

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
PETITION NO. E102 OF 2025

**IN THE MATTER OF ARTICLES 22, 23, 35, 48, 50, 159, 162(2),
165, 258 AND 260 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
ARTICLES 2, 10, 19, 20, 24, 27, 28, 35, 40 AND 41 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE AND PROCEDURE RULES 2013**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
SECTION 5 OF THE EMPLOYMENT ACT, CAP 226 OF THE
LAWS OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
GUIDING PRINCIPLES 11, 12, 13, 14, 15, 17, 18, 19, 21, 22, 23
AND 29 OF THE GUIDING PRINCIPLES ON BUSINESS AND
HUMAN RIGHTS IMPLEMENTING THE UNITED NATIONS
'PROTECT, RESPECT AND REMEDY' FRAMEWORK**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
ARTICLES 2, 7, AND 17 OF THE UNIVERSAL DECLARATION
OF HUMAN RIGHTS, 1948**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
THE CONVENTION ON THE ELIMINATION OF ALL FORMS
OF RACIAL DISCRIMINATION, 1965**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
THE COVENANT ON ECONOMIC, SOCIAL AND CULTURAL
RIGHTS, 1966**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE
ILO CONVENTION ON DISCRIMINATION (EMPLOYMENT
AND OCCUPATION) CONVENTION, 1958**

BETWEEN

ELIZABETH NJOKI.....

.....PETITIONER

VERSUS

M-KOPA KENYA LIMITED.....1ST

RESPONDENT

M-KOPA HOLDINGS LIMITED.....2ND

RESPONDENT

AND

BRITISH INTERNATIONAL INVESTMENTS

(BII) SCOTS LLP.....1ST INTERESTED

PARTY

GENERATION INVESTMENT MANAGEMENT

(GIM) CFS II CAYMAN LIMITED.....2ND INTERESTED

PARTY

YESSE OENGA.....PROPOSED 3RD INTERESTED

PARTY

NANCY SANGORO.....PROPOSED 4TH INTERESTED

PARTY

FELIX AMBULWA.....PROPOSED 5TH INTERESTED

PARTY

(Before Hon. Justice Byram Ongaya on Thursday 30th October, 2025)

RULING

1. The petitioner filed the petition and supporting affidavit dated 22.05.2025 through Rilani Advocates LLP. She pleaded that she and the class she represents are current and former employees of the 1st respondent who became ordinary shareholders of the 2nd respondent under the Employee Share Scheme known as the Share Option Plan.
2. The petition seeks to hold the 1st and 2nd respondents, together with two of its major shareholders, the 1st and 2nd interested parties herein, accountable for the blatant racial discrimination and violation of the economic rights of M-Kopa Holdings Limited Kenyan employees, who form the majority of African

employees of the company, and other employees of African descent. Therefore, the petitioner prays for herself and the class she represents:

- a. A declaration that the respondents violated the rights of the petitioner and the rights of those in the class under Articles 2, 10, 19, 20, 24, 27, 28, 35, 40 and 41 of the Constitution of Kenya.
- b. A declaration that the continued classification of the respondents' employees on the basis of race for purposes of the Share Option Plan, being the Primary Share Option Plan of Ordinary Shares and the Growth Share Plan continues to threaten the rights of the petitioner and those represented in the class as guaranteed under Articles 2, 10, 19, 20, 24, 27, 28, 35, 40 and 41 of the Constitution of Kenya.
- c. An order that the respondents are liable to pay damages to the petitioner and any member represented in the class for the violation of their rights as stated in prayers (a) and (b) above.
- d. Upon the finding of liability as in prayer (c) above, this Honourable Court be pleased to grant the petitioner and any

member of the class she represents a hearing on the quantum of damages payable.

- e. An order that the 2nd respondent is liable to compensate the petitioner and any member of the class she represents for the value lost in their ordinary shares and share options in the dilution suffered due to the actions of the 2nd respondent in creating Growth Shares and adoption of a sham recapitalization, for purposes of protecting the 1st and 2nd interested parties as well as other Preferred Shareholders of the 2nd respondent and its employees of Caucasian descent from dilution between April 2019 and July 2022.
- f. Upon the finding of liability as in prayer (c) above and the grant of prayer (e) above, this Honourable Court be pleased to grant the petitioner and the class she represents the opportunity to call any expert witnesses and present expert reports to aid the Court in determining the quantum of compensation for the value lost in Ordinary Shareholding and Options to Ordinary Shareholding based on the correct, independent and credible valuation of the 2nd respondent in the period between April

2019 and July 2022.

