IN THE COURT OF APPEAL AT NAIROBI

(CORAM: KIAGE, ACHODE & KORIR,

JJ.A.) CIVIL APPEAL NO. E680 OF 2023

BETWEEN

HUSSEIN UNSHUR MOHAMED.....APPELLANT

AND

YUSUF ABDI ADAN ..... 1ST RESPONDENT HUSSEIN AHMED FARAH ..... 2ND RESPONDENT MOHAMMED ABDIKADIR ADAN ..... 3RD RESPONDENT BLUEBIRD AVIATION LIMITED ..... 4TH RESPONDENT

*(An appeal from the ruling of the High Court of Kenya at Nairobi (**Njoki Mwangi, J.**) dated 23rd April 2023*

in

***HC Suit No. 100 of 2014*)**

****

JUDGMENT OF THE COURT

By this appeal the appellant, **Hussein Unshur Mohamed** challenges and wishes to have this Court set aside the ruling of the High Court (Njoki Mwangi, J.) dated 25.4.23 by which the learned judge allowed the application dated 15.9.22 brought by Yusuf Abdi Adan, the 1st respondent herein. The court ordered;

(i) That the appointment letter dated 2nd November 2021 appointing RSM (East Africa) Consulting Limited to

conduct a valuation of Blue Bird Aviation Limited is hereby set aside.

(ii) That the Business Valuation Report by RSM (East Africa) Consulting Limited dated 6th December, 2021 is hereby set aside.

(iii) That the parties shall appoint another Valuer within seven (7) days from 26th April, 2023, in default, the Deputy Registrar shall make such appointment forthwith, after the elapse of the seven (7) days.

(iv) That the Valuer to be appointed shall conduct a valuation of Blue Bird Aviation Limited (4th respondent) to ascertain the true value of the applicant's shareholding in the 4th respondent) company. A report of the said valuation shall be filed in Court within fourteen
(14) days of such appointment.

(v) That the terms of reference that had been agreed upon in the valuation that was undertaken by RSM Ltd shall be applicable to the valuer that shall be appointed.

(vi) That if the value of the applicant's shareholding in the 4th respondent is found to be less than the sum of Kshs. 320,912,500.00 already paid into the Judiciary bank account by the 3rd respondent, the difference shall be refunded to the 3rd respondent within seven (7) days of the filing of their valuation report. If the value will be more, the difference shall be paid by the 3rd respondent or any of the respondents to the applicant herein within sixty (60) days of the date of the filing of the Valuation Report.

(vii) That the sum held in court shall be released to the

applicant’s advocates within seven (7) days of Valuation

Report being filed in Court, subject to the value that will be determined of the applicant's shareholding in the 4th respondent.

(viii) That the applicant shall bear the costs of the valuation; and

(ix) That each party shall bear his/its own costs of this application.

The background to that application and the orders so given is uncontested. The appellant and the 1st and 3rd respondents were shareholders in Bluebird Aviation Limited (the Company) which is the 4th respondent herein, each holding 25% shareholding. There have been long-standing wrangles between the said shareholders of the company pitting the 1st respondent against the rest of them. The 1st respondent filed **Civil Suit No. 100 of 2016** before the High Court's Commercial and Tax Division at Nairobi. He claimed that he was bringing the suit on behalf of the company and accused the other shareholders of breach of their fiduciary duty of the company. He levelled a slew of accusations against them including fraud, conversion, money-laundering and theft of the company's property. He asserted that he had been active in the company in its early years but for 23 years had been locked out of its operations, could

not access information on its or is assets, and had been denied his share of profits and dividends.

