



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.110 2014**

**BETWEEN**

**CEMENTIA HOLDING AG.....1ST PETITIONER**

**DIDIER TRESARRIEU.....2ND PETITIONER**

**AND**

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

**THE REGISTRAR OF COMPANIES.....2ND RESPONDENT**

**THE NAIROBI SECURITIES EXCHANGE LTD.....3RD RESPONDENT**

**AND**

**EAST AFRICAN PORTLAND CEMENT CO LTD.....INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The 1st Petitioner, Cementia Holding AG, is a limited liability company incorporated in Switzerland and a wholly owned subsidiary of Lafarge SA, a limited liability company incorporated in Paris, France. Lafarge styles itself as one of the leading manufacturers of cement, aggregates and concrete in the world. It has operations across 64 countries in the World and its presence is in all the 6 Continents. The 1st Petitioner on its part provides seaborne import and export solutions for its customers in the cement and construction industry. The 2nd Petitioner, Didier Tresarrieu, is Lafarge's Senior Vice President, Development in Africa.

**Factual background to the Petition**

2. The facts leading to this Petition are set out in the Affidavit of the 2nd Petitioner sworn on 14th March 2014 and are set out below.
3. Lafarge holds shares in East African Portland Cement Company Ltd (hereinafter "EAPCC") through 3 subsidiaries namely, the 1st Petitioner which owns 14.6% of the shares, Associated International Cement Ltd, a limited liability company incorporated in the United Kingdom which owns 14.6% and Bamburi Cement Ltd, 12.5% of the shares. In total therefore, Lafarge holds 41.75% of the shares in EAPCC. Other share holders EAPCC are The National Social Security

- Fund (NSSF)-27%, The National Treasury-25.3% and minority shareholders-6%.
4. EAPCC is a limited liability Company incorporated in Kenya in 1993. It is listed as a public company in the Nairobi Securities Exchange (NSE) and in its last Annual General Meeting (AGM) held on 17th December 2013 the following Resolutions were passed;
    - (a) The minutes of EAPCC's AGM held on 14th December 2012 were confirmed as a true and accurate record of that day's proceedings;
    - (b) EAPCC's financial statements for the year ended 30th June 2013, the Chairman's Statement and the Directors' and Auditor's reports were adopted;
    - (c) A first and final dividend of Ksh.0.75 per share in respect of the financial year ending 30th June 2013 was declared, payable on or around 20th January 2014 to the shareholders in the register of members, as at close of business on 17th December 2013;
    - (d) In respect of the directorship of EAPCC, NSSF was re-elected as a director, Hamish Keith withdrew his offer for re-election as a director, and the 2nd Petitioner was elected as a director;
    - (e) The Directors' remuneration as set out in the financial statements for the financial year ended 30th June 2013 were approved, and
    - (f) M/s. Ernst and Young were to continue being EAPCC's auditors subject to them being reappointed in accordance with **Section 39(1)** of the **Public Audit Act**, and the Directors of EAPCC were authorised to fix the auditors' remuneration for the financial year, 2014.
  5. By letters dated 17th December 2013, EAPCC forwarded the Resolutions passed at the AGM to the 1st Respondent, Capital Markets Authority (CMA) and copied the same to the 3rd Respondent, Nairobi Securities Exchange Ltd. EAPCC on 18th December 2013 also filed Form 203A giving notification of the appointment of the 2nd Petitioner as a director of the EAPCC.
  6. By a letter dated 17th December 2013, Dr. Wilson Songa, the Principal Secretary in the Ministry of Industrialization and Enterprises Development (a nominee of the National Treasury) wrote to the 1st Respondent raising certain issues about the manner in which the 81st AGM had been conducted. On 20th December 2013, CMA wrote to the Attorney General stating that it had issued a directive to the EAPCC “*requiring that registration of the resolutions with the Registrar of Companies and any implementation of the same by the company be held in abeyance, pending resolution of the complaints by the shareholders*”. On 24th December 2013, the Registrar of Companies wrote to Dr. Songa stating that the Resolution passed by EAPCC at its AGM were null and void. In late December 2013, NSE issued an undated notice in which it stated that it had suspended implementation and application of the Resolutions passed at the 81st AGM pursuant to a directive from CMA.
  7. The Petitioners are now aggrieved by the Respondents' decision contained in the letters dated 18th December 2013 and 20th December 2013 purporting to suspend the Resolutions passed by the EAPCC at its 81st AGM, CMA's letter dated 20th December 2013 addressed to NSE directing it to give notification of the suspension of the Resolution passed by EAPCC at its 81st AGM, the Registrar of Companies' letter dated 24th December 2013 stating that the EAPCC Resolutions at the 81st AGM are null and void and NSE's undated notice stating that the application of the Resolutions passed by EAPCC at its 81st AGM had been suspended.
  8. The Petitioners in that regard now seek the following orders;

***“(1) For a declaration that the Capital Markets Authority's letter dated 18th December 2013 to the East African Portland Cement Company Limited (“EAPCC”) and/or its letter of 20th December 2013 to the Attorney General, suspending the resolutions passed by EAPCC at its annual general meeting held on 17th December 2013 or any of the resolutions passed therein, was unconstitutional and made outside the powers under the Capital Markets Act.***

(2) Without prejudice to prayer (1) above and in the alternative, that an order for judicial review by way of certiorari do issue to remove into this Court and quash, the decisions of 18th December 2013 and 20th December 2013 by the Capital Markets Authority by which it suspended the resolutions passed by EAPCC at its annual general meeting of 17th December 2013.

(3) For an order for judicial review by way of certiorari to remove into this Court and quash the Capital Market Authority's decision of 20th December 2013 by which it directed the Nairobi Securities Exchange to suspend the resolutions passed by EAPCC at its annual general meeting of 17th December 2013.

(4) A declaration that the failure by the Capital Markets Authority to conduct a proper inquiry or investigation before suspending the resolutions passed by EAPCC at its annual general meeting of 17th December 2013 was a contravention of the Petitioners' right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(5) A declaration that the Capital Markets Authority has contravened the 1st Petitioner's right to property being the dividends declared by EAPCC at its annual general meeting of 17th December 2013.

(6) A declaration do issue that the Capital Markets Authority did not have the power to direct the Nairobi Securities Exchange to suspend the implementation of the resolutions passed by EAPCC at its annual general meeting held on 17th December 2013.

(7) A declaration that in making its decisions of 18th December 2013 the Capital Markets Authority failed to afford the Petitioners a right to equal protection and benefit of the law.

(8) For an order for judicial review by way of certiorari to remove into this court and quash, the decision made by the Registrar of Companies on 24th December 2013 that the resolutions passed by EAPCC at its annual general meeting held on 17th December 2013 were null and void.

(9) A declaration do issue that the decision made by the Registrar of Companies on 24th December 2013 to the effect that the resolutions passed by EAPCC at its annual general meeting held on 17th December 2013 was unconstitutional and in contravention of the Companies Act.