- g. Upon findings in prayers (a) to (e) above, an order that the respondents issue a statement and apology to its employees, ordinary shareholders, and options holders through the primary shareholder communication channels and its website and all other communication channels for implementation of the anti-dilution plan entailing the establishment of 2 employee Share Option Plans on the basis of race, and the unprocedural and irregular dilution of their shares and value in their options and generally, the Anti-Dilution Plan as detailed in this petition. The apology and statement be issued within 14 days of the judgment herein.
- h. Upon findings in prayers (a) to (e) above, an order compelling the 2nd respondent to within thirty (30) days alter its shareholding structure in the following manner:
 - (a) Abolish the segregation of the Employee Share Option Plan on the basis of race and grant all employees the same rights under the Share Option Plan regardless of their race by:
 - i) Having one Employee Share Option Plan for all

employees

ii) Applying the terms of the Share Option plan uniformly amongst all its beneficiaries

(b) Abolish the segregation of Shareholding arising out of the Employee Share Plan and implement uniform economic rights for all such shares and specifically:

i) A classification of minor holders that is not determined on the basis of race and does not exclude employees of Caucasian descent.

ii) Uniform economic rights for all beneficiaries of the Employee Share Plan regardless of their race.

Proof that these changes have been made must be presented by the 2nd respondent to this Honourable Court via affidavit within 90 days of judgment.

i. An order awarding the costs of this petition together with interests to the petitioner.

j. Any such other or further orders as it may deem just and expedient in the circumstances in enforcing violation of human rights and fundamental freedoms.

3. In response to the petition, the 1st and 2nd respondents filed their respective preliminary objections dated 12.06.2025 through Anjarwalla and Khanna LLP. The 1st interested party filed its preliminary objection dated 19.06.2025 through Coulson Harney LLP, whereas the 2nd interested party's preliminary objection dated 16.06.2025 was filed through Oraro & Company Advocates. The objections sought to have the petition struck out on the grounds that:

(i) The petitioner's claim relates purely to a shareholders' dispute and not an employment dispute capable of adjudication by the Employment and Labour Relations Court as established under Article 162(2) of the Constitution of Kenya.

(ii) This Honourable Court therefore lacks the jurisdiction to hear the petition as the governing law clause in the Amended and Restated Shareholders Agreement dated 11.04.2023 (the Agreement) executed between the 2nd respondent and all shareholders of the 2nd respondent confers exclusive jurisdiction upon the Courts of England

and Wales over any dispute arising from or in connection with the Agreement, including any non-contractual claims or disputes. Accordingly, the petitioner has access to an alternative remedy within the jurisdiction of the 2nd respondent's domicile.

- (iii) Since there exists no employer-employee relationship between the petitioner and the 2nd respondent and 1st interested party, this Honourable Court lacks jurisdiction under the Employment and Labour Relations Court Act to entertain the petition.
- (iv) The 1st respondent is not a party to the Agreement and therefore not capable of remedying any relief sought in the petition, as the 1st respondent is not the issuer of the impugned shares.
- (v) The Court also lacks jurisdiction in the matter because the petition further raises issues on the Recapitalisation Agreement relating to the shares in the 2nd respondent dated 02.11.2020, which agreement also provides exclusive jurisdiction to the laws and Courts of England and Wales

(vi) The petition is misconceived, incompetent and an abuse of the court process in so far as it purports to invoke the jurisdiction of this Honourable Court notwithstanding the Agreements' exclusive jurisdiction clause in favour of the Courts of England and Wales.

(vii) Further, the petition is defective to the extent that the alleged class of petitioners have not been disclosed and cannot be ascertained.

(viii) The petitioner did not obtain the leave of the Court before joining the 1st interested party to this suit, despite the 1st interested party being a foreign company. There is also no cause of action disclosed and/or established as against the 1st interested party in the petition.

(ix) Lastly, the petition does not seek any relief against the 2nd interested party, and the alleged claim for breach of fiduciary duty may only be brought against a director of the company, not a shareholder.

4. The petitioner then filed a notice of motion and supporting affidavit dated 08.07.2025 through Rilani Advocates LLP,

seeking that this Honourable Court refer the petition to the Chief Justice for assignment of an uneven number of judges, being not less than three, to hear this petition. Among other grounds, she argues that determination of the issues raised transcends the petition and will have a significant bearing on her, the class she represents and the public interest, as it will dictate to multinational companies with varied shareholder classes operating in Kenya how they ought to structure their shareholding and how to treat their employees, who are also shareholders, in a manner that respects, upholds and protects human rights.