By a notice of motion dated 20.3.16, the 1st respondent sought from the High Court, in the main, an order permitting him to continue the suit as a derivative claim on behalf of the company. He sought several other orders which it is not necessary for us to recite herein. Suffice to say he made multiple allegations against the other shareholders who he sued as defendants alongside the company. That application was stoutly opposed by those defendants as being scandalous and brought in bad faith, and so permission should not be granted. Moreover, the 1st respondent had filed *Winding Up Cause No. 7* in which he had prayed, *inter alia*, that his shares be purchased by the other shareholders at market value, yet proceeded to file two other suits against them being **HCCC 182 of 2017** and **HCCC No. 197 of 2017** a mere three weeks later indicative of a desire to harass them and abuse the process of the court, especially when he had voluntarily chose to not participate in the company's management for 23 years. He had, in fact, counterclaimed and made a 3rd party claim that his 25% share be purchased at a fair price to be determined by a United States Court

in **Texas USA 153-299427-18** filed by the 3rd respondent herein. They contended that the 1st respondent was seeking orders for his personal benefit and he was guilty of forum-shopping through a multiplicity of suits with the aim of disrupting and ultimately dissolving the company.

That application was canvassed before Mabeya, J. who by a ruling delivered on 29.7.21, disallowed it. In arriving at that decision, Mabeya, J. penned this conclusion which we consider germane as it captures the essence of the dynamics between the parties herein. Said the Judge;

> **"133. The court is alive to the allegations by the defendants that the plaintiff only contributed Kshs. 150,000/= as his capital at the inception of the company. That he never made any further contribution thereafter. He never actively participated in the affairs of the company for 23 years. If he had been excluded, he never took action on it. The court concludes that he did it willingly**.
>
> **134. Further, it was the contention of the defendants, which was not denied or challenged, that they grew the company by jointly purchasing one aircraft on credit, flew it until the debt was paid off. That they purchased aircraft on credit and flew them until the company was financially stable. That it was their combined skill, effort, time and capital that led to the growth and success of the company. That from the very beginning, the plaintiff was never involved in the management of company as he was only**

approached

to buy a share as a potential permanent customer, as he was in the business of miraa exportation.

135. If the defendant's contention is anything to go by, it would shed light on why the plaintiff is eager to either have the company wound up, or leave it through a buy out of his shares. The 2nd defendant reminded the court of the story of King Solomon's wisdom in the Bible. That the plaintiff has already attempted to murder the baby through the winding up petition. Having failed in that attempt, he has asked two courts to slip the baby by his pursuit for a buyout. In this case, King Solomon declined that invitation.

136. In view of the foregoing, I find no merit in the application and decline to grant the permission sought. Being of that view, it is not necessary to delve into the second issue regarding the grant of the other interim orders sought in the application.

137. Accordingly, the application dated 30/3/2016 is without merit and is hereby dismissed in its entirety with costs to the defendants.

It is so ordered."

Disgruntled by that decision and intrepid pleader not easily deterred, the 1st respondent filed a fresh motion barely 3 weeks later on 23.8.21 seeking various orders against the other parties. Among them was a prayer for the review and setting aside of the ruling and order of 29.7.21 and that he be granted leave to continue with the suit as a derivative action. He prayed, in

the

alternative, that the dismissal order of 29.7.21, be substituted with

an order that he be bought off after a valuation of the company by a reputable firm to determine the value of his shares and unpaid dividends for that purpose. The basis for the buy-out prayer was the irretrievable breakdown of his relationship with the respondents. For good measure he repeated the prior allegations of oppression, exclusion and unfairness by the other shareholders in the company.

Those shareholder respondents raised various objections in opposition to that application some being preliminary objections which Mabeya, J. directed be heard as part of the opposition to the motion. In his ruling on the said motion which he delivered on 1.10.21, he distilled the issues raised in the preliminary objections to be;

a) Whether the application was *res judicata*.
b) Whether the application met the grounds for review.
c) Whether the application was on appeal in disguise
d) Whether the application was a new suit.

He found that the application was *res judicata* as regards the prayer for granting permission to bring derivative suit but not so the alternative prayer for by out. He also found that the ground for review canvassed, namely sufficient cause for allegedly not

being

accorded opportunity to call a witness was *"hot air"* as the matter was not to proceed by way of *viva voce* hearing and so the ground was not met. Moreover, as the 1st respondent seemed to be alleging and complaining about misapprehension of the procedure and substantive law on derivative claims he ought to have filed on appeal, not a review of the ruling of 29.7.21.

