



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mokoosio & another v Vadera & 3 others (Petition 13 of 2020)  
[2021] KEHC 56 (KLR) (21 September 2021) (Judgment)**

*Martin Lemaiyan Mokoosio & another v Reshma Praful Chandra Vadera & 3 others [2021] eKLR*

Neutral citation: [2021] KEHC 56 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS**

**PETITION 13 OF 2020**

**GV ODUNGA, J**

**SEPTEMBER 21, 2021**

**IN THE MATTER OF CONTRAVENTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS UNDER ARTICLES 22, 27 (1) &  
(2), AND 40 (2)(A) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE {{>/AKN/KE/ACT/2015/17 COMPANIES  
ACT}} NO. 17 OF 2015, PART XXIX PROTECTION OF MEMBERS  
AGAINST OPPRESSIVE AND PREJUDICIAL CONDUCT**

**AND**

**IN THE MATTER OF SECTIONS 780 AND 782 OF THE {{>/  
AKN/KE/ACT/2015/17 COMPANIES ACT}} NO. 17 OF 2015**

**BETWEEN**

**MARTIN LEMAIYAN MOKOOSIO ..... 1<sup>ST</sup> PETITIONER**

**EMMANUEL TOYANKA MOKOOSIO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**RESHMA PRAFUL CHANDRA VADERA ..... 1<sup>ST</sup> RESPONDENT**

**SIMON JOSEPH OLE KARASHA ..... 2<sup>ND</sup> RESPONDENT**

**BINDU KUMAR CHHOTALAL VADERA ..... 3<sup>RD</sup> RESPONDENT**

**NGONG MATONYOK WHOLESALERS LTD ..... 4<sup>TH</sup> RESPONDENT**



**A matter that ought to be brought as an ordinary civil suit but was framed as a constitutional petition does not deprive a constitutional court jurisdiction over the matter**

Reported by Kakai Toili

**Jurisdiction** – *jurisdiction of the High Court – jurisdiction of the High Court sitting as a constitutional court - institution of a suit as an ordinary civil suit framed as a constitutional petition - whether the institution of a suit as an ordinary civil suit framed as a constitutional petition deprived a constitutional court of jurisdiction to entertain the same - when could a court interfere in disputes regarding internal affairs of a company - , sections 780 and 782.*

**Constitutional Law** – *fundamental rights and freedoms – enforcement of fundamental rights and freedoms - culpability under the Bill of Rights - whether the nature of an entity determined its culpability under the Bill of Rights - Constitution of Kenya, 2010, articles 20,27(4) and (5).*

**Constitutional Law** – *constitutional petitions – form and content – constitutional issues - whether the mere fact that a constitutional principle could be gleaned from the pleadings qualified the matter for determination as a constitutional issue.*

**Constitutional Law** – *constitutional petitions – institution of constitutional petitions - whether one could institute a constitutional petition before exhausting statutory recourse for disposing of the matter.*

**Company Law** – *companies – Annual General Meetings of companies - what was the purpose of a company holding Annual General Meetings.*

**Brief facts**

The petitioners were stepbrothers whose father was among the three first shareholders and directors of the 4<sup>th</sup> respondent (the company). The petitioners' father died on July 31, 1982 and was survived by his two spouses and their respective children. Pursuant to the certificate of confirmation of grant dated November 2, 2018, the shares owned by the petitioners' father in the company were transmitted equally by operation of the law to the petitioners to hold for their respective houses. Pursuant thereto, the petitioners forwarded certified copies of the grant and the certificate of confirmation of grant to the respondents' advocates requesting for the transfer of shares and dividends held in the name of their father to them.

The petitioners also requested the respondents to appoint them as directors for purposes of participating in the affairs of the company, a request that had not been addressed by the respondents. It was pleaded that despite the petitioners requesting the respondents for the transfer of shares to them to be effected and for the dividend due and owing to the estate of their late father, the respondents had failed, neglected and refused to effect the transfer of shares, to issue share certificates or to pay the outstanding dividends.

According to the petitioners, since 1995 the company had not held any Annual General Meeting (AGM) and that if any such AGM had been held, then the estate of their late father had never received notice convening such a meeting. Aggrieved, the petitioners filed the instant constitutional petition seeking among others; a declaration that the respondents had violated and/or infringed the rights and fundamental freedoms of the petitioners and a declaration that the company's affairs were being conducted in a manner that was oppressive and unfairly prejudicial to the interests of the petitioners.

**Issues**

- i. Whether the nature of an entity determined its culpability under the Bill of Rights.
- ii. Whether the mere fact that a constitutional principle could be gleaned from the pleadings qualified the matter for determination as a constitutional issue.
- iii. Whether one could institute a constitutional petition before exhausting statutory recourse for disposing of the matter.
- iv. Whether the institution of a suit as an ordinary civil suit framed as a constitutional petition deprived a constitutional court of jurisdiction to entertain the same.



- v. What was the purpose of a company holding Annual General Meetings?
- vi. When could a court interfere in disputes regarding internal affairs of a company?

### **Held**

1. Article 20 of the Constitution of Kenya, 2010 (Constitution) provided that the Bill of Rights applied to all law and bound all State organs and all persons. Article 27(5) of the Constitution provided that a person should not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in article 27(4). It followed that when it came to the enforcement of the Bill of Rights, any person or entity, private or public was liable to be sued if allegations of violation were alleged against them. In other words, it was not the nature of the entity that determined its culpability under the Bill of Rights but the nature of the complaint made against it.
2. Even in ordinary civil disputes, it was not difficult to find that there was some underlying constitutional principle involved. However, the mere fact that some underlying principle could be gleaned from the pleadings did not necessarily raise the matter to the level where it could qualify for determination as a constitutional issue. A constitutional issue was that which directly arose from the court's interpretation of the Constitution.
3. Whereas every person was, pursuant to the provisions of articles 3 and 22 of the Constitution, under an obligation to respect, uphold and defend the Constitution and a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed, or was threatened, those provisions ought not to be abused.
4. To institute a constitutional petition with a view to circumventing a process by which institutions established by the Constitution, including ordinary civil courts, were to exercise their jurisdiction, was an abuse of the court process. To entertain such a cause would lead to the courts crippling such institutions rather than nurturing them to grow and develop. The Constitution only ought to be invoked where there was no other recourse for disposing of the matter.
5. Courts would not normally consider a constitutional question unless the existence of a remedy depended on it; if a remedy was available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court would usually decline to determine whether there had been in addition to a breach of the other declaration of rights. It was an established practice that where a matter could be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court would pronounce on the constitutionality of a statute only when it was necessary for the decision of the case to do so.
6. The Constitution was a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes. The Bill of Rights was robust. It had been hailed as one of the best in any constitution in the world. The courts had to interpret it with all the liberalism they could marshal. However, not every pain could be addressed through the Bill of Rights and alleged violations thereof.
7. A constitutional court should have been liberal in the manner it went round dispensing justice. It should have looked at the substance rather than technicality. It should not be seen to have slavishly followed technicalities as to impede the cause of justice. As long as a party was aware of the case he was to meet and no prejudice was to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to have proceeded to substantive hearing.
8. The mere fact that a matter that ought to have been brought as an ordinary civil suit was framed as a constitutional petition, did not thereby deprive the court of jurisdiction to entertain the same. The court could frown upon that cause and could even strike it out for being an abuse of the process but that did not make it a jurisdictional issue.
9. The complaint by the petitioners was primarily premised on section 780 of the Companies Act, 2015 which provided in section 780(1) that a member of a company could apply to the court by application for an order under section 782 of the Companies Act on the ground that the company's affairs were being or had been conducted in a manner that was oppressive or was unfairly prejudicial to the interests of members generally or



of some part of its members (including the applicant). The court under section 782 had the power to make such orders in respect of the company as it considered appropriate for giving relief in respect of the matters complained of.

10. Generally, matters affecting companies ought to be litigated as civil suits rather than as constitutional issues. Whereas the issues raised could have been dealt with as an ordinary civil suit, it would not advance the course of justice to send the parties away from the seat of justice based on that procedural lapse.

11. The petitioners had, whether due to their own issues or otherwise, not actively participated in the management of the company. The law however required that they be informed of the manner in which the company was being managed. The allegations they had raised against the respondents were substantive and the only way in which they could be properly addressed was by the conduct of an audit and inspection of the processes which had been undertaken by the respondents in their absence.

12. An Annual General Meeting served two important purposes; -

1. in one sense as a mechanism for accountability to shareholders and the shaping of the business of the company; and
2. in another sense as an act of compliance with the law.

Compliance with the law was assessed on the company's adherence to the legal requirements set out in the Companies Act, 2015 especially the making of returns on its operations; the general meetings and resolution it had made during the year, tax returns, directorship of the company, shareholding and so on and so forth. If a company did not do the things set out in law, the law had prescribed the penalty thereto.

13. Whereas disputes regarding internal affairs of a company ought to be resolved in accordance with the constitution of the company, where it was alleged that the company was not acting in accordance with its own constitution, the court had the power to intervene. In the instant case the allegations were that the respondents had violated the constitution of the company and therefore the court was entitled to intervene.