5. Further, the petitioner filed a notice of motion and supporting affidavit dated 16.07.2025, seeking that the Court issues conservatory orders in the nature of an injunction, restraining and staying the 2nd respondent from soliciting, purchasing or completing the acquisition of any ordinary shares or options for ordinary shares or otherwise obtaining ordinary shares or options for ordinary shares held by the current and former employees of the 1st and 2nd respondents, who form the class of persons represented in the petition, under the Series F Financing Plan.

The application is grounded on, among other reasons, that the petition raises issues on: (a) protection of human rights in shareholding plans, particularly where certain shareholders are powerful global investors against employees' rights; (b) the duty of companies and shareholders to protect other shareholders, where such shareholders are employees; and (c) the jurisdiction of this court where actions by shareholders are implemented in a company incorporated in a foreign jurisdiction but violate the fundamental rights and freedoms of Kenyan citizens.

6. Seeking to join the petition, the proposed 3rd, 4th and 5th interested parties thereafter filed a notice of motion dated 22.07.2025 through Henia Anzala & Associates Advocates. The application is supported by the affidavit of the proposed 3rd interested party and based on the grounds *inter alia* that they are shareholders of the 2nd respondent adversely mentioned in the petition, and to have their position heard by the Court to avoid adverse orders being made against them. Subsequently, the 1st and 2nd respondents, and the 1st and 2nd interested parties signed a Consent dated 13.08.2025, agreeing to the 3rd, 4th and 5th

interested parties being joined to the suit. However, in her grounds of opposition dated 15.08.2025, the petitioner opposed the joinder application mainly on the premise that the applicants failed to demonstrate an identifiable and proximate interest in the subject matter of the petition.

7. In response to the petitioner's empanelment application dated 08.07.2025, the 1st and 2nd respondents filed their grounds of opposition dated 01.09.2025, the 1st interested party filed its grounds of opposition dated 29.08.2025, and the 2nd interested party filed its grounds of opposition dated 29.08.2025. They oppose on the grounds that:

(i) This Honourable Court does not have jurisdiction to entertain the empanelment application within the meaning of Article 165(4) of the Constitution of Kenya, as the jurisdiction of this Court has been expressly challenged and must be determined as a preliminary issue.

(ii) The empanelment application does not meet the threshold under Article 165(3)(b) or (d) of the Constitution to warrant certification for empanelment under Article 165(4) of the

Constitution, as the issues raised do not constitute a “substantial question of law” contemplated by the Constitution and interpreted by judicial precedent.

- (iii) Certification under Article 165(4) of the Constitution requires more than mere novelty or complexity; the matter must involve exceptional facts not clearly addressed by existing binding precedent, as affirmed in **Amos Kiumo & 2 others v Cabinet Secretary, Ministry of Interior & Coordination of National Government & 3 others [2014] eKLR.**
- (iv) The application having failed to raise a substantial question of law, section 21(2) of the ELRC Act does not apply, and allowing the application would therefore be an abuse of court process contrary to the spirit of section 3(1) and (2) of the ELRC Act.
- (v) The petition does not raise any novel or unsettled constitutional questions necessitating empanelment, and the petitioner has failed to identify and precisely articulate the

specific substantial questions of law alleged to arise from the petition.

(vi) The petition does not raise a matter of public interest warranting certification, as the petitioner brings the claim in her personal capacity and has not demonstrated that she represents any identifiable class of persons whose rights are similarly affected.

(vii) The issues for determination in the petition pertain to private shareholding rights and do not transcend the individual circumstances of the petitioner.

(viii) The empanelment application undermines the principle of judicial efficiency as enshrined in Article 159(2)(b) of the Constitution, which mandates the expeditious delivery of justice. The application amounts to a misuse of limited judicial resources, particularly in circumstances where there is no legal uncertainty regarding the issues raised in the petition or in the notices of preliminary objection challenging this Court's jurisdiction.

8. Further in reply to the petitioner's injunction application dated 16.07.2025, the 1st and 2nd respondents filed their grounds of opposition dated 01.09.2025, the 1st interested party filed its grounds of opposition dated 29.08.2025, and the 2nd interested party filed its grounds of opposition dated 02.09.2025. They oppose on the grounds that:

- (i) This Honourable Court has no jurisdiction to hear and determine the injunction application because a preliminary jurisdictional objection on the entire petition has been raised.
- (ii) Without prejudice to the foregoing, the application does not satisfy the test for the grant of an interim injunction pursuant to the line of cases emanating from **Giella vs. Cassman Brown (1973) EA 358**. If allowed, the application would prejudice the rights of other shareholders not party to the suit.
- (iii) The 1st respondent is not a proper subject of the conservatory orders sought, which are directed at restraining actions related to the Series F Financing Plan, solely within

the purview of the 2nd respondent. The petitioner has therefore failed to establish a prima facie case with a probability of success against the 1st respondent, as required under the applicable legal principles for the grant of an injunctive relief.