(10) For an order for judicial review by way of certiorari to remove into this court and quash, the decision by the Nairobi Securities Exchange contained in the undated notice suspending the implementation of the resolutions passed by EAPCC at its annual general meeting held on 17th December 2013.

(11) A declaration do issue that the Nairobi Securities Exchange had no power to suspend the implementation of the resolutions passed by EAPC at its annual general meeting held on 17th December 2013.

(12) Costs.”

### The Petitioners' Case

9. Mr. Ohaga and Mrs. Otaba presented the Petitioners' case and it was the Petitioners' submission that their right to equal protection and benefit of the law as provided for under **Article 27** had been violated. That CMA could only properly purport to suspend the Resolutions passed at the EAPCC's 81st AGM after EAPCC had been given an opportunity to respond to the allegations made in CMA's letter dated 18th December 2013. Therefore CMA violated their rights under **Article 27** of the **Constitution** by acting on allegations raised by the nominee of the National

- Treasury without inviting the other shareholders present at the AGM, including the 1st Respondent, to respond to those allegations. And that CMA directed NSE to give notification of suspension of the Resolutions without hearing any of the other shareholders of EAPCC. Further, that the Registrar of Companies violated their right to a hearing by declaring the Resolutions null and void without inviting EAPCC to respond to the allegations made by Dr. Songa. They therefore claimed that in so doing, the Registrar of Companies failed to accord equal treatment to the 1st Petitioner as a shareholder of EAPCC as he did to other directors of EAPCC, specifically, Dr. Songa.
10. Mr. Ohaga, further submitted that the principle of natural justice underlined in **Article 47** of the **Constitution** requires that no person should be condemned unheard and that the Petitioners ought to be given a just and fair hearing for that reason. He also claimed that the Petitioners were entitled to be heard before CMA suspended the Resolutions and before the Registrar of Companies declared the Resolutions null and void and also before the NSE issued a notice of the Suspension of the Resolutions. And that the Petitioners' right to be heard by each of those entities was crucial because each of the Respondents' decisions had a direct bearing on the rights of the Petitioners. He relied in that regard on the decisions in *Mandeep Chauhan v Kenyatta National Hospital & 2 Others (2013) e KLR*, *Republic v Chief Magistrate Milimani Commercial Court & 2 Others ex-parte Violet Ndanu Mutinda & 5 Others (2014) e KLR* and *Jeremiah Gitau Kiereini v Capital Markets Authority & Another (2013) e KLR*. It was his further contention that even if no actual hearing was to be held in relation to the making of the administrative decision, the Petitioners were further entitled to be informed of any decision which would have adverse consequences for them and to notification of the possible consequences of such a decision. He cited the case of *Geothermal Development Company Ltd v AG & 3 Others (2013) e KLR* in support thereof.
  11. He added that lack of procedural fairness and natural justice on the part of CMA was further demonstrated by its letter of 18th December 2013, requesting information as to how the issues of the poll in regard to the 81st AGM had been dealt with. Counsel stated that a poll in law must be duly demanded in accordance with the Company's Articles of Association at the meeting giving rise to the poll where a resolution is proposed. That the request for the poll by representatives of NSSF and National Treasury was not done in accordance with **Article 67** of the **Articles of Association of EAPCC**, which requires that it should be a request in writing at the AGM. And that unless so demanded at the AGM, a declaration by the Chairman of the meeting as to the outcome of the resolution shall be conclusive.
  12. Regarding Court cases filed on the affairs of EAPCC, (*i.e. specifically *East African Portland Cement Company Ltd v Capital Markets Authority & 3 Others Petition No. 600 of 2013**), the Petitioners submitted that the existence of several suits would not have prevented the CMA from exercising its statutory mandate at all.
  13. On the issue of fair hearing, Mr. Ohaga submitted that the Respondents had failed to apply the relevant statutes governing their mandates and functions in a reasonable and fair manner thus violating the Petitioners' right to fair hearing under **Article 50(1)** of the **Constitution**. More specifically, that CMA had failed to apply itself to the provisions of the **Capital Markets Act** and the Registrar of Companies on his part had acted in contravention of the **Companies Act** and the NSE had also failed to apply itself to the circumstances under which suspension can be properly and lawfully effected. That in undertaking its duties, the CMA ought to ensure that the objects set out at **Section 11(1)** of the **Capital Markets Act** are achieved and that it has no statutory powers to suspend resolutions passed by a company. In any event, that CMA's suspension powers are only as provided under **Section 11(3), (25) and (26)** which powers are not in regard to suspension of company resolutions passed.
  14. That in suspending the EAPCC Resolutions, CMA violated its principal function which is to protect the interests of the investor as stated under **Section 11(d)** of the **Capital Markets Act**. He also submitted that under **Section 64** of the **Companies Act**, the Registrar of Companies does not have powers to declare company resolutions as null and void and his decision was made without any legal authority and is consequently null and void. Reliance in that regard was made on the authority of *Benjamin Leonard Mac Foy v United Africa Co. Ltd (1962) AC 152*.
  15. On the violation of right to property as provided under **Article 40** of the **Constitution**, the Petitioners contended that by suspending the registration or implementation of the Resolutions passed by EAPCC at its 81st AGM, in respect to the payment of dividends, the Respondents have

denied the 1st Petitioner its right to property in so far as it states that all the Resolutions passed at the 81st AGM are null and void. And that **Article 40** of the **Constitution** protects the 1st Petitioner against the arbitrary taking and deprivation of property or interference with its fundamental rights to its property. That if the Resolution is suspended, there would be no dividends payable thus violating the 1st Petitioner and other shareholders' right to property. The 1st Petitioner in that regard claimed that the dividends declared during the AGM constitute property as envisaged under **Article 40**. The following cases were cited to support this argument; the Inter-American Court case of *Baruch Ivcher Bronstein v Peru, Judgment of February 6 2001*, and *Attorney General v Lawrence (1985) LRC (Const) 921*.

For the above reasons, the Petitioners seek the orders elsewhere set out above.