Finally, the judge held that in the full circumstances of the case, including the fact that the suit had already pended before the court for over 5 years, it would not be just to require the 1st respondent to file a fresh suit. He noted that the other shareholders had, as early as March 2016, asked the 1st respondent to exercise the right to be bought off and, seeking to do substantive justice untrammelled by technicalities of procedure, he concluded he had the discretion to grant that remedy under **sections 238** and **239** of the Companies Act as justice demanded that the earlier the parties parted, the better for them and the company. Accordingly, he allowed their motion in the following terms;

(a) The prayer for review and granting permission to bring a derivative suit is denied.

(b) The alternative prayer is allowed and the ruling and order

of 29/7/2021, that dismissed the application dated

30/3/2016 is hereby reviewed and substituted with an order that the plaintiff be bought off

(c) The plaintiff's shares in the 4th respondent be purchased by the remaining shareholders, that is, the 1st, 2nd and 3rd respondents or any one of them or by the 4th respondent, and the Company's capital be reduced accordingly.

(d) Consequently, the parties are hereby directed to agree within 14 days of the date hereof, on the appointment of a reputable firm to undertake the valuation of the 4th respondent with a view of ascertaining the value of the plaintiff's shareholding thereon for subsequent purchase as aforesaid. In default, the Court shall appoint one.

(e) This matter is to be mentioned on a day to be fixed at the delivery of this ruling for compliance

(f) Although the applicant was successful, however, for failure to have sought the remedy initially, I will make no order as to costs.

Following that ruling, and in furtherance of orders (c) and (d) thereof on the purchase of the 1st respondents shares after valuation: the firm of Biriq & Co. Advocates on record for the appellant herein wrote a letter dated 6.10.21 addressed to H & K Law, on record for the 1st respondent, which was copied to counsel on record for all the other parties, requesting the 1st respondent to

propose names of valuers for the appellant's consideration. H & K

Law Advocates responded to that letter promptly on the same day and proposed 3 valuers, namely;

1. KPMG International Limited (Kenya)
2. PFK Kenya LLP
3. RSM (Eastern Africa) Consulting Ltd.

There did follow an exchange of correspondence which culminated in the parties appointing PKF Kenya LLP to do the valuation but, after receiving the terms of reference the said valuers presented, the parties all agreed to appoint the firm of RSM East Africa Ltd (RSM) to undertake the valuation. The scope of work, conditions of engagement and the respective areas of responsibility for the company and RSM were captured in a letter from RSM acknowledged and signed on 10.11.21 by partners in the law representing the respective parties.

RSM duly conducted the valuation and presented a Business valuation Report dated 6.12.21, and counsel the 2nd respondent herein lodged it in court on 7.12.21 in anticipation of the mention of the matter before court slated for 8.12.21. On that date the 1st respondent sought time to study the report while the other parties preferred to have the report adopted stating, among other things, that the matter had been in court for way too long.

Mabeya, J.

granted the adjournment sought by the 1st respondent and directed that the parties record a settlement on 1.2.22.

Come 1.2.22, the parties had not agreed and the record of the proceedings of the day are a testament to the seemingly unbridgeable chasm between them.

> **"1/2/2022**
> Virtually Before Hon. Justice Mabeya
> C/A Sophie
> Mr. Kibet for the Plaintiff
> Ms. Jan Mohammed SC for the 1st defendant
> Mr. Sagana for the 2nd defendant
> Mr. Kemboy for 4th defendant
>
> **Mr. Kibet**
> There was a Business Valuation Report dated 6/12/2022. We have not formalized any settlement. We raised queries on the report on 3/1/2023 including assumptions made by the valuer. There was the issue of non-attachments.
>
> We have not reached a settlement. On 12/1/2022 the valuers withdrew the report. We are back to square 1.
>
> **Mr. Kemboy**
> I am taken a-back by Mr. Kibet. It is not true that the report has been withdrawn. The valuation has been done, it is not open for the plaintiff to disagree with the

valuation.

The valuer responded to all the issues. He is contemptuous

of the order he got. The Plaintiff has to live with the valuation.

The plaintiff must comply with the order of the court.