*Petition allowed.*

### **Orders**

- i. *A declaration was issued that the respondents had violated and/or infringed the rights and fundamental freedoms of the petitioners under articles 22, 27(1) and (2) and 40(2)(a) enshrined in the Constitution.*
- ii. *A declaration was issued that the company's affairs were being conducted in a manner that was oppressive and unfairly prejudicial to the interests of the petitioners.*
- iii. *Directions that an inspector be appointed under section 786 of the to investigate the affairs of the company and to report on those affairs to the court. The parties were to agree on the inspector and in default the inspector was to be appointed by the court.*
- iv. *An order was issued compelling the directors of the company to furnish the petitioners with certified copies of all bank statements from 2013 to 2019 and the audited financial statements/accounts of the company for the years 2013, 2014, 2015 and 2019.*
- v. *An order was issued compelling the directors of the company to undertake a forensic audit of the company's books of accounts for the years 2013 to 2019 by a reputable independent audit firm to be agreed by the parties and in default be appointed by the court.*
- vi. *The respondents were to effect the transfer of the shares of the petitioners' father to the petitioners as per the confirmed certificate of grant dated November 2, 2018 and to furnish the petitioners with a share certificate.*
- vii. *The costs of the inspection and the audit was to be borne by the company.*
- viii. *Liberty to apply was granted.*

### **Citations**

#### **Cases**

1. Agricultural Development Corporation of Kenya v Nathaniel K. Tum & another — Followed
2. Almond Resort Limited v Mohamed Mahat Kuno & another — Explained



3. Ben Kipeno & Others vs. AG Pet15/07 and Bahadur vs. AG — Explained
4. Cecilia Karuru Ngayu v Barclays Bank of Kenya & another — Explained
5. CNM vs WMG (2018) eKLR — Explained
6. Coast Water Services Board vs. Mrs. Alome Achayo & 5 others — Explained
7. Coast Water Services Board vs. Mrs. Alome Achayo & 5 Others — Explained
8. Foss vs Harbottle — Explained
9. Gabriel Mutava & 2 others vs. Managing Director Kenya Ports Authority & Another — Explained
10. General Plastics Limited vs. Industrial Property Tribunal & Another — Explained
11. Gitahi Gethenji & 3 others vs. James Ndungu Gethenji & 3 others — Followed
12. Hezekiel Oira v Ethics and Anti-Corruption Commission & another — Explained
13. Jacob Juma vs Hon. Evans Kidero, Governor of Nairobi County. — Explained
14. Jeminah Wambui Ikere vs. Standard Group Ltd and Anor — Explained
15. John Harun Mwau vs. Peter Gastrow & 3 Others — Explained
16. John Muturi Nyaga vs. Graham Alexander Walsh & 3 others — Explained
17. Joseph Mwangi Mbote & 2 others vs Kenya Tea Development Agency (Holdings) Limited & 2 others — Explained
18. Karuri & others vs. Dawa Pharmaceuticals Company Limited and others — Explained
19. Maggie Mwauki Mtalaki vs. Housing Finance Company of Kenya — Explained
20. Muiruri vs. Credit Bank Ltd & Another — Explained
21. Nation Media Group Limited vs. Attorney General — Followed
22. Ngoge vs. Kaparo & 4 Others — Explained
23. Okiya Omtatah Okoiti & 3 Others vs Nairobi City County and 5 others — Explained
24. Peter Nganga Muiruri Vs Credit Bank Limited & Another, — Explained
25. Peter Oduor Ngoge vs. Hon. Francis Ole Kaparo — Explained
26. Rapinder Kaur Atwal vs. Manjit Singh Amrit — Explained
27. Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant vs. Ihururu Dairy Farmers Co-operative Society Ltd — Explained
28. Services Board vs. Mrs. Alome Achayo & 5 Others — Explained
29. Tanui & 4 Others vs. Birech & 11 others — Explained
30. Uhuru Muigai Kenyatta vs. Nairobi Star Publications Limited — Explained
31. William Njiraini Nguru vs Mununga Tea Factory & 3 others Kerugoya — Explained
32. Zaburi Musa Hamisi & 3 others vs Ishmael Hillon & 4 others — Explained
33. AG vs S.K. Dutambala — Explained
34. Fredericks & others vs MEC for Education and Training, Eastern Cape & Others — Explained
35. NM & Others vs. Smith and Others (Freedom of Expression Institute as Amicus Curiae) — Explained
36. Harrikisson vs. AG — Explained
37. Home Affairs vs. Bickle & others — Explained
38. Memphis Publishing Company vs Cherokee Children and Family Services — Explained
39. Wahid Munwar Khan vs. The State AIR — Explained

#### **Statutes**

1. Companies Act, 2015 — section 2, 114 (3) (d)(g); 114 (3) (g); 238; 239; 240; 241; 242; 275; 276; 653 (1); 654 (3)(4); 717; 780(2)(a); 786 — Interpreted
2. Constitution of Kenya, 2010 — article 3, 22, 23 (1); 27 (1) (2); 27(3) (4) (5) ; 40(2)(a); 165(1)(3)(b)(d) — Interpreted
3. Industrial Property Act, 2001 — section 115 (1) — Interpreted
4. Insolvency Act, 2015 — Interpreted

#### **Advocates**

*Mr Kimani* for Petitioners



## JUDGMENT

1. The facts of this petition, according to the petitioners are that the petitioners are step-brothers whose father, the late John Watenga Mokoosio was among the three first shareholders and directors of the 4<sup>th</sup> respondent, Ngong Matonyok Wholesalers Ltd, (hereinafter referred to as “the Company) when it was incorporated in 1968. The said deceased died on July 31, 1982 and was survived by his two spouses, Penina Siamata and Florence Ngendo Mokoosio and their respective Children. The initial Grant and Certificate of confirmation Grant was issued in the names of both wives, Penina Siamata Mokoosio and Florence Ngendo Mokoosio as co-administrators. The 1<sup>st</sup> and the 2<sup>nd</sup> petitioner are the children of Penina Siamata Mokoosio and Florence Ngendo Mokoosio respectively.
2. According to the petition, the 4<sup>th</sup> respondent Company is a major Distributor of Alcohol/beer for Kenya Breweries Limited/East Africa Breweries Limited within Karen, Dagorreti Corner, Wangige, Mwimuto, Kikuyu, Kabete, Ngong Town and Magadi.
3. Pursuant to the Certificate of Confirmation of Grant dated rectified on November 2, 2018, the shares owned by the petitioners’ father in the Company totalling 18,000 ordinary shares or 30% of the issued and paid up ordinary shares of the Company were transmitted equally by operation of the law to the petitioners to hold for their respective houses though the 1<sup>st</sup> petitioner is the only son in his house.
4. Pursuant thereto, on December 20, 2018, the petitioners through their Advocates forwarded certified copies of the Grant and the certificate of confirmation of Grant to the respondents’ Advocates requesting for the transfer of shares and dividends held in the name of the Estate of the late John Mokoosio to the petitioners. The said letter attached certified copies of the petitioners’ Identity cards and KRA PIN certificates to facilitate the transfer process and the letter further requested for share transfer forms and other requisite documents for the petitioners’ signatures. The letter further gave a bank account for purposes of payments of dividends due and owing to the estate of the Late John Watenga Mokoosio.
5. According to the petitioners, since the shareholding of the Company is made up of three families and each family is entitled have a Director in the company, the Petitioners also requested the respondents to appoint them as Directors to be able to participate in the affairs of the Company, a request that has not been addressed by the respondents. It was pleaded that since the petitioner’s father died in 1982, only the late Penina Siamata Mokoosio had been appointed as a Director of the Company until her death in the year 1995.
6. It was pleaded that despite several further letters and emails by the petitioners and their Advocates to the respondents requesting for the transfer of shares to them to be effected and for the dividend due and owing to the estate of their late father, the respondents have failed, neglected and refused to effect the transfer of shares, to issue share certificates or to pay the outstanding dividends. According to the petition, the respondents only forwarded the share transfer forms to the petitioners’ advocates on March 7, 2020 but have declined to forward the draft minutes showing that the petitioners’ will be appointed as directors of the Company contemporaneously with the transfer of shares given that their family is entitled to have director (s) under article 38 of the Articles of Association of the Company as is the case with the other two families.
7. The petitioners complained that since the death of Penina Siamata Mokoosio in the year 1995, the Estate of their late father has not received any annual dividends due and owing to them as per articles



32 and 47 of the Articles of Association of the Company and neither have they received any Directors report regarding the company and in particular a report regarding dividends as required under section 654 (4) of the Companies Act,2015. The petitioners pleaded that have only been receiving a monthly payment of KShs 60,000.00 (Kshs 30,000.00 each) the purpose of which has never been explained to them and when an explanation was sought, the respondents purported it to be monthly dividends and immediately stopped the payment to the petitioners. As a result, the petitioners are unable to account for this money for tax purposes.