### **The 1st Respondent's Case**

16. The 1st Respondent, The Capital Markets Authority (CMA), is a statutory body established under the **Capital Markets Act, (Cap 485A Laws of Kenya)**. Its mandate is to regulate and develop orderly, fair and efficient capital markets in Kenya with a view to promoting market integrity and investor confidence. It carries out its functions in accordance with the powers set out under **Section 11(3)** of the **Capital Markets Act** and the rules and regulations made under the said Act.
17. In response to the Petition, it filed a Replying Affidavit sworn on 20th March 2014 by Ms. Rose Lumumba, its Corporation Secretary. It also filed written submissions dated 26th March 2014.
18. It was the submissions of the 1st Respondent that it received the Resolutions allegedly passed at the EAPCC AGM on 18th December 2013. That it thereafter received a letter of complaint dated 17th December 2013 from Dr. Wilson Songa on behalf of the National Treasury and NSSF stating that it had demanded for a poll at the AGM which request was unreasonably rejected. Subsequently, CMA wrote to the EAPCC seeking more information on the issue as part of an inquiry it had launched. In the meantime, it requested EAPCC not to take any steps towards implementation of the AGM Resolutions pending the inquiry. That EAPCC did not give its confirmation that it would not act on the Resolutions pending the inquiry and instead it proceeded to lodge the Resolutions with the 2nd Respondent and also placed a notice in the newspaper in regard to the change of directorship. As a result, the 1st Respondent directed the 3rd Respondent to communicate the suspension of the Resolutions made at EAPCC's 81st AGM and subsequently, it sought the views of all parties, involved as part of its investigations into the issue.
19. Mr. Kiragu, learned Counsel for the 1st Respondent further submitted that the 1st Respondent suspended the implementation of the Resolutions passed at the EAPCC 81st AGM to enable it conduct an inquiry under **Section 11(3)(h)** of the **Capital Markets Act** and also to protect the interests of the shareholders. That under **Section 11(3)(w)** of the **Act** the 1st Respondent has power to “do all such acts as may be incidental to the attainment of the objectives of the Authority”. It was therefore Mr. Kiragu's submission that the 1st Respondent acted within its statutory mandate and that it had the power to suspend the implementation of the Resolutions pending the inquiry. He relied on the case of *Dry Associates Ltd v Capital Markets Authority and Another Petition No. 328 of 2011* in that regard. He further argued that the refusal of a poll would in essence affect the investors' confidence if it were found to be true that a poll was indeed unlawfully rejected.
20. Mr. Kiragu also argued that the suspension of the implementation of the Resolutions was a temporary measure pending the determination of the issues raised. That the 1st Respondent has not made any final decision in regard to the issues raised and so the present Petition is premature.
21. It was the 1st Respondent's further submission that none of the Petitioners' rights have been infringed as alleged and that the suspension was indeed in furtherance of the right to equal treatment to be accorded to all the shareholders. That the 1st Petitioners' right to equal treatment must therefore and in that regard be balanced with the rights of all other shareholders.
22. In regard to the claim of violation of right to property, the 1st Respondent contended that the payment of dividends must be exercised with equitable consideration and in a manner that is just to all shareholders. Reliance was placed on the case of *Andy Forwarders Services Ltd v The Capital Markets Authority and Another (2011) e KLR* to support that proposition.
23. On the issue of the right to fair hearing, the 1st Respondent stated that it gave the Petitioners a

- right to be heard by requesting them to respond to the 1st Respondent's letter dated 18th December 2017. And in any event, it claimed that under **Section 11(3)(h)** of the **Capital Markets Act**, the 1st Respondent has the responsibility of making an inquiry into the request made by any person and that there was no requirement that the 1st Respondent must invite other persons to respond to the request before taking the decision to make an inquiry. Further, that it is not practical to require the 1st Respondent to consult all shareholders and that due to the urgency of the matter, the 1st Respondent had no choice but to suspend the implementation of the Resolutions to allow a fair process of inquiry and thus preserving the rights of all the shareholders.
24. In regard to the issue of the poll, it was the 1st Respondent's case that the issue whether a poll was requested and rejected, forms the subject of the inquiry by the 1st Respondent, since two conflicting positions have been made in respect thereof.
25. It was the 1st Respondent's additional submission that the decision to suspend the implementation of the Resolutions did not nullify the appointment of the 2nd Petitioner but only placed the appointment on hold until the issues in dispute are determined. And that the Resolutions were not declared null and void by the 3rd Respondent but the latter only indicated that they would be so declared only if they are found not to have been properly passed.
26. As regards **Article 40** of the **Constitution** and in furtherance of the submission on the right to property, the 1st Respondent claimed that it only suspended the Resolutions to facilitate an inquiry into the events of the EAPCC AGM and that no final decision has been made on the issue. That the 1st Respondent in any event has the mandate to make such inquiries especially on the declaration of dividends and determine whether they are payable. Thus the Petitioners cannot claim such dividends until the process is concluded and that **Article 40** does not apply in situations where the dividends are unlawfully acquired. Reliance was placed on the case of **Beach Bay Holdings Ltd v Ratim Relations & two others Petition No.11 of 2011** to support that submission.
27. As regards the alleged violation of **Article 47** of the **Constitution**, the 1st Respondent submitted that in suspending the implementation of the Resolution, it acted lawfully and reasonably in the circumstances, in that no shareholder would have attained unfair advantage over the other shareholders while investigations were ongoing. And that the 1st Respondent applied the rules of natural justice by giving the parties concerned an opportunity to state their respective cases in writing.
28. The 1st Respondent urged the Court to weigh the respective interests of the Petitioners, the other investors and the capital markets and having done so proceed to dismiss the Petition with costs.

### **The 2nd Respondent's Case**

29. The 2nd Respondent, the Registrar of Companies, opposed the Petition through the Replying Affidavit of Francis Ndirangu, a State Counsel working in the 2nd Respondent's registry, sworn on 25th March 2014.
30. In his Affidavit, Mr. Ndirangu stated that the right to demand for a poll in an AGM is found at **Articles 67, 68 and 71** of the **EAPCC Articles of Association** and **Section 137** of the **Companies Act**. That Dr. Songa and one Mr. Kyengo had filed a notice of intention to demand a poll on all agenda items of the AGM which right they were denied at the 81st AGM of EAPCC.
31. That **Section 137** of the **Companies Act** invalidated any provision of the Articles of a Company whose effect is to exclude the right to demand a poll at a general meeting or which makes ineffective a demand for a poll on any such question as demanded. That no resolution could be passed at the AGM without a poll being conducted since it had been demanded on all agenda in the AGM by representatives of both NSSF and National Treasury. That the Chairman of EAPCC did not have discretion in deciding whether to accept or reject a demand for a poll properly lodged in an AGM.
32. He further stated that it was within the 2nd Respondent's mandate to reject any resolutions that had been made in contravention of a company's Memorandum and Articles of Association and the Companies Act.
33. That the issues raised in this Petition are substantially the same issues raised in **Petition NO. 600 of 2013, East African Portland Cement Company Ltd (EAPCC) v The Capital Markets Authority Ltd & 5 others** where a ruling was delivered on 20th February 2014, by Mumbi J. and

that the Petitioners should have been joined in that case as Interested Parties instead of them filing a new suit.

34. Mr. Ndirangu further adopted the submissions of the 1st Respondent and added that the 2nd Respondent could not act on the Resolutions because the matter was being investigated by the 1st Respondent and that the Petitioners neither lodged objections with the 2nd Respondent nor did they demand a hearing. It cannot in the circumstances be said that their right to a hearing was violated. In any event that the letter of 24th December 2014 from the 2nd Respondent was merely an opinion and not conclusive on any issue under contest.

For the above reasons, the 2nd Respondent prayed that the Petition be dismissed with costs.

### **The 3rd Respondent's Case**

35. The 3rd Respondent, the Nairobi Securities Exchange Limited neither responded to the Petition nor made oral submissions at the hearing.

