. What this also implies is that the court will have to give regard to the scope and the preamble of the mandate of CMA under the Capital Markets Act. That will also apply to any issues raised under the Competitions Act.

16. With the above in mind, I need not belabor further than to pronounce myself that the main issue in the dispute is commercial in nature. This court has jurisdiction under the Companies Act to determine whether or not the rights of a minority shareholder have been violated. Whether the Petition is framed in a Constitutional manner and some of the prayers sought are Judicial Review in nature does not bar the court to determine the Petition. The court has jurisdiction even in a commercial dispute to pronounce itself on any violation of a constitutional right of a minority shareholder.

17. For the above reasons, I find the application by the 2nd Respondent dated 22nd April, 2020 without merit. The same is hereby dismissed with no orders as to costs. This Court shall hear and determine the Petition to its conclusion.

DATED AND DELIVERED AT NAIROBI THIS 13th MAY, 2021

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Bowry for the Petitioner/Respondent.
2. Mr. Githendu for the 1st Respondent.
3. M/s Mwangi for the 2nd Respondent/ Applicant.
4. Mr. Munyu for the 3rd Respondent.
5. Mr. Oraro & Mr. Chacha Odera for the 4th and 5th Respondents.
6. No appearance for Mr. Omari for the 6th Respondent.