8. According to the petitioners, since 1995 when late Penina Siamata Mokoosio died, the Company has not held any Annual General Meeting and if any such annual general meeting has been held, then the Estate of their late father has never received notice convening such a meeting contrary to articles 30 and 31 of the articles of Association of the Company and sections 114 (3) (d) and 275 of the Companies Act,2015. According to the petitioners, current directors of the Company have been irregularly and unprocedurally appointing and removing auditors and company secretaries of the Company without involving the petitioners yet they have no such powers under the Articles of Association of the Company and this offends section 717 of the Companies Act,2015 regarding appointment and removal of auditors of the Company.
9. The petitioners averred that despite several demands, the respondents have failed, neglected and refused to furnish the petitioners with the company's annual financial statement and reports for the years 2013-2019 thereby violating the Petitioners' right as members under Section 114 (3) (g) of the Companies Act,2015. Further, the respondents have completely shut out the petitioners from all the affairs of the 4<sup>th</sup> respondent and they have not been involved in the affairs of the company a situation which is unfair and prejudicial to their interests as members of the 4<sup>th</sup> defendant. This action also amounts to discrimination against the estate of John Wetanga Mokoosio given that the other two families fully participate in the affairs of the Company.
10. It was pleaded that the respondents have been procuring loan facilities without the knowledge of the petitioners who are shareholders and that the Company search (CR12) shows that on 26<sup>th</sup> February, 2019 the Company took a loan facility of Kshs 26,100,000/-. Despite the Company doing well financially, the respondents have failed to pay the petitioners any dividends yet the financial statements for the years 2016, 2017 and 2018 shows that for those three years the Directors were paid emoluments of Kshs 18,660,000/-, Kshs 18,761,216/- and Kshs 26,614,190 respectively while the 4<sup>th</sup> respondent made profits of Kshs 5,584,340/-, Kshs 13,135,631/- and Kshs 13269,678/- respectively.
11. The petitioners averred that the acquisition of 1,350 shares in the Company by Reshma Praful Chandra Vadera, the 1<sup>st</sup> respondent herein, and her subsequent appointment as a Managing Director without an annual general meeting is questionable given that the Estate of her father, Prafulchandra Vithaldas Vadera is still ongoing. The said Estate, it was pleaded is only entitled to have one (1) shareholder as per the Memorandum and Articles of Association of the Company yet they currently have two (2) shareholders in violation of the Memorandum and Articles of Association of the Company.
12. The petitioners lamented that the respondents' failure to effect the transfer of shares to the petitioners, failure to accord an opportunity to the petitioners to be directors and failure to pay the outstanding dividends is oppressive and is unfairly prejudicial to the interests of the petitioners as it relates to the company.
13. In view of the foregoing, this Court was urged to afford the petitioner's redress for violation of their Rights that have been infringed such as right of equality and freedom from discrimination by depriving the petitioners their right to have a Director in the Board of the Company yet all the other families



have representatives; unlawfully depriving the petitioners' their right to property by denying them their rightful dues as dividends from the Company; and that the 1<sup>st</sup> to 3<sup>rd</sup> respondents are conducting the affairs of the Company as a personal property to the exclusion of the Petitioners and in a manner that is oppressive and to the unfair prejudice of the petitioners.

14. In their petition, the petitioners therefore seek the following orders:
  1. A declaration that the respondents have violated and/or infringed the rights and fundamental freedoms of the petitioners 22, 27 (1) & (2) and 40 (2)(a) enshrined in the *Karuri & others vs. Dawa Pharmaceuticals Company Limited and others*
  2. A declaration that the 4<sup>th</sup> respondent's affairs are being conducted in a manner that is oppressive and unfairly prejudicial to the interests of the petitioners.
  3. That the court be pleased to appoint one or more competent inspectors under section 786 of the *Companies Act, 2015* court to investigate the affairs of a company and to report on those affairs in such manner as the court directs.
  4. The inspection in (3) above to include investigation as to the legality of the transfer of 1,350 shares in the 4<sup>th</sup> respondent to Reshma Praful Chandra Vadera and her subsequent appointment as a Director.
  5. An order compelling the Directors of the 4<sup>th</sup> respondents to furnish the petitioners with certified copies of all bank statements from 2013 to 2019 and the audited financial statements/ accounts of the 4<sup>th</sup> respondent's for the years 2013, 2014, 2015 and 2019.
  6. An order compelling the Directors of the 4<sup>th</sup> respondent to undertake forensic audit of the 4<sup>th</sup> respondent's books of accounts for the years 2013 to 2019 by a reputable independent audit firm failing which the court be pleased to allow the petitioners to appoint forensic auditors at the respondents' cost.
  7. An order compelling the respondents to pay the dividends outstanding to the estate of the late John Watenga Mokoosio in the amount to be determined upon carrying out the aforesaid forensic audit.
  8. An order for the respondents to effect the transfer of the shares of the Late John Watenga Mokoosio to the petitioners as per the confirmed certificate of grant dated 2<sup>nd</sup> November 2018.
  9. An order compelling the respondents to furnish the petitioners with a share certificate.
  10. An order for the appointment of the petitioners as Directors of the 4<sup>th</sup> respondent to represent the family of the late John Wetenga Mokoosio as per article 38 of the Articles of Association of the Company.
  11. Such further and other consequential orders, declarations and directions as this honourable court may consider appropriate for the purpose of enforcing and securing the enforcement of the rights of the petitioners.
  12. That the costs of this petition be borne by the respondents.
15. In support of the petition, the petitioners reiterated the contents of the petition in their supporting affidavit and further deposed that the 3<sup>rd</sup> respondent is a stranger to the Company given that he holds no shares and was illegally appointed as a Director of the Company without the approval of the members of the company. He however purports to represent the family of Prafulchandra Vithaldas Vadera and



receives Directors' emoluments hence buttresses the position that the said family has two directors in the board of the 4<sup>th</sup> respondent instead of one.

16. It was contended by the petitioners that they have explored all avenues in a bid to resolve the aforesaid issues and had no option but to move this Court to protect their interests as members. In the petitioners' view, by virtue of section 780(2)(a) of the *Companies Act, 2015*, they are members of the Company by the operation of the law and enjoy all rights and privileges of members. As such, they are already admitted as members by the operation of the law and part of the reason the petitioners moved this honourable court is because the respondents have refused to actualize the transfer of shares from the petitioners' late father to the petitioners and subsequently provide them with share certificates and pay dividends. They therefore have capacity as members of the 4<sup>th</sup> respondent by virtue of the certificate of confirmation of grant to institute the instant Petition whether or not they have been admitted or included as shareholders and/or Directors of the 4<sup>th</sup> respondent.
17. The petitioners reiterated that through their Advocates, they requested for the dividends and the share transfer forms from the respondent's Advocates on December 20, 2018 but have just been taken in circles prompting the petitioners' Advocates to issue a demand letter dated February 18, 2020. That it is only after the said demand letter that the Respondents' Advocates forwarded the share transfer forms via email on March 7, 2020.
18. It was deposed that the late Penina Siamata Mokoosio, who is the mother of the 2<sup>nd</sup> petitioner, was a Director/Shareholder of the Company and held that position until her death on October 11, 1995. After her death, the 2<sup>nd</sup> petitioner, Emmanuel Toyanka Mokoosio and the 1<sup>st</sup> Petitioner's mother, Florence Ngendo Mokoosio, (now deceased) were appointed by the family as their representative in the Company. However, their attempts to participate in the affairs of the Company were frustrated and stonewalled and the attempt by Florence Ngendo Mokoosio to become a director of the Company was never actualized until her death in 2013. According to petitioners, the only payment they have been receiving from the Company is a total Kshs. 60,000.00 that is Kshs. 30,000.00 for each of the petitioners which payment has never been explained and when an explanation was sought on in April, 2020, the respondents stated that it was dividends and immediately stopped the payment. In the petitioners' view, this was absurd because dividends are paid annually at the end of each financial year not monthly after being declared in an AGM hence cannot be constant every year because it is pegged on the company's profits for the preceding year.
19. According to the petitioners, there is no proof of minutes and or board resolutions of the Company accepting the resignation of the two founding Directors/Shareholders that is Chhotalal Vithaldas Vadera and Dinker Vithaldas Vadera as alleged, neither are there minutes and or board resolutions of the Company approving the appointment of one Prafulchandra Vithaldas Vadera purportedly in 1984 as the Managing Director of the Company as alleged by the 2<sup>nd</sup> respondent.
20. The petitioners denied the existence of a long standing dispute regarding the administration of the Estate of the Late John Wetanga Mokoosio as alleged, and averred that if any such disputes existed, the same were resolved in late 2017 hence the application for rectification of the Grant of Letters of Administration was filed on December 5, 2017 and allowed on November 2, 2018 whereby the petitioners were appointed as Co-Administrators of the Estate of the Late John Wetanga Mokoosio. According to the petitioners' the family dispute was largely being perpetuated by the respondents due to their failure to pay dividends thereby creating or escalating suspicion among some family members. They accused the respondents of avoiding to transfer the shares and pay the full dividends to the petitioners with the hope of reigniting the family dispute for them to continue delaying transfer of shares and payment of dividends and maintain status quo.