### **The Interested Party's Case**

36. The Interested Party, EAPCC, opposed the Petition. It filed a Replying Affidavit sworn on 19th March 2014 by Sheila Kahuki, the Interested Party's Acting Company Secretary.
37. In furtherance of the issues raised by Ms. Kahuki, Mr. Karori argued the Interested Party's case and it was his submission that the 1st Respondent under **Section 11** of the **Capital Markets Act** has the power to give directions to any public company, the securities for which, are traded in the stock market. That the powers of the 1st Respondent in that regard include the power to inquire, either on its own motion or at the request of any other person into the affairs of any company which the authority has approved, has granted a license and any public company whose securities are traded with the 3rd Respondent. That therefore, the 1st Respondent acted within its powers in suspending the implementation of the resolutions pending inquiry. To support that submission, reliance was placed on the cases of *Dry Associates Ltd v Capital Markets Authority (supra)*, *Shah Munge & Partners Limited & 4 Others v Capital Markets Authority, Civil Appeal No. 913 of 2003*, *Andy Forwarders & Partners Ltd & 4 Others v Capital Markets Authority (supra)* and *Peter Muthoka v CMC Holdings & Another HCCC No. 154 of 2012*.
38. On the issue of suspension specifically, it was Mr. Karori's submission that the Petitioners have all along been aware of the position taken by CMA that the letter of 18th December 2013 amounted to a suspension. In any case, he claimed that the Interested Party interpreted that letter to be a directive issued by the 1st Respondent suspending the implementation of the Resolution.
39. On the issue of a poll at the AGM, the Interested Party admitted that Dr. Songa and Mr. Kyengo in their letters dated 17th December 2013 and 20th December 2013, requested for a poll which was denied by the Chairman of EAPCC. Counsel therefore submitted that unless the 1st Respondent concluded its investigations and made findings on the complaint, the validity of the resolutions would always be in doubt.
40. On the right to call for a poll, he claimed that **Article 67** of the **EAPCC Articles of Association** merely states that the request for a poll must be made in writing. That it can be either before or at the AGM as long as the written demand is received before the declaration of the result by show of hands. That **Section 137(1)** of the **Companies Act** makes void any provision in a company's Articles of Association that takes away the right to demand a poll at the AGM. Counsel thus claimed that the Chairman and Company Secretary had a statutory and fiduciary duty to ensure that any qualifying shareholder requiring a poll was facilitated in that regard.
41. Mr. Karori further contended that this Court has no jurisdiction to determine the matter before it because the dispute giving rise to the suspension aforesaid relates to matters of corporate governance and that it is only the 1st Respondent that is mandated to enquire into the genesis of the dispute in respect of the complaints lodged by the shareholders. And that should any party be aggrieved against the findings of the 1st Respondent, it can then appeal to the High Court against the final decision. The 1st Respondent according to him, is yet to commence that inquiry and has already put in place interim measures to facilitate effective investigations and resolutions which is within its mandate. On that aspect, he referred the Court to the cases of *Kenya Pipeline Ltd v*

**Hyosung Ebara Company Ltd & Others Civil Appeal No. 145 of 2011, Kenya Planters Cooperative Union v Kenya Commercial Bank and Others Petition No. 8 of 2014 and Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1.**

42. The Interested Party further claimed that the Petition was unmerited and if the orders sought are granted then it would amount to usurping the powers of the 1st Respondent and would legitimize the resolutions passed at the AGM without considering if the AGM was in fact conducted in accordance to the law. Mr. Karori thus urged the Court to dismiss the Petition with costs.

**Determination**

43. Before proceeding to determine the merits or otherwise of the Petition before me, I must first address my mind to the issue of jurisdiction set out by the Interested Party. Should I find that the jurisdiction of the Court has been improperly invoked, then I will down my tools but if not, then I will proceed and determine the substance of the Petition before me – see **Motor Vessel "Lillian S" (supra)**.
44. Having said so, the Petition before me relates to actions taken by the 1st and 2nd Respondents with regard to the Resolutions reached by the Interested Party at its 81st AGM held on 17th December 2013. Following complaints lodged by the nominee of the National Treasury, Dr. Wilson Songa in a letter dated 17th December 2013 and the nominee of NSSF, Mr. Gideon Kyengo, regarding the conduct of the AGM and failure to be accorded a poll as demanded, the 1st Respondent suspended the resolutions and sought to allegedly investigate the matter. It is that administrative decision that is largely the subject of this Petition. As can be seen from the orders reproduced in their entirety elsewhere above, the Petitioners seek *inter alia* orders that the suspension of the Interested Party's resolution is unconstitutional as the 1st Respondent did not have such powers; that this Court should quash the the decision of the 1st Respondent which suspended the Resolution of the 1st Respondent from its AGM and that the suspension of the Resolution without conducting a proper inquiry is a contravention of the Petitioners Rights under the Bill of Rights and specifically **Articles 40 and 47 of the Constitution**. The alleged actions of the 2nd and 3rd Respondents are peripheral to the above complaints against the 1st Respondent.
45. I have reflected on the issues raised and I have seen the extract of the Resolution passed at the 81st AGM of the Interested Party, subject of this Petition, which is annexed to the Affidavit of the 2nd Petitioner and it reads follows;

***"(1) Confirmation of Minutes – It was unanimously resolved to confirm the minutes of the 80th Annual General meeting of the Company held on 14th December 2012 as a true and accurate record of that day's proceedings.***

***(2) Financial Statements for the Year ended 30 June 2013 – By a show of hands, it was resolved by majority vote that the Financial Statements for the Financial year ended 30 June 2013 together with the Chairman's Statement and the reports of the Directors and the Auditors thereon be and are hereby adopted.***

***(3) Dividends – By a show of hands, it was resolved by majority vote to declare a first and final dividend of Kshs.0.75 per share (2012:Nil) in respect of the Financial Year ended 30 June 2013 payable on or around 20 January 2014 to the shareholders on the Register of Members as at the close of business on 17 December 2013.***

***(4) Re-election of Directors - (i) It was unanimously resolved that he National Social Security Fund (NSSF), a Director retiring at this meeting by rotation in accordance with Article 98 of the Company's Articles of Association be and is hereby re-elected a Director of the Company. (ii) It was noted that Mr. Hamish Keith, a Director retiring at this meeting by rotation in accordance with Article 98 of the company's Articles of Association had withdrawn his officer for re-election as a director of the Company. (iii) It was resolved by majority vote on a show of hands that Mr. Didier Tresarrieu be and is hereby elected as a Director of the Company.***

(5) **Director's Remuneration** – *By a show of hands, it was resolved by majority vote on a show of hands to approve the Directors' remuneration as shown in the Financial Statements for the Financial year ended 30 June 2013.*

(6) **The Appointment of Auditors** – *It was noted that Messrs Ernst & Young, who were appointed by the Auditor-General as authorised auditors, having expressed their willingness, continued in office as auditors of the company subject to being re-appointed in accordance with Section 39 (1) of the Public Audit Act, Chapter 412A and the Directors were authorised to fix their remuneration for the ensuing financial year.”*