Mr. Sagana

I support Mr. Kemboy. Litigation must come to an end. All the valuation firms were proposed by the plaintiff.
The two were agreed. They were signed by the parties. There is a valuation report in court. We pray that it be adopted.

The report has not been withdrawn. RSM forwarded several documents after 12/1/2022. The 3rd defendant is ready to buy off the plaintiff's shares. He seeks 6 months to pay for the same.

Mr. Daud

I support my colleagues Mr. Kemboy and Sagana. We cannot have new applications being made after the orders of the court have been made.

The valuation has not been withdrawn. Asking for another valuation will prejudice the Co. We ask the court to adopt the report.

Mr. Kibet

The report cannot be adopted as paragraph 11 invalids itself. It is not signed or sealed.

Faced with that seeming imbroglio, Mabeya, J. directed that the parties comply with the orders of the court given on 1.10.21 within 14 days and that any party who desired any orders should formally apply for the same. He then set a mention dated of 15.2.22 to confirm compliance. On that day the court was informed that the appellant herein had filed an application dated 9.2.22. The judge directed that the said application be responded to within 7 days and that parties file and serve written submissions therein within 14 days thereafter and that there would be a mention on 3.3.22 for giving of a ruling date.

The appellant's said application sought the following prayers;

1. *That this honourable court be pleased to certify this application as urgent and that the same be heard on priority basis.*

2. *That this honourable court do issue an order that the Business Valuation Report of Bluebird Aviation Limited (the 4th defendant herein) dated 6th December 2021 submitted by RSM (Eastern Africa) Consulting Ltd carried out pursuant to the order of this honourable court issued on 1st October, 2021 be adopted as an order of the court.*

3. *That as a consequence, the plaintiff transfers his 25% shareholding in the 4th defendant to either defendant at a value of Kshs.320,912,500 forthwith (or soon thereafter but no later than 180 days from the date of this order) in accordance with the Business Valuation Report dated 6th December, 2021 by RSM (Eastern Africa) Consulting Ltd.*

4. *That in the alternative to prayer (3) above, the **Deputy Registrar of this Court shall execute the share transferring** the plaintiff's 25% shareholding into the 4th defendant company upon either defendant depositing the sum of Kshs.320,912,500 into this court and which sum (Kshs.320,912,500) shall only be released to the plaintiff after the Registrar of companies has effected the changes in the said shareholding.*

5. *That **the full payment** by either defendant of the value of the plaintiff's 25% shareholding in the 4th defendant valued at Kshs. 320,912,500 the Registrar of Companies be and is hereby directed to effect the changes in the shareholding of the 4th defendant company to reflect that the plaintiff ceases being a shareholder of the 4th defendant*

6. *That the costs be borne by the plaintiff.*

In both the grounds in which it was founded and the supporting affidavit of the appellant, a history of the matter as has been captured herein was narrated. Additional grounds were stated to include;

(g) The second part of the orders of 1st October, 2021 requiring the valuation of the 4th defendant with a view of ascertaining the value of the plaintiff's shareholding thereon for subsequent purchase has been effectively complied with.

(h) In the absence of the plaintiff's cooperation, it is impossible to comply with the first part of the orders of 1st October 2021 on the purchase of the plaintiff's shares within the prescribed time limit

(i) The 3rd defendant has expressed his readiness and willingness to purchase the plaintiff's 25% shareholding in the 4th Defendants valued at Kshs. 320,912,500

(j) As a consequence, there is therefore a necessary consequential process to give effect to the honourable court's orders issued on 1st October 2021.

(k) In any event, the plaintiff's action is an unjust impediment to compliance of the orders of 1st October 2021 ***and is in tantamount*** *to a gross abuse of the court process and a mockery of the judicial system and especially the obligation to ensure efficient and effective administration of justice.*

(l) The honourable court has the power to enforce compliance with its orders by making any such orders to facilitate the just, expeditious, proportionate and affordable solution of the civil disputes before it.