21. It was averred that on December 15, 2017 the firm of M/s Kipyator Kibet & Associates Advocates withdrew the demand issued to the 4<sup>th</sup> respondent vide their letter dated August 29, 2017 on the ground that parties had reached an amicable settlement. The petitioners pleaded that the 2<sup>nd</sup> respondent has selectively made reference to outstanding dividends payable to the shareholders of the Company for the years 2016, 2017 and 2018, but has purposely failed to address the outstanding dividends for the years 2013, 2014, 2015, 2019 and 2020 in an attempt to deny the Petitioners and the beneficiaries of the Estate of John Wetanga Mokoosio their rightful dividends for the said years despite the Company making huge profits. Further, in an attempt to conceal the rightful dividends payable to the said Estate for the years 2013, 2014, 2015 and 2020, the respondents have refused to supply the petitioners with annual financial statements for said years given that the statements will reveal the Company's financial position including but not limited to the emoluments paid to the Directors for the said period. However, upon demand for dividends statement, the respondents supplied via email on September 12, 2020 a statement showing that the petitioner are owed dividends amounting to Kshs. 5,901,814.00 as at 31/7/2020, a sum that the petitioners disputed since it does not show how the figures were arrived at and does not include dividends for the years 2016, 2017, 2019 and 2020 hence the prayer for forensic audit.
22. The petitioners further averred that they requested for the share transfer forms on December 20, 2018 through their Advocates, but only received the share transfer forms from the respondents' Advocates on March 7, 2020, the delay in executing the share transfer forms being occasioned by the respondents. The deponent denied any fraud in executing the said forms and averred that at the time of the execution of the share transfer forms he was in Kenya having arrived on February 22, 2020 and left on March 11, 2020 hence his signature was witnessed by his Advocate Mr. Kimani.
23. The petitioners asserted that though the petitioners have the right to be appointed as Directors, the respondents have not been keen on making the said appointment and have in fact not done so despite the fact one does not need to be shareholder to be a Director in a Company. While they admitted that it is true that each family in the 4<sup>th</sup> respondent Company is entitled to one position in the board of Directors, they averred that since as evidenced from the CR12 dated February 17, 2020, the Vadera family has two Directors, that is Reshma Praful Chandra Vadera and Bindu Kumar Chhotalal Vadera, the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively, it is unfair for the family of the Late John Mokoosio to only have one board position in the Company.
24. It was noted that whereas it is alleged that Chhotalal Vithaldas Vadera and Dinker Vithalas Vadera resigned and were replaced by Prafulchandra Vithaldas Vadera, nowhere has the 2<sup>nd</sup> respondent mentioned the appointment of the 3<sup>rd</sup> respondent, Bindu Kumar Chhotalal Vadera, as a Director of the Company and or as a replacement of Chhotalal Vithaldas Vadera and that there is no proof of minutes and or board resolutions of the Company approving the appointment of the said 3<sup>rd</sup> respondent as a Director of the Company as alleged by the 2<sup>nd</sup> respondent. The petitioners therefore insisted that the 3<sup>rd</sup> respondent is and should be considered a stranger to the Company given that he holds no shares and was illegally appointed as a Director of the Company without the approval of the members of the company. The petitioners failed to understand how being out of the Country will directly/indirectly affect and/or has an impact on the daily running of the affairs of the Company if appointed as an Executive Director and they invited the Court to take judicial notice that following the Covid-19 pandemic working from home and virtual meetings has become the norm. Furthermore, the deponent denied that he would be unable to attend the Company's meetings because of the time difference between Kenya and USA. It was disclosed that the 1<sup>st</sup> respondent, Reshma Praful Chandra Vadera, who is in fact a Director of the 4<sup>th</sup> respondent is for a fact domiciled in the United Kingdom as indicated on the CR12.



25. The petitioners averred that the Guarantee and Indemnity were done in a clandestine manner without involving the petitioners in August, 2020 when the matter was already in Court as evidenced by the Letter of Guarantee dated November 24, 2020 from Absa Bank to Kenya Breweries Limited which buttresses the position that the respondents have completely shut out the petitioners from the affairs of the Company despite them holding 30% of the issued shares of the company.
26. The petitioners took issue with the purported minutes and board resolution of the 4<sup>th</sup> respondent Company produced by the 2<sup>nd</sup> respondent supposedly approving the appointment of the 1<sup>st</sup> respondent, Reshma Praful Chandra Vadera, as a Director of the Company for the following reasons:-
- a. The purported minutes does not indicate the time of the meeting commenced;
  - b. The purported minutes does not mention the members present in the meeting;
  - c. The purported minutes does not indicate the Chairperson of the meeting;
  - d. The purported minutes does not confirm the minutes of the previous or last board meeting by reading, approving and signing the same;
  - e. The purported minutes does not indicate the date of the previous or last board meeting; and
  - f. The purported minutes does not indicate the time the meeting ended.
27. The petitioner invited the Court to compare the purported minutes with the previous minutes of the Company and they averred that the fact that the 2<sup>nd</sup> respondent has produced annual returns is not sufficient to prove the share transfers were legally transferred since the 2<sup>nd</sup> respondent has not demonstrated by providing stamped and filed share transfer forms, minutes of shareholder's meeting and board resolution approving the purported transfer of 1,350 shares in the 4<sup>th</sup> respondent Company from Prafulchandra Vithaldas Vadera to the 1<sup>st</sup> respondent.
28. It was further averred by the petitioners that the audited accounts for the years 2016, 2017, 2018 and 2019 were only provided to the petitioners in the year 2020 after a demand letter was issued hence it was not voluntary as the respondents are purporting to insinuate. In any event, despite numerous requests, the respondents are yet to supply the petitioners with the audited accounts for the years 2013, 2014, 2015 and 2020.
29. Contrary to and in response to the averments the petitioners averred that the 2<sup>nd</sup> respondent's averments are disjointed and incoherent, whereas the 2<sup>nd</sup> respondents states that in the year 2018 the Auditor of the Company M/s Mathara & Associates indicated his intention not to continue working with the Company, the 2<sup>nd</sup> respondent still proceeds to state that on 1<sup>st</sup> September, 2020 the petitioners were invited for an online meeting by the respondents together with the said Company Auditor M/s Mathara & Associates. The petitioners also questioned the appointment of the auditors give the fact that no Annual General Meeting of Company has never held for more than 10 years now.
30. According to the petitioners whereas the respondents' Advocates had initially alleged that the reason the shares had not been transferred to the petitioners is because they were in the process of appointing a new Company Secretary of the Company, that reason clearly contradicts the averments in the Replying Affidavit as the 2<sup>nd</sup> respondent is now insinuating that the since the 4<sup>th</sup> respondent has a share capital of Kshs. 1,200,000/- it is not mandatory for it to have a Company Secretary. This current stand by the respondents obviously vacates the excuse of appointment a new Company Secretary thus there is no reason or justification as to why the shares have not been transferred to the petitioners to date.



31. The petitioners noted that as evidenced from the financial statements for the years 2016, 2017, 2018 and 2019 the respondents have been paying themselves hefty Directors Emoluments calculated to reduce the dividends or profits available for distribution among shareholders. For instance, the 2019 financial records of the 4<sup>th</sup> respondent Company shows that approximately Kshs 60,000,000.00 disappeared from the books of the Company and Kshs. 27,384,000/- was used as Directors emoluments. This, according to them, justifies appointment one or more competent inspectors under section 786 of the *Companies Act, 2015* to investigate the affairs of the Company and to report on those affairs in such manner as the Court directs. Similarly, this Court should issue an order for a forensic audit of the 4<sup>th</sup> respondent's books of accounts for the years 2013 to 2019 by a reputable independent audit firm failing which the Court should allow the petitioners to appoint forensic auditors at the respondents' cost.
32. The petitioners asserted that their rights cannot be violated merely because the family of the Late Prafulchandra Vithaldas Vadera is yet to take out Grant of Letters of Administration for his Estate since the shares of the family of the Late John Wetanga Mokoosio in the Company are known and are not transferable subject to the transfer of shares to the beneficiaries of the family of the Late Prafulchandra Vithaldas Vadera.
33. On behalf of the petitioner, it was submitted that the High Court is established under article 165(1) of the Constitution of Kenya, 2010 which has on its part, elaborately set out the jurisdiction of the High Court. Reference was made to *Hezekiel Oira v Ethics and Anti-Corruption Commission & another* [2016] eKLR and *Peter Nganga Muiruri Vs Credit Bank Limited & Another*, Civil Appeal No. 203 of 2006 and it was submitted that the Constitution of Kenya, 2010 does not create any exception to the High Court's unlimited original jurisdiction in any way expressly or implicitly save for matters Land, Environment and Employment which are litigated the respective special courts of equal status.
34. It was submitted that section 2 of the *Companies Act, 2015*, 2015 is very clear on the application of the Act to all companies and therefore this Court has the mandate to ensure that companies whether private or public are regulated in the interests of their members and in particular to protect members against oppressive and prejudicial conduct. The Petitioners relied on the case of *Almond Resort Limited v Mohamed Mahat Kuno & another* [2020] eKLR where Kariuki, J addressed the issue of the jurisdiction of the High Court in as far as matters relating to the affairs of the Company as contemplated under section 780 of the *Companies Act, 2015*.
35. Reference was also made to the case of *John Muturi Nyaga vs. Graham Alexander Walsh & 3 others* [2017] eKLR where Tuiyott, J (as he then was) addressed the nature of the Application as contemplated under section 780 of the *Companies Act, 2015*.
36. According to the petitioners, the predominant issues raised in the Petition relate to disputes over the transfer of shares/Shareholding and Directorship of the Company, payment of due and owing dividends to the petitioners and general affairs of the Company which fall squarely within the Jurisdiction of the High Court. The petitioners have thus approached this Court on the strength of its unfettered and unlimited original jurisdiction and under section 780 the *Companies Act, 2015*.
37. It was further submitted that the High Court under the provisions of article 165(3)(b) and (d) of the Constitution has the jurisdiction to determine the question of whether constitutional rights have been violated or are threatened with violation. As such, this Honourable Court has the jurisdiction to entertain this Application/Petition and to make appropriate pronouncements on the prayers sought in the Petition.