46. It was the Respondents as well as the Interested Party's submission that those Resolutions were passed without a poll as requested by the nominees of the National Treasury and NSSF. That the said nominees subsequently wrote letters dated 17th December 2013 shortly after the AGM addressed to the 1st Respondent complaining about the manner in which the AGM was conducted. For avoidance of doubt, in his letter, Dr. Songa writes as follows;

*17<sup>th</sup> December 2013*

*“MOI/CONF.5/2 Vol.2*

*Mr. Paul Muthaura*

*Acting Chief Executive*

*Capital Markets Authority*

**NAIROBI**

*Dear Mr. Muthaura,*

**EAST AFRICAN PORTLAND CEMENT COMPANY (The Company) AGM OF 17<sup>TH</sup> DECEMBER 2013**

*I have just come from attending the above AGM at which I was the duly authorized proxy for the Treasury of the Government of Kenya which holds 25% of the shares of the Company. At that meeting, among other attendees was Mr. Kyengo holding proxy for NSSF holder of 27% shares in the Company who agrees with the contents of this letter.*

*This letter therefore represents the position of holders of 52% of the shares in the Company and the majority of the voting rights in the Company.*

*As you will note from my two letters dated 17th December 2013 attached to this letter, I had indicated that I would demand for a poll in accordance with Article 67 of the Company's Articles which I did and was supported by Mr. Kyengo aforesaid.*

*In breach of the provisions of the Companies Act, the Articles, the Capital Markets Authority regulations, the Chairman of the meeting, Mr. Mark Karbolo unilaterally rejected the call for the poll and decided to proceed with each agenda item, without stating whether the resolutions were passed or not. At some stage, the meeting became unruly and the Chairman supported by other directors called off the meeting*

*Arising from the foregoing therefore, I wish to state as follows;*

*1) Considering that two shareholders representing over 52% of the share in the Company demanded for a poll and indicated that the intention to vote against all resolutions in the attached agenda other than a resolution to re-elect NSSF and to change the auditors, the AGM should*

*be deemed to have aborted considering that the main purpose of the AGM was to pass the financial statements which was rejected.*

*2) The conduct of the Chairman is against the provisions of the Companies Act, the Capital Markets Authority regulations, and the guidelines on Corporate Governance practices by public companies which essentially provide that every shareholder shall have a right to participate in the general shareholders meeting including the election of directors, and that all shareholders should be encouraged, to participate in the Annual General Meetings and to exercise their votes.*

*3) The AGM was a total sham and the conduct of the Chairman of the meeting was in blatant breach of acceptable standards on conduct of meeting of companies and against Article 67 of the company's Articles of Association which provide that at any General Meeting of the Company a resolution put to the vote of the meeting shall be decided on a show of hands unless before or upon the declaration or the result of show of hands a poll be demanded in writing by at least three members for the time being entitled to vote at the meeting, or by a member or members holding or representing by proxy or entitled to vote in respect of one-tenth or more in nominal value of the capital represented at the meeting. (Emphasis added).*

*As the regulator of the Company, and pursuant to the powers vested in you we are writing to request for the following;*

*a) Require the company not to carry into effect any resolutions purportedly passed in the AGM which should for all purposes be deemed to have been adjourned and direct the Company to reconvene the AGM and an independent person be nominated by yourselves to oversee the conduct of the meeting.*

*b) Investigate the conduct of the Chairman, the other Board members namely; Titus Naikuni, Hamish Keith, Kephur Tande and the Company Secretary, Mr. Maonga in relation to the AGM.*

*c) Confirm that the purported nomination and election of one Didier Tresarrieu was a nullity as it was not in accordance with the Articles of the Company and in particular Article 101.*

*We look forward to your urgent confirmation and for good order I have copied this letter to the Registrar of Companies, the Attorney General and the Board.*

**SIGNED**

**DR. Wilson Songa, MBS**

**PRINCIPAL SECRETARY**

cc **The Cabinet Secretary**  
**Githu Muigai, EGH, SC**

**Mr.**

**Ministry of Industrialization & Enterprise Development**

**Attorney General**

**Office of the Attorney General & Department of Justice**

**NAIROBI,**

**The Registrar of Companies    The Managing Trustee**

Office of the AG & Department of Justice National Social Security Fund

Sheria House  
Social Security House

NAIROBI.

NAIROBI.

*The Board of Directors.”*

On his part, Gideon Kyengo wrote as follows;

“SF/A/8/63(S)  
VOL.XXXIII(40)  
20<sup>th</sup> December, 2013

*The Chief Executive*

*Capital Market Authority*

*Embankment Plaza, 3rd Floor*

*Longonot Road, Upperhill*

*NAIROBI.*

*Attn: Mr. Wycliffe Shamiah*

*Dear Sir,*

**RE: 81<sup>ST</sup> ANNUAL GENERAL MEETING (AGM) OF EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED (EAPCC) HELD ON 17 DECEMBER 2013**

*I refer to the enclosed letters from the Principal Secretary, Ministry of Industrialization and Enterprise Development dated 17 December, 2013 the contents of which I hereby confirm and to the letter from J.L.G. Maonga, Company Secretary of EAPCC dated 18 December 2013.*

*As you are aware, the 81st AGM for EAPCC was held on 17 December 2013. I attended the AGM as a proxy of the National Social Security fund (NSSF) and the Principal Secretary of the Ministry of Industrialization attended as a proxy for the Government of Kenya.*

*The EAPCC shareholding structure is such that the Government/NSSF control 52% (Treasury 25% and NSSF 27%), Lafarge through different share accounts own 42% while minority Shareholders own 6%.*

*We had anticipated that the Chairman, Managing Director and the Directors of Lafarge with the backing of the Company Secretary would vote against the Government/NSSF position at the AGM and to deal with this, in advance of the AGM, the Principal Secretary, Ministry of Industrialization and NSSF wrote separately to the Chairman, EAPCC, demanding a poll at the 81st AGM in accordance with Article 67 of EAPCC's Articles of Association. Article 67 provides that: “At any General Meeting of the company a resolution put to the vote of the meeting shall be decided on a show of hands unless before or upon the declaration of the result of the show of hands a poll be demanded in writing by at least three members for the time being entitled to vote at the meeting, or by a member or members holding or representing by proxy or entitled to vote in respect of one-tenth or more in nominal value of the capital represented at the meeting, and unless a poll be so demanded a declaration by the Chairman of the meeting that a resolution has been carried, or has been carried by a particular*

*majority, or lost, or not carried by a particular majority, shall be conclusive, and an entry to that effect in the minutes book of the Company shall be conclusive evidence thereof, without proof of the number of proportion of the votes recorded in favour of or against such resolution”.*