(iv) In any event, the application has been overtaken by events as the transaction sought to be prevented already took place, as admitted by the petitioner in her grounds of opposition dated 15.08.2025 filed in response to the joinder application dated 22.07.2025.

9. The petitioner thereafter filed grounds of opposition dated 02.09.2025 against the 1st and 2nd respondents' preliminary objections dated 12.06.2025, the 1st interested party's preliminary objection dated 19.06.2025, and the 2nd interested party's preliminary objection dated 16.06.2025. She urged as follows:

a) The Court of Appeal's decision in **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696** set the applicable threshold for a preliminary objection to be that it must be based on a clear point of law and

must not require examination of factual evidence. Further, a proper objection could dispose of the entire suit if argued as a point of law. The objection by the 1st respondent fails this standard because it presupposes facts yet to be ascertained through judicial scrutiny.

- b) The petition alleges violations of substantive employment rights which are enshrined in Article 41 of the Constitution of Kenya, which guarantees fair labour practices, and section 5 of the Employment Act, which prohibits discrimination in employment. It references roles, conduct and context that point to an employment relationship, which the Court must first examine before dismissing the matter on jurisdictional grounds.
- c) To determine whether the claim pertains to employment or shareholder matters requires a factual inquiry into the nature of the petitioner's relationship with the 1st respondent and the nature of the relationship between the petitioner, the 1st and 2nd respondents and which are matters of evidence. Consequently, the question of jurisdiction is not a preliminary issue but a substantive issue that requires this Court to consider all

evidence before making a determination.

- d) Further, the petition does not seek contractual enforcement action for the Amended and Restated Shareholders Agreement. It rather invokes constitutional and statutory protections under Kenyan law, particularly Articles 27, 28, 35, 40 and 41 of the Constitution of Kenya, and section 5 of the Employment Act, which rights are enforceable independently of any contractual framework and not ousted by foreign jurisdictional clauses. This position was affirmed by the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] eKLR**.
- e) The 1st respondent is not an isolated legal entity operating independently, but a subsidiary of the 2nd respondent, incorporated and operating under the 2nd respondent and at all material times acting as its operational arm within the jurisdiction of the Republic of Kenya. The violations cited in the petition are not confined to contractual obligations under the Shareholders Agreement but extend to systemic conduct amounting to a violation of constitutional rights attributable to

both the 1st and 2nd respondents, jointly and severally.

- f) The petitioner and the class she represents were employees of the 1st respondent, a subsidiary of the 2nd respondent and were granted shares under the Employee Share Scheme. The 2nd respondent's documents, including its Articles of Association and Share Option Plan, explicitly define eligible employees to include those employed by subsidiaries. The 1st interested party, as the largest investor and board influencer, actively participated in decisions affecting these employees' rights.
- g) The question of jurisdiction as raised by the 2nd respondent, is itself a substantial question of law that needs to be referred to a bench of an uneven number of judges in accordance with Article 165(4) of the Constitution and Section 21(2) of the ELRC Act.
- h) The doctrine of constitutional avoidance does not apply herein because the petition is anchored in constitutional violations and breaches of employment rights occurring within the territorial jurisdiction of the Republic of Kenya. Additionally, the remedies sought are not available under contractual law,

meaning the clause purporting to vest exclusive jurisdiction in the Courts of England and Wales cannot oust the jurisdiction of a Kenyan court seized of a matter alleging violations of rights guaranteed under the Constitution.

- i) The Constitution under Article 48 guarantees every person the right to access justice. To enforce a foreign jurisdiction clause in this context would be to deny the petitioners meaningful access to justice, especially since the alleged constitutional violations involve vulnerable classes of persons. Further, the Court is bound by Article 159(2)(d) to administer justice without undue regard to procedural technicalities and jurisdiction clauses in commercial contracts cannot be used to shield parties from accountability for constitutional violations.
- j) Rule 4(b) of the ELRC Rules, 2024 establishes a Judicial Review and Labour Rights Division specifically mandated to hear constitutional petitions involving employment rights. Rule 10(1) of the ELRC Rules further provides that constitutional petitions shall be instituted in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms)

Practice and Procedure Rules, 2013.