38. The petitioners referred to section 780(2)(a) of the *Companies Act, 2015* as regards the definition of “member” and submitted that they have capacity as members of the Company by virtue of the certificate of confirmation of grant to institute the instant Petition whether or not they have been admitted or included as shareholders and/or Directors of the Company.
39. The petitioners were of the view that they have clearly and categorically pleaded in the Petition the particular rights and freedoms that have been infringed and the manner in which they have been infringed by the respondents. From the Petition it is clear that the crux of the petitioners’ claim is that the actions or inactions thereof of the Company as pleaded in the Petition are tantamount to infringement, violation and abuse of the petitioners’ rights and freedoms and in particular the right and freedom from discrimination under article 27 and protection of right to property under article 40(2) (a) of the Constitution and the cited provisions of the *Companies Act, 2015*. Article 20 of the Constitution is very clear, the Bill of Rights applies to all law and binds all State organs and all persons. Article 22 further provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Therefore, it was submitted, the Petition meets the threshold.
40. In this case it was submitted that the respondents have completely shut out the petitioners from all the affairs of the 4<sup>th</sup> respondent and they have not been involved in the affairs of the company a situation which is unfair and prejudicial to their interests as members of the Company. This in effect amounts to discrimination against the estate of John Wetanga Mokoosio given that the other two families fully participate in the affairs of the Company. Further, it was the Petitioners’ submission that the evidence produced is sufficient to support the petitioners’ claim that they have been unfairly discriminated in running the affairs of the Company.
41. Further, the thrust of article 40 of the *Constitution* is to protect property rights under the law. Such rights are governed by statutes and in the instant case, the *Companies Act, 2015*. The petitioners’ case is grounded on the fact that they have an absolute and indefeasible 30% stake as members of the Company by the operation of the law. That being the case, the actions of the respondents of not transferring the shares entitled to the petitioners and failing to pay dividends to them despite the Company making huge profits and paying directors exaggerated salaries and emoluments are tantamount to unlawfully depriving the petitioners’ their proprietary rights in the shares and their rightful dues in the form of dividends from the Company since 1995. This in effect is an infringement, violation and abuse of the rights and freedoms of the petitioners. The petitioners therefore crave that this court protects their right to property under article 40 of the Constitution.
42. According to the petitioners, section 114 (3) (d) and (g) of the *Companies Act, 2015* confers a member of a company the right to receive notices of general meetings and the right to be sent a copy of the company’s annual financial statement and reports. Further, section 275 of the Act provides that a resolution of members of a company is validly passed at a general meeting if—(a) notice of the meeting and of the resolution is given; and (b) the meeting is held and conducted in accordance with this Act and the company’s articles while section 276 of the *Companies Act, 2015* gives directors of a company powers to convene a general meeting of the company. In this case however, the respondents have never held any Annual General Meeting for over 10 years now and despite having an opportunity to address the said issue, they have failed to inform the Court as to why they have not been convening Annual General Meetings. In this regard reference was made to the decision of Gikonyo, J in the case of *Agricultural Development Corporation of Kenya v Nathaniel K. Tum & another*
43. Therefore, it was submitted that by failing to hold and or notify the petitioners of any Annual General Meeting, the respondents are and have been in violation of not only the law but also the Articles



of Association of the Company. In addition, the respondents have never sent the petitioners the Company's annual financial statement and reports for the years 2013-2019 despite several demands by the petitioner, thereby violating the petitioners right as members under section 114(3)(g) of the [Companies Act, 2015](#).

44. It was further while sections 653 (1) and 654 (3) of the *Companies Act, 2015* requires the directors of a company to prepare a directors' report for each financial year of the company and inter alia except in the case of a company that is subject to the small companies regime, specify in the report amount (if any) that the directors recommend should be paid as a dividend, since the petitioners' father died in 1982, only the late Penina Siamata Mokoosio has been appointed as a Director of the Company until her death in the year 1995. Accordingly, the Estate of their late father has not received any annual dividends due and owing to them as per Articles 32 and 47 of the Articles of Association of the Company and neither have they received any Directors report regarding of the company and in particular a report regarding dividends as required under section 654 (4) of the *Companies Act, 2015*.
45. While section 717 of the *Companies Act, 2015* requires a Company to appoint an auditor or auditors for each financial year of the company, unless the directors resolve that an audited financial statement is unlikely to be required, following the petitioners' persistent request, the respondents have only supplied the Petitioners with annual financial statements for the years 2016, 2017 and 2018. However, the Respondents have refused to furnish the petitioners with audited financial statements for the years 2013 to 2015 and 2019. In this regard the Petitioners referred to the case of *Gitabi Gethenji & 3 others vs. James Ndungu Gethenji & 3 others [2018] eKLR* and submitted that the Company has continued to operate without accountability to its members/shareholders and in particular the petitioners. Further, that the running of 4<sup>th</sup> respondent Company without any accountability to its members/shareholders is unconstitutional, undemocratic, unfair and oppressive. Ten (10) years is a long time for a company to run without participation of its members/shareholders. Accordingly, the Court should consider the interests of the petitioners as bona fide members of the Company.
46. On costs, the petitioners relied on [Cecilia Karuru Ngayu v Barclays Bank of Kenya & another](#), and *Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant vs. Ihururu Dairy Farmers Co-operative Society Ltd* respondents' case.

#### Respondents' Case

47. In response to the Petition, the respondents averred that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are Executive Directors and shareholders of the 4<sup>th</sup> respondent Company while the 3<sup>rd</sup> respondent is a Non-Executive Director of the 4<sup>th</sup> respondent and is not a Shareholder of the Company. According to the respondents, the Company has two shareholders who are deceased namely the Estate of the Late Prafulchandra Vithaldas Vadera and the Estate of the late John Watenga Mokoosio.
48. According to the respondents, the Company as a private company does not offer public services and does not have any relationship with any government agency and neither is it listed on the Nairobi Securities Exchange. Further, it does not enjoy any government funding, is not created by an Act of the legislature and is not subject to any government regulation and control over its affairs. It is owned and controlled by private individuals and neither the state nor any public body owns any of its voting stock or shares to qualify it to be a public entity. According to the respondents, a private company as an entity limited by shares is ordinarily not subject to constitutional interpretation as to its internal governance processes and practices. Accordingly, this Petition is a non-starter as the dispute between the parties herein is a commercial dispute between shareholders and their company since it concerns the election of director/shareholders of the Company, payment of dividends, transfer of shares of the fourth respondent and audit of the fourth respondent's books of accounts which are internal



issues that are usually regulated by rules and regulations embedded in the Articles of Association and Memorandum of Association of the company.

49. It was disclosed that the respondents in finding a solution to the petitioners grievances convened an Annual General Meeting as per the Articles of Association which meeting was scheduled to be held once the Covid 19 pandemic was brought under control and the Petitioners had not exhausted the internal disputes resolution mechanisms established under the Articles of Association before approaching the court. It was averred that courts are reluctant to interfere with the internal management issues of companies unless the constitution of association is breached or there is a violation of the rules of natural justice in which case the court will intervene by issuance of injunction in a civil suit to compel a company to comply with its Articles of Association. In this case it was contended that the petitioners have not demonstrated any violation of the Constitution and any injury suffered and have also not established that this is a constitutional matter worthy for consideration by the court sitting as a Constitutional court.
50. In the respondents' view, the test of establishing whether a Petition raises a constitutional issue is hinged on the guidelines that there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate and seeking a constitutional relief in the absence of such feature would be a misuse and abuse of court process. Therefore, this petition is a misuse and abuse of court process since the petitioners have an avenue of adequate redress in the Annual General Meeting (A.G.M) and further if not contended with the resolutions passed in the AGM they can move the court vide a civil suit for appropriate orders since the dispute at hand is of a commercial nature as it revolves around the internal management of a private company. In their view, no special circumstances have been disclosed in the Petition which indicate that the means of redress available to the petitioners at the Company's Annual General Meeting and in a civil court are not adequate in settling the dispute between the parties.
51. The court was in any event urged to note that the petitioners are yet to be admitted or included as Shareholders and/or Directors of the Company and that the petitioners only forwarded to the respondents' lawyers the relevant share transfer form on June 3, 2020 just over a month ago prior to the proceedings yet the late John Watenga Mokoosio passed away on July 31, 1982 a period of thirty eight (38) years before.
52. According to the respondents, despite the delay in finalization of the succession cause, the family of John Mokoosio have been regularly paid sums towards dividend payments in the 4<sup>th</sup> respondent. It was therefore contended that this court does not have jurisdiction to issue the orders sought in this constitutional petition hence the only remedy in the circumstances is to issue orders striking out of the Petition.
53. According to the respondents, the late John Watenga Mokoosio was the owner of 18,000 ordinary shares in the Company representing 30% of the issued and paid up shares therein. After the death of the late John Watenga Mokoosio, his wife, Penina Siamata Mokoosio was made a director of the company until her death on October 2, 1995 and not October 11, 1995 as wrongly by the Petitioners. It was averred that after the death of Penina Siamata Mokoosio her co-wife, Florence Ngendo Mokoosio was incorporated in the running of the affairs of the Company until her death on September 18, 2013 however she did not hold any position of director in the Company. It was averred that for reasons best known to the family of the late John Watenga Mokoosio his shares in the Company were never transferred into the names of his two said wives.
54. The respondents set out the particular of the correspondences received by the Company from the beneficiaries of the estate of the deceased. According to the Respondents, on February 25, 2010 the