*Both the Permanent Secretary, Ministry of Industrialization and Enterprise Development and NSSF handed copies of the letters calling for the poll to the Chairman and all Directors of the Company during the Board Meeting that preceded the AGM, and at the request of Mr. Songa, Principal Secretary, Ministry of Industrialization and Enterprise Development, the Chairman read the contents of the letters to the Board. Copies of the request for the poll were also forwarded to the Capital markets Authority.*

*To our dismay and in breach of the basic tenets of the rule of law, and notwithstanding the letters and our repeated verbal demands for a poll at the AGM in the presence of all Directors and Shareholders, the Chairman supported by the Company Secretary, Managing Director and the Lafarge Directors unilaterally declared no poll would take place and that voting would be by acclamation to deliberately deny the Government and NSSF of its legal rights.*

*I wish to make the following brief comments in respect of the enclosed letter from the Company Secretary to the CMA dated 18th December 2013:*

*The assertion on 6 that there was no demand for a poll for any of the resolutions is dishonest, unethical and blatantly untruthful.*

*The Company Secretary states at Item 5 that each of the resolutions of EAPCC set out in the agenda were duly passed by a show of hands. Given the Government and NSSF's majority shareholding and repeated requests for a poll during the AGM, the clear demonstration of bias and disregard for a poll by the Chairman, company Secretary, Managing Director and Lafarge Directors makes the purported resolutions null and void.*

*The Company Secretary states at item 5 that the meeting was properly closed at 2.00 p.m. after each of the resolutions were duly passed. While several agenda items may have been mentioned, no resolution was duly made. Essentially, what transpired is that the meeting became unruly and the Chairman and the Directors called off the meeting and my understanding was that the meeting stood adjourned.*

*It is clear that the minutes prepared by the Company Secretary are not reflective of the deliberations at the AGM, contain deliberate omissions and misrepresentation of facts on the proceedings and conduct of the Board meeting of EAPCC held on 17 December, 2013 and the 81st AGM of the Company and should not be implemented or relied upon for any purpose whatsoever.*

*As the regulator of EAPCC, and pursuant to the powers vested in you, we kindly submit our request that the CMA issue the necessary directives for the minutes and purported resolutions not to be acted upon until the issue is fully resolved.*

*Yours faithfully,*

**SIGNED**

**GIDEON W. KYENGO**

**FOR: CEO/MANAGING TRUSTEE**

cc **Board of Directors**

**East African Portland Cement Company Limited.**

47.As can be seen both Dr. Songa and Mr. Kyengo complained that they had given notice of their

intention to demand a poll but despite their right to do so, a poll was not conducted and they therefore called upon the 1st Respondent, as a regulator of the EAPCC, not to effect the Resolutions passed at the AGM and investigate the conduct of the Chairman and other Board Members.

48. In response to those letters, the 1st Respondent in its letter dated 18th December 2013 wrote to the Interested Party as follows;

**“CMA/MRT/8/66**

**18 December 2013**

**Mr. John Maonga**

**Company Secretary**

**East African Portland Cement Co. Limited**

**Ngong Hills Hotel Business Center**

**3rd Floor, Suite B 309**

**Ngong Road**

**NAIROBI**

**Dear Sir,**

**RE: 81<sup>ST</sup> ANNUAL GENERAL MEETING OF EAST AFRICA PORTLAND CEMENT CO. (EAPCC) HELD ON DECEMBER 17, 2013**

**We refer you to the proceedings of the Annual General meeting of East African Portland Cement Co. (the Company) which was held on December 17<sup>th</sup> 2013.**

**To enable us appreciate the deliberations at the said Meeting, pursuant to the provisions of Section 13 (1) of the Capital Markets Act, kindly advise us on;**

**Whether a poll was requested for the matters coming up for deliberations as per the Agenda;**

**Whether the Items for deliberation were put to the poll as per the Company's Articles of Association and the Companies Act.**

**The outcome of the polls taken; and**

**The resolutions subsequently made at the meeting.**

**We will appreciate to receive your early response by close of business today, 18 December 2013.**

**Yours sincerely,**

**SIGNED**

**WYCLIFFE SHAMIAH**

**DIRECTOR, MARKET OPERATIONS**

cc **Mr. Kephah L. Tande**

**Managing Director**

**East African Portland Cement Co. Limited**

**Namanga Road off Mombasa Road**

**P.O. Box 20 00204**

**ATHI RIVER.**

49. In response to that letter, the Company Secretary of EAPCC wrote a letter dated the same day stating that there was no demand for a poll made prior to the AGM. He wrote as follows;

**“MNA/26/12/2013**

**18 December 2013**

**The Chief Executive**

**Capital Market Authority**

**Embankment Plaza, 3rd floor**

**Longonot Road, Upperhill**

**NAIROBI.**

**Att: Mr. Wycliffe Shamiah**

**Dear Sir**

**81ST ANNUAL GENERAL MEETING (AGM) OF EAST AFRICAN PORTLAND CEMENT COMPANY (EAPCC) LIMITED HELD ON 17 DECEMBER 2013**

***I refer to your letter dated 18 December 2013 ref CMA/MRT/8/66 and write to brief you as follows:-***

***1. On 26 November 2013, NSSF submitted a notice of a special resolution seeking to increase the number of directors in EAPCC from the current maximum of seven to a maximum of eleven directors. And, since this resolution was intended to alter the Company's Articles of Association, it required a special notice but the notice was received very late on 26 November 2013 after we had circulated the notice and agenda convening the AGM and I advised NSSF accordingly.***

***2. On 9 December 2013, I received a notice of Nomination by Cementia Holding AG proposing the election of Mr. Didier Tresarrieu as a director at the 81st AGM of EAPCC Ltd. This notice of nomination was a valid one since it complied with the provisions of the Company's Articles of Association which required seven clear days excluding the day of service and the day of the AGM.***

***3. On 10 December 2013, I received a notice by a shareholder called Mr. George Kirimi Miriti proposing to nominate Mr. William Lay for election as a director at the 81st AGM or EAPCC. The notice was late by one day.***

***4. At the Board meeting of EAPCC held in the morning of 17 December 2013 prior to the time of the AGM, Dr. Wilson Songa and Mr. Gideon Kyengo raised the issue of the notice proposing to elect Mr. William Lay and they were advised that the notice was received late.***

5. *At the 81st AGM held on 17 December 2013, the meeting started well and after the Chairman tabled the Financial Statements for the year ended 30 June 2013, Dr. Wilson Songa stood up and addressed the shareholders with various allegations insinuating that the Financial Statements were inaccurate and asked the shareholders not to approve the same including approval of dividend payment. He also stated that he was going to oppose each of the resolutions except the appointment of auditors. His position was also supported by Mr. Gideon Kyengo. The Chairman and the Managing Director explained to the shareholders that the accounts were properly prepared, audited, approved by the Board and signed off by the Auditor-General.*

*Upon adequate explanations to the shareholders' queries, the Chairman put the resolution to vote by a show of hands and all the shareholders present voted in favour of the resolution save for only three (Dr. Songa, Mr. Kyengo and Mr. Miriti) who voted against the resolution by a show of hands. This process continued for all the subsequent resolutions until the meeting was properly closed at 2.00 p.m.*