Whereas all the other respondents were in support of that application: the appellant filed a 42-paragraph affidavit sworn on 22.2.22 in opposition thereto. He explained why he did not agree with the business valuation report and levelled several allegations against RSM and the other shareholders, the details of which we need not go into. He swore, *inter alia*;

> ***"31. That the present application is a cover-up of the outright and malicious contempt committed by the valuer in an attempt to contemptuously condemn the orders of the court issued on 1st October 2021. At best, the present application is***

a choreographed blackmail to effect the buy-out of my shareholding

without full and transparent process capable of ascertaining the real and fair value.

32. That my shareholding cannot be acquired on the basis and reliance of an unascertainable valuation process where the purported source of the information contained in the report is kept secret and without full disclosure of the shareholder being bought out.

33. That my constitutional right to property, being the actual and ascertainable value of my shares is a fundamental issue, is threatened and I am highly likely to be deprived of my rights recognized in law and as such the buy-out should not be allowed to proceed under such doubtful circumstances and unmerited basis of the sham valuation report.

34. That in this instant case, should the court adopt the said valuation report, there is a risk that my shares may be purchased at a gross value (sic) thereby causing substantial loss to myself."

He asked that the application be disallowed as being frivolous, and unmeritorious, urging that the court give effect to its orders of

1.10.21 by appointing an independent valuer to undertake the valuation process afresh.

By a ruling dated 3.6.22, Mabeya, J. opined that since the parties had jointly engaged RSM to undertake the valuation of the company and willingly agreed to **its letter of engagement**, a

valid consent existed between them and the same was akin to a binding

contract between the parties thereto and can only be set aside on conditions that can set aside a contract as stated in case law he cited. He found that the 1st respondent had not illustrated fraud, collusion or lack of sufficient material facts at the time of entering consent. Nor had he proved foul play on the part of the other parties or demonstrated that the report was incorrect. He then disposed of the application as follows:

> ***"On the basis of the foregoing, the court finds merit in the application dated 9/2/2022 and allows the same on the following terms:***
>
> (a) Prayer 2 is granted.
> (b) Prayer 3 is granted. The plaintiff is hereby ordered to transfer his 25% shareholding in the 4th defendant to the 3rd defendant who is interested in purchasing them upon receipt of the sum of Kshs.320,012,500 being the value of his shareholding thereof. This should be within 60 days from the date hereof.
> (c) In default, prayer 4 shall be deemed granted.
> (d) Prayer 5 is granted as prayed.
> (e) Each party to bear own costs.
>
> It is so ordered.
>
> **DATED** and **DELIVERED** at Nairobi this 3rd day of June, 2022."

The 1st respondent was aggrieved by that ruling and on 14.6.22 lodged a notice of appeal signifying intent to appeal

against

the whole of it. He followed it with an application for stay of execution dated 16.6.22 filed before this Court. This was after his oral application for stay of execution was rejected by Mabeya, J. on

3.6.22 since the ruling impugned had a 60-day window within which the 1st respondent could move this Court. The court also clarified its ruling, after hearing representations by counsel of the parties, as follows;

> ***"I have considered the representation by parties. I think there is a misinterpretation of the order of this court made on 3/6/2022.***
>
> ***The 3rd defendant had sought in his application a period of not later the 180 days to pay the sum of Kshs.320,912,500 which had been returned as the value of the plaintiff 25% shareholding.***
>
> ***In the ruling of 3/6/2022 the court found that period to be unreasonably long. I ordered that the said amount be paid within 60 days and on payments, the plaintiff do execute the requisite transfer document. The orders quite correctly as put by Kibet learned counsel for the plaintiff, was self-executory. That once the money is availed for payment to the plaintiff and he fails to accept the same for one reason or the other the said sum was to be deposited in this court and deputy registrar to execute the transfer forms accordingly.***
>
> ***The monies were payable anytime between 3/6/2022 and 2/8/2022 upon payment the plaintiff***

was

supposed to forthwith execute the transfer forms failing of which the deputy registrar was to do so.

In view of the foregoing let the 3rd defendant pay to the plaintiff the monies forthwith and in the event the plaintiff does not accept the same may be deposited in court at anytime thereafter Order No. 4 which is involuntary transfer shall take place on or after the 61st day from today.

Stay declined. Typed proceedings and ruling be supplied upon payment."