Company received a letter from the firm of Amuga & Company Advocates representing the family of Penina Siamanta Mokoosio instructing them not to pay any dividends or shares to anybody pending further instructions by the entire family. On March 5, 2010 the Company received a letter from the firm of Kantai & Company Advocates acting on behalf of Florence Ngendo Mokoosio instructing them to pay 50%:50% to each family. On May 4, 2020 the said law firm of Kantai & Company Advocates wrote to the Company and stated payment should only be made to the Administrators of the estate. On July 2, 2010 the said law firm of Amuga & Company Advocates wrote to the Company authorizing payment and release of the dividends. On June 7, 2017 the Company received a letter from the law firm of Barongo Ombasa & Company Advocates stating the shares in the Company were to go to the 2<sup>nd</sup> petitioner herein, Emmanuel Toyanka Mokoosio and his sister Suzie Mokoosio. On August 29, 2017 the Company received a letter from the law firm of Kipyator Kibet & Associates stating that dividend payments should be stopped immediately and withheld awaiting the beneficiaries to meet and agree on shareholding.

55. Pursuant to the foregoing, the respondents' Advocates on record, Mungai Kalande & Company Advocates then wrote to both the law firms on September 8, 2017 and advised them to obtain certificate of confirmation of grant from the court and it was only after the said letters from the lawyers that the petitioners herein finally obtained a rectified confirmation of grant on November 2, 2018. According to the Respondents, the family of the late John Watenga Mokoosio took a period of thirty six (36) years to agree on distribution of the shares in the Company hence the petitioners herein only became entitled to be shareholders of the 4<sup>th</sup> respondent as from November 2, 2018.
56. Further, to become a shareholder the Administrators who also happen to be the petitioners herein were required to executed share transfer forms transferring the shares to the beneficiary which were only sent to the 4<sup>th</sup> respondent on June 3, 2020.
57. The respondents therefore averred that any delay in transfer of the shares is solely the fault of the petitioners.
58. It was however averred that the respondents, in finding a solution to the petitioners grievances, convened an Annual General Meeting as per the Articles of Association on 6<sup>th</sup> August 2020 at 3 p.m for which the petitioners were duly served with the relevant notice by the Company Secretary. Attached and marked "A" is a copy of the said notice. It was disclosed that the Company held its AGM for the year 2016 on December 4, 2020 at 2 p.m and that the petitioners were duly served with the relevant notice by the Company Secretary. Attached and marked "B" is a copy of the said notice. As for the 2017 AGM, it was averred that the same was held on December 4, 2020 at 2:30 p.m and that the petitioners were duly served with the relevant notice by the Company Secretary. As regards the 2018 AGM, the same was held 2018 on December 4, 2020 at 3 p.m and similarly, the petitioners were duly served with the relevant notice by the Company Secretary.
59. It was submitted on behalf of the respondents that the dispute at hand is between members of the company and their company and concerns the election of directors, payment of dividends and transfer of shares of a private company which are internal issues regulated under clauses 21-27, 38 and 47 of the fourth respondent Company's Articles of Association. As to what constitutes a constitutional question the respondents relied on the case of *CNM vs WMG (2018) eKLR* in which Mativo, J cited with approval the South African case of *Fredericks & others vs MEC for Education and Training, Eastern Cape & Others*
60. According to the respondents, this Petition does not raise any constitutional issue worthy for consideration by the court and further reliance was placed on *Gabriel Mutava & 2 others vs. Managing*



*Director Kenya Ports Authority & Another Civil Appeal No. 67 of 2015* where the Court of Appeal emphasised on the need to follow the prescribed procedure.

61. A corollary to the foregoing, it was submitted is the principle of constitutional avoidance as illustrated by Korir J in *Joseph Mwangi Mbote & 2 others vs Kenya Tea Development Agency (Holdings) Limited & 2 others* and by Emukule, J in *Maggie Mwauki Mtalaki vs Housing Finance Company of Kenya* . It was the respondents' view that the petitioners have failed to demonstrate any violation of the constitution and any injury suffered and have failed to indeed establish that this is a constitutional matter. In support of this submission they relied on the case of *Coast Water Services Board vs Mrs Alome Achayo & 5 others*
62. Whereas the respondents agreed with the petitioners that the rights deemed to have been violated as outlined in the Petition are all rights whose adjudication is conferred upon the court by virtue of articles 23 (1) and 165 of the Constitution of Kenya 2010, what the Petitioners refuse to acknowledge firstly, is that the subject matter of the alleged contravention of their rights is centred around the management of the affairs of a private company Ngong Matonyok Wholesale Limited and secondly, who is the guarantor of the rights alleged to have been denied, violated or infringed. These are relevant matters for consideration. The right to property under article 40 and the right to equality and freedom from discrimination which the petitioners allege to be violated are rights which can only be guaranteed by the state or state organ.
63. It was averred that the respondents being private citizens and a private limited liability company are neither the state nor an organ of the state. And even if they were, there is no allegation in the Petition that the respondents were assumed or were conferred with the capital and responsibility to protect the peoples' property and to ensure they are not arbitrarily deprived of their property, an obligation of the state or state organ. In support of this assertions they placed reliance in the decision of Emukule J in *Maggie Mwauki Mtalaki vs Housing Finance Company of Kenya Limited* Petition No 70 of 2013.
64. It was therefore submitted this Petition does not raise any constitutional issue for determination and as such is an abuse of court process and should be dismissed with costs.
65. As for the petitioners' entitlement to the shares in the Company, the respondents did not dispute the fact that the petitioners are entitled to acquire shares belonging to their deceased father in line with clauses 21-27 of the Company's Articles of Association. While they acknowledged that there has been a delay in transfer of the shares to the Petitioners, they contended that the delay falls squarely on the petitioners door step since it has taken the petitioners family a period of thirty six (36) years to agree on distribution of shares in the 4<sup>th</sup> respondent Company and to complete the succession cause in relation to their fathers' estate which was concluded on November 2, 2018 thirty six (36) years after his demise. Further, the petitioners availed signed copies of the share transfer forms to the respondent on June 3, 2020. The delay by the petitioners is the reason as to why they are yet to acquire the shares however there is enough evidence to suggest that the process of transfer of shares to the petitioners is currently underway. The petitioners failure to agree on the distribution of their father's estate for a period of thirty six (36) years is also the reason as to why dividends on their fathers' shares were not paid out by the Company. Payment of dividends is a matter regulated under clause 47 of the fourth respondent's Articles of Association.
66. According to the Respondents, the decision on appointment of the Petitioners' as directors is an issue reserved for determination at the company's general meeting as stipulated under clause 38 of the Articles of Association. For this proposition, they relied on *Okiya Omtatah Okoiti & 3 Others vs Nairobi City County and 5 others* , *William Njiraini Nguru vs Mununga Tea Factory & 3 others Kerugoya* , *Zaburi Musa Hamisi & 3 others vs Ishmael Hillon & 4 others*



67. It was submitted that the transfer of shares, payment of dividends and election of directors are internal issues regulated by clauses 21-27, 38 and 47 of the fourth (4<sup>th</sup>) respondent's Articles of Association. The appointment of the Petitioners as directors and their enlistment as new shareholders are matters that are currently under consideration by the company hence issuance of orders in respect to these issues will amount to interference by the court in the internal management of the company. There are clear rules under the company's Articles of Association guiding election of directors and shareholders which the company is yet to apply its mind to hence it is our submission that the company should be left to make its own decisions which if found later on to have been in contravention of its own constitution that is when the court will have an avenue to intervene.
68. It was therefore submitted that the petition as filed is premature since the internal dispute resolution mechanism of the company is yet to be fully exhausted. The matters complained of herein can be resolved by the company itself.
69. On whether an order for the appointment of an Inspector under section 786 of the *Companies Act, 2015* can issue, it was submitted that the subject matter of the Petition is the management of the affairs of Ngong Matonyok Wholesaler Limited a private company incorporated under the *Companies Act, 2015* cap 486 in 1968. In the respondents' view, disputes as to the management of the affairs of a private company are issues that could best be dealt with in a normal civil suit and not by a way of constitutional petition. According to them, if the petitioners are aggrieved by the manner in which the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents undertook the management duties at the Company it is not in order for them to lodge a complaint in regard to wrongs committed against the company as a constitutional petition. Such complaints should have been pursued by use of the common law principle of derivative action especially where fraud on the minority by the majority is alleged like in the case herein.
70. Accordingly, where there is a breach of duty by the directors of a company as alleged herein the wrong done was a wrong done to the company and it is only the company alone that could sue as illustrated in the famous case of *Foss vs Harbottle*, where the court held that the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself. Whereas there are exceptions to the rule in *Foss vs Harbottle* where a member can sue in his own name it was submitted that the law contemplates a clear procedure to be followed when a member lodges complaints in regard to alleged mismanagement of companies and it is the expectation of the law that such a procedure ought to be complied with as illustrated by Lenaola J in *Petition No 331 of 2015 Jacob Juma vs Hon Evans Kidero, Governor of Nairobi County*.
71. It follows therefore, that claims against the wrongs committed to a company are to be instituted by way of a derivative action and more importantly by a shareholder in a company and reliance was placed on the *Matter of CMC Holdings Limited*, Miscellaneous Civil Case No 273 of 2012.
72. The law, according to the respondents, thus contemplates a clear procedure to be followed when lodging of complaints in regard to alleged mismanagement of companies which procedure outlined above in the matter of CMC Holdings Limited acquired statutory approval and has been codified under sections 238, 239, 240, 241 and 242 of the *Companies Act, 2015* No 17 of 2015.
73. Since what is before the honourable court is a constitutional petition and not a derivative suit and the issues to be addressed must be looked at from the prism of the constitution and not company law per se, the Court was urged that having found that there are no constitutional issues for determination to strike out the petition with costs as the orders sought therein can only issue in a derivative suit.
74. However, should the court be inclined to order that an inspector be appointed it was submitted that the order of appointment of an inspector should be subject to the Petitioners giving security as their