6. *To answer your specific questions, I can confirm that there was no demand for a poll for any of the resolutions since the three shareholders who objected to the resolutions had only voted by a show of hands in respect of all resolutions and none of them demanded a poll before or after the declaration of the results. The procedure for a demand of a poll is clearly stipulated in the Company's Articles of Association.*

*In addition to the above, please note that the NSSF Representative is the Chair of the Board Audit Committee which reviewed and recommended the Audited Financial Statements to the Board for approval.*

*I hope that the foregoing will enable you to appreciate what led to and transpired at the 81st AGM of EAPCC Ltd.*

*Yours faithfully*

**SIGNED**

**J L G MAONGA**

**COMPANY SECRETARY**

*JLGM/smm*

*cc The Chief Executive*

*Nairobi Securities Exchange Ltd*

*All Directors*

*East African Portland Cement Company Ltd.”*

In a separate letter dated 18th December 2013, the 1st Respondent wrote another letter stating *inter alia* as follows;

***“We will appreciate to receive your response at the earliest and in any event by close of business on 19 December 2013. Pending determination of the matters contained in your response kindly confirm that no precipitate action will be taken to register the resolutions at the companies registry or implement them.”***

50. I have combed through the record and I did not see any response or undertaking by the Interested Party suggesting that it would not implement the Resolutions passed at the AGM as requested by the 1st Respondent. Perhaps, that is the reason why the 1st Respondent wrote to the 3rd

Respondent a letter dated 20th December 2013 stating as follows;

**“CMA/MRT/8/66/e.225/13  
December 20 2013**

**Mr. Peter Mwangi**

**Chief Executive**

**Nairobi Securities Exchange**

**The Exchange**

**55 Westlands Road**

**NAIROBI.**

**Dear Mr. Mwangi**

**RE: EAST AFRICA PORTLAND CEMENT CO. (EAPCC) AGM OF 17 DECEMBER 2013**

**We refer you to the letter dated 17 December 2013 from the Ministry of Industrialization and Enterprise Development, and our subsequent letter dated 18 December 2013 addressed to East Africa Portland Cement co. Limited (EAPCC) copied to you.**

**Pursuant to the provisions of Section 11(3)(i) of the Capital Markets Act, you are hereby directed to immediately communicate the suspension of the implementation of the Resolutions of the EAPCC Annual General Meeting aforesaid, which were circulated by the Exchange on 19 December 2013, pending the consideration and determination of the various issues that have been raised with respect to the conduct of the resolutions made at the 81st Annual General Meeting of the EAPCC held on December 17, 2013.**

**Kindly let us have your confirmation of compliance with the above directive at the earliest.**

**Yours sincerely,**

**SIGNED**

**PAUL M. MUTHAURA**

**AG. CHIEF EXECUTIVE.”**

Subsequently, the 3rd Respondent issued the Notice of Suspension of the Application of the Resolutions passed at the 81st AGM of the Interested Party.

51. On the same date, the 1st Respondent wrote to the Attorney General seeking advise on whether the Companies Act had been contravened in the conduct of the AGM. The 2nd Respondent responded on behalf of the Attorney General in his letter dated 24th December where he stated as follows; **“Based on the above findings, the Registrar of Companies shall not give effect to the said resolutions if the same are submitted by the Company to the Companies' Registry”.**

52. I have taken the trouble to reproduce all the above correspondences to show that the single issue that triggered all the events leading to this Petition is whether Dr. Songa and Mr. Kyengo had properly demanded for a poll at the AGM. In answer to that question and whether thereafter the Respondents handled the outcome within the law, there are two conflicting stories in that regard. The Petitioners and the Company Secretary of the Interested Party in correspondence stated that a poll was not demanded while in these proceedings, the Interested Party and the Respondents have

stated that a poll was indeed demanded but was rejected by the Chairman of the Interested Party. The determination of that fact is core to the dispute. The question at this stage is however whether the 1st Respondent has the mandate to determine that crucial issue at all.

53. The 1st Respondent is a creature of the **Capital Markets Act**. The preamble to that Act states that; it is;

*“An Act of Parliament to establish a Capital Markets Authority for the purpose of promoting, regulating facilitating the development of an orderly, fair and efficient capital market in Kenya and for connected purposes”*

54. **Section 11** of the **Act** sets out the principal objectives of the Authority which are;

*“(a) The development of all aspects of Capital Markets with particular emphasis on the removal of the impediments to, and the recreation of incentives for longer term investments in productive enterprises;*

*(b) to facilitate the existence of a nation wide system of stock market and brokerage services so as to enable wider participation of the general public in the stock market;*

*(c) creation, maintenance of a market in which securities can be issued and traded in an orderly, fair and efficient manner, through the implementation of a system in which the market participants are self regulatory to a maximum practicable extent;*

*(d) protection of investor interests;*

*(e) the facilitation of a compensation fund to protect the investors from financial loss arising from the failure of a licenced broker or dealer to meet his contractual obligations; and;*

*(f) the development of a framework to facilitate the use of electronic commerce for the development of Capital Markets in Kenya”*

Under **Section 11(2) (cc)** the Authority is empowered to impose sanctions for breach of the provisions of the **Act** or the Regulations made thereunder or for non-compliance with the Authority's requirements or directions. The Authority can order a person to remedy or mitigate the effects of any breach of the Regulations. **Section 11(3)(h)** empowers the Authority to inquire, either on its own motion or at the request of any other person into the affairs of any person including a company which the Authority has approved or to which it has granted a licence and any public company the securities of which are traded on an approved securities exchange. It is under this regulation that M/s. Webber Wentzel were instructed by the Authority to conduct the investigations and prepared a report.

The Authority is also empowered to give directions to any person which it has approved or to which it has granted a licence and any public company the securities for which are traded in the stock market - See **Section 11(2)(i)** of the **Act**. Whenever such directions are given they must be complied with.

The Authority can also prescribe rules or guidelines on corporate governance of a company whose securities have been issued to the public - see **Section 11(3)(v)**.”