By an application dated 15.9.22, the 1st respondent moved the High Court for orders that;

"***(a) This honourable court be pleased to set aside the appointment letter dated 2nd November, 2021 appointing RSM (East Africa) Consulting Limited to conduct a valuation of Blue Bird Aviation Limited.***

(b) Upon granting prayer (a) above, this honourable court be pleased to set aside the Business Valuation Report by RSM (East Africa) Consulting Limited dated 6th December, 2021.

(c) This honourable court be pleased to appoint a reputable firm to undertake the valuation of the 4th respondent within fourteen days (14) with a view of ascertaining the value of the applicant's shareholding thereon for subsequent purchase by the 1st, 2nd and 3rd respondents or any one of them or by the 4th respondent and the company's capital be reduced accordingly within fourteen (14) days thereafter in compliance with this Court's Orders of 1st October 2021."

In the grounds and in the supporting affidavit, the 1st respondent rehashed the history of the dispute between the parties and its long journey before the courts and repeated the complaints we have already adverted to in pressing for the court to *"appoint a valuer to undertake another valuation in the interest of justice and equity."*

That motion was opposed by the other parties. The appellant filed grounds of opposition dated 23.9.22 stating that:

> ***"1. The suit is manifestly scandalous, vexatious and an abuse of the court's procedure /process.***
>
> ***2. The plaintiff is no longer a shareholder/director of the 4th defendant. Accordingly, the application has been overtaken by events.***
>
> ***3. The Court having rendered its trial decision on the derivative action and a ruling to the review application is functus officio and thus lacks jurisdiction to entertain the application.***
>
> ***4. The application does not lie in law, is incurably defective, incompetent and ought to be struck out with costs to the respondents."***

On its part the company filed a notice of preliminary objection dated 26.9.22 raising the following grounds which if sought to be determined *in limine*:

> ***"1. That in view of the express provisions of Order 45 Rule 6 of the Civil Procedure Rules, 2010, this honourable court lacks jurisdiction to***

entertain the notice of motion application.

2. ***That having ceased to be a Director of the 4th respondent, the applicant lacks locus standi to sustain this suit either under sections 238 and 239 of the Companies Act, 2015 (Derivative Action) or under sections 780 and 782 of the Companies Act, 2015 (Claim for Protection Against Oppressive Conduct and Unfair Prejudice).***

3. ***That after the ruling delivered by this Court on 3rd June 2022 and the clarification ruling of 8th July, 2022, this Court became functus officio and therefore lacks jurisdiction to hear and determine the applicant's notice of motion application dated 15th September, 2022.***

4. ***That consequently, the applicant's notice of motion application dated 15th September 2022 is woefully incompetent, incurably defective and ought to be dismissed with costs."***

All the parties filed written submissions which were in time highlighted before Njoki Mwangi, J. who, by a ruling dated 25.4.23, the subject of this appeal, allowed the 1st respondent's application as being meritorious and made the following orders:

"***(i) The appointment letter dated 2nd November, 2021 appointing RSM (East Africa) Consulting Limited to conduct a valuation of Blue Bird Aviation Limited is hereby set aside.***

(ii) The Business Valuation Report by RSM (East Africa) Consulting Limited dated 6th December, 2021 is hereby set aside.

(iii) The parties shall appoint another Valuer within seven (7) days from 26th April, 2023, in default, the Deputy Registrar shall make such

appointment forthwith, after the elapse of the seven (7) days.

(iv) The Valuer to be appointed shall conduct a valuation of Blue Bird Aviation Limited (4th respondent) to ascertain the true value of the applicant's shareholding in the 4th respondent company. A report of the said valuation shall be filed in court within fourteen (14) days of such appointment.

(v) The terms of reference that has been agreed upon in the valuation that was undertaken by RSM Ltd shall be applicable to the valuer that shall be appointed.

(vi) If the value of the applicant's shareholding in the 4th respondent is found to be less than the sum of Kshs.320,912,500.00 already paid into the Judiciary bank account by the 3rd respondent, the difference shall be refunded to the 3rd respondent within seven (7) days of the filing of the Valuation Report. If the value will be more, the difference shall be paid by the 3rd respondent or any of the respondents to the applicant herein within sixty (60) days of the date of the filing of the Valuation Report.