contribution towards meeting costs of the investigation in line with section 786 (3) of the *Companies Act, 2015* which stipulates that before appointing an inspector the court may require the applicants to give security of an amount not exceeding Kenya shillings five hundred thousand (Kshs 500,000/=) as contribution towards meeting costs of investigation.

75. In conclusion the Court was urged to dismiss the Petition with costs as the same lack merit and are an abuse of process.

Determination

76. I have considered the issues raised in the petition.
77. The petitioners contend that their constitutional rights have been violated by the manner in which the 1<sup>st</sup> to 3<sup>rd</sup> respondents manage the affairs of the 4<sup>th</sup> respondent Company. The first issue for determination is whether this Petition raises issues that ought to be canvassed by way of a Constitutional Petition. Collateral to that issue is the question whether the respondents are liable in a Constitutional petition. According to the respondents since the matters in dispute touch on the affairs of the 4<sup>th</sup> respondent, a purely private company, the respondents cannot be liable in a constitutional dispute. In this regard, they cited the decision of *Coast Water Services Board vs. Mrs Alome Achayo & 5 Others* Petition No 30 of 2014. I however perused the said decisions and the tests which the respondents rely on were in respect of the case of *Memphis Publishing Company vs Cherokee Children and Family Services Inc 87 S W 3d 67*. Emukule J in *Coast Water Services Board vs Mrs Alome Achayo & 5 Others (supra)* himself, while allowing the petition, appreciated that:

“...note is taken of the constitutional position that even private persons, or private entities may breach and are liable for breach of the Constitutional, provisions like, discrimination on the grounds of gender (Article 27(3) and 27(4) and (5) women and men have the right to equal opportunities in political, economic, cultural and social spheres), a person shall not discriminate directly or indirectly against another person on the grounds of gender (sex).”

78. This position is founded on Article 20 of the Constitution which provides that the Bill of Rights applies to all law and binds all State organs and all persons as well as Article 27(5) of the Constitution which provides that a person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4). It follows that when it comes to the enforcement of the Bill of Rights, any person or entity, private or public is liable to be sued if allegations of violation are alleged against them. In other words, it is not the nature of the entity that determines its culpability under the Bill of Rights but the nature of the complaint made against it. That then brings me to the issue of the nature of the complaints that strictly speaking may fall be subject of a constitutional petition. In other words, what matters constitute constitutional issues.?
79. This being a constitutional petition, it is important to set out the parameters that determine whether a matter raises issues for determination in a constitutional petition or whether the issues ought to be dealt with as an ordinary suit. It is important to note that even in ordinary civil disputes, it is not difficult to find that there is some underlying constitutional principle involved. However, the mere fact that some underlying principle may be gleaned from the pleadings does not necessarily raise the matter to the level where it may qualify for determination as a constitutional issue.
80. In *Muiruri vs. Credit Bank Ltd & Another* Nyamu, J held that a constitutional issue is that which directly arises from the court's interpretation of the Constitution; for example – what is a fair trial is



a constitutional issue and the courts have interpreted what is the meaning of a fair trial. In *Ngoge vs Kaparo & 4 Others*, court the expressed itself as hereunder:

“We find that the making of an allegation of contravention of chapter 5 provisions per se, without particulars of the contravention and how that contravention was perpetrated would not justify the court’s intervention by way of an inquiry where the particulars of contravention and how the contravention took place are plainly lacking in the pleadings. Indeed there is a wealth of authorities on the point...Any such inclination to demand an inquiry every time there is a bare allegation of a constitutional violation would clog the Court with unmeritorious constitutional references which would in turn trivialise the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where the facts as pleaded in this case, do not plainly disclose any breach of fundamental rights or the Constitution there cannot be any basis for an inquiry... It is the view of this court that the matter was rendered academic and speculative by the dissolution and the court has no business giving declarations and orders in a vacuum. A constitutional court has no business giving orders or declarations in academic or in speculative matters... In our view, it cannot be correct to suggest that a constitutional matter cannot be dealt with in a summary manner in deserving cases. There are in fact many instances where the court must for example move first to prevent abuse of its process and to safeguard the dignity of the court. Abuse of process includes using the court process for a purpose or in a significantly different way from its ordinary and proper use. My own conception of a constitutional issue when it relates to the interpretation of a provision of Constitution is that there are posed to the court, two or more conflicting interpretation of the Constitution and the constitutional court is asked to pronounce on which is the correct one... The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is fallacious...the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

81. Whereas every person is pursuant to the provisions of article 3 and 22 under an obligation to respect, uphold and defend the Constitution and a right to right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, it is my view that those provisions ought not to be abused. As was held in *Karuri & others vs. Dawa Pharmaceuticals Company Limited and others*

“Nothing can take the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application. Baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process...A Constitutional Court must guard its jurisdiction among other things to ensure that it sticks to its constitutional mandate and that it is not abused or trivialised. There is no absolute right for it to hear everything and it must at the outset reject anything that undermines or trivialises or abuses its jurisdiction or plainly lacks a cause of action... The notion that wherever there is a failure by an organ of the Government or a public



authority or public office to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals is fallacious. The Right to apply to the High Court under the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court, the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms.”

82. Therefore, it is my view and I so hold that to institute a Constitutional Petition with a view to circumventing a process by which institutions established by the Constitution, including ordinary civil courts, are to exercise their jurisdiction is an abuse of the Court process. To allow entertain such a course would lead to the Courts crippling such institutions rather than nurturing them to grow and develop.

83. It is in that light that I understand the Court’s position in [\*John Harun Mwau vs. Peter Gastrow & 3 Others\*](#) that the Constitution only ought to be invoked when there is no other recourse for disposing of the matter and in which the Court expressed itself in the following terms:-

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights...It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.”

84. Similarly, in [\*Uhuru Muigai Kenyatta vs Nairobi Star Publications Limited\*](#), Lenaola, J (as he then was) held that:

“Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (*supra*) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in *AG vs S.K. Dutambala* (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

85. Accordingly, it was held in [\*Jeminah Wambui Ikere vs Standard Group Ltd and Anor\*](#) that:

“...each case must be looked at in its specific and unique circumstances and that the Court must determine whether there is a constitutional issue raised in the petition that ought to be addressed by the Court under Article 23(1) of the Constitution.”



86. The rationale for this was given in *Rapinder Kaur Atwal vs Manjit Singh Amrit* where it was held that:

“All the authorities above, would point to the fact that the Constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes. In this case, the former must be true...I must add the following; our Bill of Rights is robust. It has been hailed as one of the best in any constitution in the world. Our courts must interpret it with all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violations thereof”.

87. I associate myself with the decision in *Nation Media Group Limited vs Attorney General [2007] 1 EA 261* to the effect that:

“A Constitutional Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice...As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to proceed to substantive hearing...Although the application may be vague for citing the whole of Chapter 5 of the Constitution, however the prayers sought are specific and they refer to freedom of expression guaranteed under the Constitution.”

88. So, in *General Plastics Limited vs. Industrial Property Tribunal & Another*, Wendoh, J expressed herself as hereunder:

“The only conclusion I can arrive at is that, it seems the Applicant is dissatisfied with the decision of the Respondent and that being so, their recourse lies in filing an appeal to the High Court under s. 115 (1) of the *Industrial Property Act, 2001*. In my considered view the Applicants have abused the court process by unnecessarily protracting this matter and making what is not a constitutional issue into one and in the meantime, the Applicant is benefiting from interim orders against the disputed design. The statute under which the 1<sup>st</sup> Respondent is created provides procedure for a party aggrieved by that decision, that procedure must be followed instead of camouflaging every such grievance as a constitutional issue. The court must prevent abuse of its process by disallowing such applications. (See *Ben Kipeno & Others vs AG* Pet 15/07 and *Bahadur vs AG* where the court said;

“The constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can find a claim under substantive law, the proper cause is to bring the claim under that law and not under the Constitution.”