55. In regard to the functions of the Capital Markets Authority as elaborated under **Section 11** of the **Capital Markets Act**, Musinga J (*as he then was*) in **Peter Muthoka v CMC Holdings and Others (supra)** stated as follows;

*“Section 11 of the Capital Markets Act is very elaborate, I believe the Legislature did not exhaustively stipulate each and every thing that the Authority is empowered to do in the*

*discharge of its mandate and that is why Section 11(w) states that the Authority can;*

*“do all such acts as may be incidental or conducive to attainment of the objectives of the Authority or the under this Act.”* *the exercise of its powers*

*This provision is, in my view, comparable to Sections 3 and 3A of the Civil procedure Act which saves the inherent jurisdiction of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”*

56. I principally agree with the learned judge. The provisions of **Section 11** would show that CMA has the powers to regulate capital markets generally and it also has powers to ensure that the security market is orderly, fair and efficient. It is the best judge of the operations of those it has licensed and to confirm whether the licensees are acting in accordance with the regulations as laid down.
57. I have further considered the material before me, the dispositions and submissions made by the parties and my opinion is as set out herebelow.
58. That even if the material before me is sufficient to determine the dispute now before me with regard to whether there was a request for a poll or not, at the 81st AGM, I am constrained not to proceed and determine that issue for good reason and to be stated shortly.
59. I say so because the facts before me indicate that the 1st Respondent is still seized with the matter and is conducting an investigation in that regard. In that regard, its letter dated 10th January 2014 states as follows;

*“CMA/MRT/8/66/E.225/13*

*January 10, 2014*

*Mr. Mark Ole Karbolo - Board Chairman*

*East African Portland Cement Company Limited*

*Namanga Road off Mombasa Road*

*P.O. Box 20 00204*

*ATHI RIVER.*

*Dr. Wilson Songa - Principal Secretary*

*Ministry of Industrialization & Enterprise Development*

*Social Security House*

*P.O. Box 30418-00100*

*NAIROBI.*

*Mr. Richard Langat – Director*

*East African Portland Cement Company Limited*

*Namanga Road off Mombasa road*

*P.O. Box 20 00204*

*ATHI RIVER.*

**Dr. Titus Naikuni – Director**

**East African Portland Cement company Limited**

**Namanga Road off Mombasa Road**

**P.O. Box 20 00204**

**ATHI RIVER.**

**Dr. Kamau Thugge, EBS – Director**

**East African Portland Cement company Limited**

**Namanga Road off Mombasa Road**

**P.O. Box 20 00204**

**ATHI RIVER.**

**Mr. Kephah Tande - Managing Director**

**East African Portland Cement company Limited**

**Namanga Road off Mombasa Road**

**P.O. Box 20 00204**

**ATHI RIVER.**

**Dear Dr. Thugge**

**RE: EAST AFRICAN PORTLAND CEMENT CO. (EAPCC) AGM OF 17 DECEMBER 2013**

**We refer to the various conflicting correspondence received on the above.**

**The Authority, with a view to establishing further details relating to the conflicting correspondence in this matter, would like to invite the Directors of East African Portland Cement Company Limited (EAPCC) to a meeting to be held at the Authority's offices in Embankment Plaza, Longonot Road, Upper Hill on Tuesday, 14 January 2014 at 10.00 a.m.**

**The Agenda of the meeting is as follows;**

- 1) To discuss the events that occurred during the meeting of the Board of Directors held on 17 December 2014 immediately prior to the Annual General Meeting in relation of the complaints received from two (2) Directors of EAPCC and the initial responses to the complaint received from EAPCC ; and,**
- 2) To discuss the events that occurred during the Annual General Meeting in relation to the complaints received from two (2) Directors of EAPCC and the initial responses received from EAPCC.**

**For the avoidance of doubt, the Authority wishes to clarify that the above meeting is not intended to curtail, or otherwise interfere with the current Court proceedings under Petition No.600 of 2013. In this regard directors are requested not to invite legal counsel in that case to attend the meeting.**

*We look forward to fruitful and mutually beneficial discussions with all the parties for purpose of protecting the interests of the shareholders of EAPCC as well as safeguarding the confidence of the wider market in the Kenyan capital markets.*

*Kindly confirm your attendance by telephone to Mrs. Felistus Nderitu on 2264200/202 or by email [ceoffice@cma.or.ke](mailto:ceoffice@cma.or.ke) by 12 noon on Monday January 13, 2014.*

*Yours sincerely,*

**SIGNED**

**PAUL M. MUTHAURA**

**AG. CHIEF EXECUTIVE.**”

60. This Court does not have the benefit of the outcome of the meeting referred to above as none of the parties alluded to it and whether there are ongoing discussions relating to the dispute at hand.

61. In that context, I am aware of the rule that even if this Court has jurisdiction to determine a violation of fundamental rights and freedoms, it must give an opportunity to other relevant bodies established by law to deal with a dispute as provided in the relevant statute. This rule was well articulated by the Court of Appeal in Narok County Council v Trans Mara County Council [2000] 1 EA 161 at page 164 where it stated that;

*“It seems to me to be plain beyond argument that the jurisdiction of the High Court can only be invoked if the Minister... refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter case his decision Page 15 of 24 can be challenged by an application to the High Court for a writ of certiorari because under the relevant section, the decision is to be made on a fair and equitable basis.”*

62. This rule was in fact later cemented by the Court of Appeal in Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425, where it held that:-

*“In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”*

63. I am wholly in agreement and I am also duly guided by the above finding and like Musinga J. (as he then was) stated in Peter Muthoka (supra), the Capital Markets Act reserved for CMA certain functions and mandates at the first instance including investigating the specific issue whether a poll was demanded and whether it was denied or not at the 81st AGM of EAPCC. It has, with tremendous respect to the Petitioners, begun an investigation on that issue and has sought their input as it has sought the input of other parties. What wrong has it committed by doing so? What illegality has it committed? What illegalities have the other Respondents committed by stating that the Resolutions of the 81st AGM of EAPCC should not be implemented until the CMA initiated investigations are completed and a finding made one way or the other? How can it be said that the Respondents have been denied a hearing when they have been asked to submit themselves to the investigations?

64. It is obvious to me that whereas the EAPCC may be undergoing internal turmoil and whereas its management may not be pulling all in the same direction (the Company Secretary's position is particularly interesting as the previous and present holders of the office have different views on a number of issues), regarding the crucial issue of the poll, only CMA can properly resolve that issue at the first instance under the Capital Markets Act and then this Court can thereafter be properly seized of the dispute on appeal as is provided for under **Capital Markets Act**. To do otherwise would be to usurp the statutory mandate of CMA and delve into a dispute that has not

- properly matured.
65. In the event, the position as articulated by Mr. Kiragu and Mr. Karori learned Counsel for the 1st Respondent and EAPCC is correct and the case as articulated above would lead me to the conclusion that the CMA ought to expeditiously conclude its investigation on the issues raised by Dr. Songa and Mr. Kyengo noting the fact that putting it on hold any longer has implications on the affairs of EAPCC and its expectant shareholders
66. Having stated as above, it follows that this Court is not ready to assume jurisdiction at this stage and there is nothing more to say on the substance of the Petition so as not to prejudice the CMA investigations.
67. In the meantime and for obvious reasons, the Petition shall stand dismissed and the Petitioners are at liberty to apply, once the CMA investigations are concluded one way or the other.
68. Regarding costs, I am of the view that since the dispute has not been resolved, let each party at this stage bear its own costs.
69. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 4TH DAY OF JULY, 2014**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Kariuki – Court clerk

Mr. Kiragu for 1st Respondent

Mrs. Otaba for Petitioner

Miss Odari for Mr. Kanori for Interested Party

**Order**

Judgment duly delivered.

**ISAAC LENAOLA**

**JUDGE**