(vii) The sum held in Court shall be released to the applicant's advocates within seven (7) days of the Valuation Report being filed in court, subject to the value that will be determined of the applicant's shareholding in the 4th respondent;

(viii) The applicant shall bear the costs of the valuation; and

(xi) Each party shall bear his/its own costs of this application."

Dissatisfied with that decision, the appellant filed a notice of appeal dated 27.4.23 and thereafter instituted the present appeal by lodging, a memorandum of appeal dated 24.8.23. He raised several grounds of complaint which we summarize to be that the learned judge erred by;

- Entertaining the 1st respondent's application to review a review order without jurisdiction in defiance of order 45 Rule 6 of the Civil Procedure Rules.
- Entertaining the application without jurisdiction by reason of *res judicata* contrary to section 7 of the Civil Procedure Act.
- Entertaining the application without jurisdiction to enquire, supervise, superintend over or review the decision of a judge of concurrent jurisdiction contrary to Article 165(6) of the Constitution.
- Misapprehending and misapplying section 63(e) of the Civil Procedure Act whilst lacking jurisdiction as the main suit was non-existent having been finalized and its orders fully implemented.
- Allowing an application seeking to circumvent of the rules of procedures including section 80 of the CPA and order 45 Rule 1 of the Civil Procedure Rule to overturn orders overturn able only on appeal.

- Ignoring jurisprudence on res judicata, functus officio, prohibiting of piece-meal litigation and sitting on appeal on and overturning the decision of Mabeya, J.
- Holding that the application arose out of a non-existent finding of unfair prejudice under section 780 of the Companies Act no suit or petition having been filed thereunder.
- Proceeding on the basis of wrongdoing by RSM, thereby condemning them unheard.
- Directing the Deputy Registrar to appoint a valuer in the absence of parties' agreement within 7 days without guidance or their participation.

He thus prayed that the ruling be set aside.

The parties herein filed written submissions through their counsel on record. For the appellant, Ms. Sagana, Biriq & Muganda Advocates LLP filed submissions dated 24.7.25. They first gave on account of the procedural journey of this matter which we need not repeat having ourselves captured it in detail herein. A sign post moment they identified was the 1st respondent's motion of 23.4.21 filed seeking review of Mabeya, J's. dismissal on 29.7.21 of his application dated 30.3.16 that sought permission to institute a derivative action. Mabeya, J, partly reviewed his ruling and granted prayers for the 1st respondent to be bought out of the company in

furtherance of which RSM, first proposed by the 1st respondent, was appointed by the parties to undertake a valuation of the company's for purposes of determining the value of his shares. That value, being 25% of the shares, was placed at Kshs.320,912,500 in the valuation report.

The appellant vide an application dated 9.2.22 sought the court's adoption of the valuation report but the 1st respondent opposed it by affidavit claiming that; *inter alia*, the report was not signed and sealed by the author; the valuer was influenced by the appellant, the 2nd and 3rd respondents; he was not given the audited accounts relied on; and, the report did not meet international accounting standards. Beyond resisting adoption of the report, the 1st respondent in his affidavit urged the court to instead appoint another valuer to conduct the valuation afresh. Mabeya, J. allowed the appellant's application, adopted the RSM business valuation report and ordered the 1st respondent to transfer his shareholding to the 3rd respondent.

The 1st respondent further submitted as follows:

> ***"10. The orders issued on 3rd June, 2022 were fully implemented by 29th July, 2022 whereby;***

(a) The 3rd respondent deposited the sum of Kshs.320,912,500 being the price for the 1st respondents shares in the 4th respondent into the Judiciary Account a trust of the 1st respondent herein.

(b) The 1st respondent's shares in the 4th respondent were equally transferred and registered in favour of the 3rd respondent herein.

(c) The current status (CR12) of the 4th respondent reflecting the changes in its shareholding and directorships was shared with the parties' Advocates and filed in Court.