In *Speaker of National Assembly vs Njenga Karume* (1990-1994) EA 546 the Court of Appeal reiterated the above principle, that where the Constitution or A Statute provides a certain procedure to be followed, that procedure must be adhered to. In this case, failure to follow the procedure set out in the Regulations disentitles the Applicant to the Constitutional remedy sought herein. See also *Harrikisson vs AG*.”



89. Further afield, in *NM & Others vs Smith and Others (Freedom of Expression Institute as Amicus Curiae)* the Constitutional Court of South Africa stated that:

“It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.”

90. Similarly, in *Minister of Home Affairs vs Bickle & others*, Georges, CJ held as follows;

“It is an established practice that where a matter can be disposed off without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so ( *Wabid Munwar Khan vs The State AIR*).”

91. The judge added that:

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

92. Our own Supreme Court has clarified its position with regard to appeals filed in accordance with article 163(4)(a) and in *Peter Oduor Ngoge vs Hon Francis Ole Kaparo Petition No 2 of 2012* in declining to hear an appeal expressed itself as hereunder:

“In the petitioner’s whole argument, we think, he has not rationalised the transmutation of the issue from an ordinary subject of leave-to-appeal, to a meritorious theme involving the interpretation or application of the Constitution - such that it becomes a matter falling within the appellate jurisdiction of the Supreme Court...the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment will deserve further input of the Supreme Court.”

93. It is however my view that the mere fact that a matter that ought to have been brought as an ordinary civil suit is framed as a constitutional petition, does not thereby deprive the court of jurisdiction to entertain the same. The court may frown upon that course and may even strike it out for being an abuse of the process but that does not make it a jurisdictional issue.

94. In this case, the complaint by the petitioners is primarily premised on section 780 of the *Companies Act, 2015* which provides in subsection (1) that a member of a company may apply to the Court by application for an order under section 782 on the ground that the company’s affairs are being or have been conducted in a manner that is oppressive or is unfairly prejudicial to the interests of members generally or of some part of its members (including the applicant). The Court under section 782 of the said Act has the power to make such orders in respect of the company as it considers appropriate for giving relief in respect of the matters complained of. The respondents however contend that the reliefs which the petitioners seek herein are capable of being granted in a civil suit. I agree that generally matters affecting companies ought to be litigated as civil suits rather than as constitutional issues.



95. In this case, however, the petitioners allege that the manner in which the respondents are treating them is discriminatory since the family of the late John Watenga Mokoosio have been completely blacked-out from the affairs of the Company, a situation which is unfair and prejudicial to their interests as members of the Company. This, according to the petitioners, in effect amounts to discrimination against the estate of John Wetanga Mokoosio given that the other two families fully participate in the affairs of the Company.
96. It is also contended that the respondents' action of not paying the petitioners their dividends amounts to deprivation of their rights to property under article 40 of the Constitution whose thrust is to protect property rights under the law. Such rights, it is contended, are governed by statutes and in the instant case, the *Companies Act, 2015*. The petitioners' case is grounded on the fact that they have an absolute and indefeasible 30% stake as members of the Company by the operation of the law. That being the case, the actions of the respondents of not transferring the shares entitled to the petitioners and failing to pay dividends to them despite the Company making huge profits and paying directors exaggerated salaries and emoluments are tantamount to unlawfully depriving the Petitioners' their proprietary rights in the shares and their rightful dues in the form of dividends from the Company since 1995. This in effect is an infringement, violation and abuse of the rights and freedoms of the petitioners. The petitioners therefore crave that this court protects their right to property under article 40 of the Constitution.
97. In light of these allegations, whereas I agree that the issues raised herein could have been dealt with as an ordinary civil suit, I find that it would not advance the course of justice to send the parties away from the seat of justice based on that procedural lapse. It is in that light that I associate myself with the sentiments of Tuiyott, J (as he then was) in the case of *John Muturi Nyaga vs Graham Alexander Walsh & 3 others* [2017] eKLR where he expressed himself as follows:-

“The opening words of section 780(1) talks of a member applying to Court by Application. Our section 780(1) borrows heavily form section 994(1) of The English *Companies Act, 2015* 2006 which provides as follows:-

“(1) A member of a company may apply to the court by petition for an order under this Part on the ground—

(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial”.

Unlike the Kenyan situation, the English Law is that a Section 994 Application requires a Petition. The Grounds on which the Petition is presented and the nature of relief must be specified in the Petition.”

“This Court very much doubts that the Application contemplated under section 780 is in the nature of the typical application provided for under order 51 of The Civil Procedure Rules. I prefer to think that, just like Applications for Liquidation of Companies under the *Insolvency Act, 2015* (Act No 18 of 2015), a section 780 Application should ideally be by way of Petition.”



98. In this case, it is not in doubt that the petitioners have, whether due to their own issues or otherwise, not actively participated in the management of the 4<sup>th</sup> respondent. The law however requires that they be informed of the manner in which the 4<sup>th</sup> respondent is being managed. The allegations they have raised against the respondents are substantive and the only way in which they can be properly addressed is by the conduct of an audit and inspection of the processes which have been undertaken by the respondents in their absence.

99. I therefore associate myself with the sentiments expressed by Gikonyo, J in the case of *Agricultural Development Corporation of Kenya vs. Nathaniel K Tum & another* [2014] eKLR where he stated as follows:-

“It bears repeating, that an Annual General Meeting serves two important purposes: in one sense as a mechanism for accountability to shareholders and the shaping of the business of the company; and in another sense as an act of compliance with the law. Accountability to the shareholders is best described by the activities which take place in an Annual General Meeting and include; presentation of profit and loss account, and balance sheet; relevant information on the assets and operations of the company; directorship; share dividend and public share issue, if any, is to be undertaken. Compliance with the law is assessed on the company’s adherence to the legal requirements set out in the *Companies Act, 2015* especially the making of returns on its operations; the general meetings and resolution it has made during the year, tax returns, directorship of the company, shareholding and so on and so forth. If it does not do the things set out in law, the law has prescribed the penalty thereto...Meanwhile, lapses such as the ones herein could be cured through an Annual General Meeting where appropriate resolutions are made and then returns are filed with the Registrar of Companies in accordance with the *Companies Act, 2015*.”

100. I also agree with Makau, J in the case of *Gitahi Getbenji & 3 Others vs James Ndungu Getbenji & 3 Others* [2018] eKLR that:-

“The general meetings are of great importance for shareholders as it is from such a meeting that shareholders get assurance of accountability of directors as was noted in the case of *Agricultural Development Corporation of Kenya vs Nathaniel K Tum & another* [2014] (*supra*)...It is therefore clear that the directors have to promote the success of the company and in doing so have to act fairly as the members of the company. The director must therefore be put to task and held accountable.....”

101. Whereas I agree that disputes regarding internal affairs of a company ought to be resolved in accordance with the constitution of the company, where it is alleged that the company is not acting in accordance with its own constitution, the court has the power to intervene.

102. It was therefore held in *Tanui & 4 Others vs Birech & 11 others* that:

“While it is not the business of the High Court or the Court of Appeal to involve itself in the day to day running of institutions such as the Church, colleges, clubs and so on, yet where it is shown that such an organisation is conducting its affairs in a manner contrary to its constitution and to the detriment of its members, then the High Court and the Court of Appeal would not only be entitled to but is under a duty to compel it, either, by injunction or otherwise, to obey its constitution.”



103. In this case the allegations are that the respondents have violated the constitution of the 4<sup>th</sup> respondent Company. In that case this court is entitled to intervene.
104. Having considered the issues raised in this petition, I find the same merited and the orders which commend themselves to me and which I hereby grant are as follows:
- 1) A declaration that the respondents have violated and/or infringed the rights and fundamental freedoms of the petitioners under articles 22, 27 (1) & (2) and 40 (2)(a) enshrined in the *Constitution of Kenya, 2010*.
  - 2) A declaration that the 4<sup>th</sup> respondent's affairs are being conducted in a manner that is oppressive and unfairly prejudicial to the interests of the petitioners.
  - 3) I hereby direct that an inspector be appointed under section 786 of the *Companies Act, 2015* to investigate the affairs of the company and to report on those affairs to the court. The parties to agree on the said inspector and in default the inspector to be appointed by the court.
  - 4) An order compelling the Directors of the 4<sup>th</sup> respondents to furnish the petitioners with certified copies of all bank statements from 2013 to 2019 and the audited financial statements/ accounts of the 4<sup>th</sup> respondent's for the years 2013, 2014, 2015 and 2019.
  - 5) An order compelling the Directors of the 4<sup>th</sup> respondent to undertake forensic audit of the 4<sup>th</sup> respondent's books of accounts for the years 2013 to 2019 by a reputable independent audit firm to be agreed by the parties and in default be appointed by the court.
  - 6) The respondents to effect the transfer of the shares of the Late John Watenga Mokoosio to the petitioners as per the confirmed certificate of grant dated November 2, 2018 and to furnish the petitioners with a share certificate.
  - 7) The costs of the inspection and the audit to be borne by the 4<sup>th</sup> respondent.
  - 8) As this dispute could have been resolved by filing a civil suit, there will be no order as to costs.
  - 9) Liberty to apply granted

105. It is so ordered.

**READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 21ST SEPTEMBER, 2021.**

**G V ODUNGA**

**JUDGE**

Delivered in the presence of:

Mr Kimani for the Petitioners

Mr Mungai for the Respondents

CA Martha