- k) Rule 3(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides that the rules it sets out apply to all proceedings under Article 22 of the Constitution; with Rule 3(2) going ahead to set the overriding objective as facilitating access to justice. Rule 5 expressly provides that a petition shall not be defeated by reason of misjoinder or non-joinder of parties, and the Court may at any stage of the proceedings add or strike out parties as necessary to enable it to adjudicate upon and settle all questions involved. In particular, Rule 5(3) permits the Court to grant leave for service on parties outside Kenya.
- l) The 1st and 2nd interested parties, as the largest investors with key board participation rights, actively participated in decisions affecting these employees' rights, were complicit in discriminatory employment practices and the creation of a racially segregated shareholding structure and benefited the most from the violations committed by the 2nd respondent. The 1st and 2nd interested parties are therefore properly joined to the

petition.

m) While the dispute involves shareholding in a company registered under English Law, the petition raises substantial issues of blatant racial discrimination and violation of the economic rights of employees of the 1st respondent, which is a Kenyan company.

10. The parties filed their respective submissions on the petitioner's applications of 08.07.2025 and 16.07.2025, and on the various preliminary objections and grounds of oppositions as filed. Parties also highlighted their submissions before the Honourable Court on 21.10.2025.

11. The Court has considered the parties' respective submissions. The Court returns as follows:

a) The preliminary objections raise a pertinent issue which is whether the Court has jurisdiction. In opposing the preliminary objection and particularly on whether the case is about employment or about employee shareholding agreement, it is submitted for the petitioner that the preliminary objection is not based upon undisputed facts

and the Court will need to make an inquiry at the full hearing, look at the employment contracts, and also examine the employee shareholding structure, classifications, and agreements.. The court considers that as a shareholder, the individual employee has rights that are separate from their employment relationship with the company. Such shareholding rights are protected by corporate laws and the company articles of association as submitted for the respondents and interested parties.

b) The Court finds that as submitted by learned Counsel George Oraro SC, the preliminary objection is premised on facts as pleaded for the petitioner and nothing more. The question is whether the dispute is about rights and obligations in the employment contract, or is about shareholding rights, or is a mixed grill. To answer the question, the Court has examined the pleadings. Part III of the petition outlines the subject of the petition. It alleges discrimination of employees of the 1st and 2nd respondent of Kenyan origin on the basis of race together with other

African employees being ordinary shareholders and share option holders under the 2nd respondent's share option plan. It is alleged that the discriminated employees have been classified into lesser class of shareholders, below other employees of Caucasian and non-African descent. It is further alleged that the effect is to benefit the majority shareholders and employees of Caucasian descent. Further, the African employees share holding is being diluted unprocedurally so by rewarding the value extracted from ordinary shares to the majority shareholders and employees of Caucasian descent, thereby causing the Kenyan and other employees of African descent immense financial loss.

- c) The Court finds that the primary dispute in the instant petition is about shareholding, value of the shares relative to various classes of shareholders, and generally the share structure in dispute. It happens that the employees of 1st and 2nd respondents are part of the shareholders but which the Court finds to be independent of the contract of employment. There is nothing in the petition invoking

employment rights and obligations between the parties. The issues raised for the petitioner as the subject matter of the dispute or petition are about shareholding structure which go to the relevant articles of association of the company rather than the contract of employment. In making that finding the Court does not need to go beyond the facts as pleaded and which so far are not disputed. The petitioner is bound by the pleadings and the Court finds that the dispute falls outside the jurisdiction of this Court as a specialised court to hear and determine disputes relating to employment and labour relations. The preliminary objection is upheld accordingly and the Court will down its tools as it were for want of jurisdiction.

d) The Court has considered whether the petition should be struck out or transferred to the High Court. The Court has taken cognisance of prevailing practice of transfer of files between the High Court and the Co-equal courts of Employment and Labour Relations Court and the Environment and Land Court. In view of the principles in

Article 159 of the Constitution, it will be just to transfer the petition to the appropriate Court.

Accordingly, in view of the findings, the Court orders and makes directions as follows:

- 1) The Court lacks jurisdiction to hear and determine the petition in view that it raises issues about shareholding structure and not employment and labour rights and obligations.
- 2) The orders herein for determination by this Court of the residual preliminary points of objection, application for empanelment, application for conservatory orders and application for joinder are hereby set aside and the same to be determined by the Court with requisite jurisdiction.
- 3) The petition is hereby transferred to the Constitutional Division of the High Court for hearing and disposal accordingly and mention before the Divisional Presiding Judge on 05.11.2025 at 9.00am or soon thereafter for further directions, accordingly.
- 4) The Deputy Registrar to cause transfer of the file to the High Court Registry at Nairobi forthwith, today.
- 5) Costs in the cause.

**Signed, dated and delivered by video-link and in court at Nairobi
this Thursday 30th October, 2025.**

**BYRAM ONGAYA
PRINCIPAL JUDGE**