11. All the matters in controversy had thus been conclusively determined save for the appeal preferred by the 1st respondent. There remained no outstanding issue for adjudication a fact expressly acknowledged by Hon. Justice Mabeya in his ruling of 3rd June 2022 wherein he noted inter alia, that: the "Implementation of the court order of 1st October, 2021 would bring the endless litigation that plagues this matter to an end" (page 182 of the record). By 29th July 2022, the final curtain was drawn on what has evidently become a theatre of ceaseless litigation."

It was submitted that the application giving rise to the impugned ruling was filed 103 days after the ruling of Mabeya, J. on the first review application and that the grounds in support thereof "were word for word as those [the 1st respondent relied on in opposition to the appellant's application dated 9th February 2022 seeking the court: adoption of the same report." The

appellant demonstrated this by a tabular representation listing the 1st

appellant's averments in the two instances. He went on to juxtapose, again in tabular-form the findings of Mabeya, J. on the one hand, and the learned judge on the other, the four issues of the unsigned and unsealed report; the parties' consent to appoint RSM; the shareholders giving audited accounts; and on alleged influence by the other directors.

Counsel for the 1st appellant then turned to address the issues arising sequentially. First, they addressed the question whether the learned judge had jurisdiction to *"sit on appeal, modify or overturn"* Mabeya, J's previous decision. Asserting that she did not, they attacked her holding that the RSM's business valuation report was not properly before Mabeya, J. and that his adoption of it could not undo a wrong already done before proceedings to set aside the appointment letter. Citing Article 165(6) of the Constitution and the Supreme Court's holding in ***SAMUEL KAMAU MACHARIA & ANOR Vs. KENYA COMMERCIAL BANK LTD & 2 OTHERS [2012] eKLR***, it was urged that the learned judge had no jurisdiction to sit on appeal over, review, reverse, set aside, modify, overrule, question or interfere with the decision or pronouncements of a judge of concurrent jurisdiction. We were also referred to our decision

in

BELLEVUE DEVELOPMENT CO. LTD Vs FRANCIS GIKONYO & 7 OTHERS and the Supreme Court's ***KENYA HOTEL PROPERTIES LTD Vs. ATTORNEY GENERAL & 5 OTHERS [2022] KESC 62 (KLR).***

Next, they addressed whether the learned judge had jurisdiction *"to review a review order."* Answering in the negative, counsel argued that the issue of the valuation report being unsigned and unsealed had been canvassed before Mabeya, J. in the first review application and **Order 45 Rule 6** of the **Civil Procedure Rule** was a substantive legal bar to successive applications for review. The court was *functus officio* after the first review.

Next was *res judicata*. It was argued that Mabeya, J. was previously addressed on whether to adopt or reject the RSM report and he was persuaded to adopt it, which he did. They, therefore, criticized the learned judge for entertaining, the same issue and holding that Mabeya, J. had not determined its validity. Citing ***NATIONAL LAND COMMISSION Vs. REGISTERED TRUSTEES OF THE ARYA PRATINIDHI SABHA, EASTERN AFRICAN & ANOR***

[2019] KECB 586 (KLR), they urged that *res judicata* extends to

any issue that ought to be put forth for a conclusive and wholesome, rather than piecemeal determination of the rights or objections of the parties. They also placed reliance on the Supreme Court's decision in ***COMMUNICATIONS COMMISSION OF KENYA & 5 OTHERS [2014] KESC 53 (KLR)*** and **Explanation No. 4 to section 7** of the Civil Procedure Rules. They submitted that the learned judge's ruling *"not only breaches the principles of res judicata but has also erected a precedent sanitizing forum shopping and an abuse of the court process at the expenses of the integrity of our honourable courts."* They went further afield to cite ***CELIR LLP Vs. SUMATHI PRASAD BAFNA & ORS [2024]*** where the Indian Supreme Court held that a failure to raise an issue that could be raised in earlier proceedings debars a party from raising the same in subsequent proceedings as there should be an end to litigation and a party ought not to be vexed twice in a litigation for the same cause.

Did the learned judge misapprehend and misapply **section 63(e)** of the **Civil Procedure Act** to wrongly assume jurisdiction? The appellant maintains that once the appeal for adoption of the RSM valuation report was heard and determined,

the High Court

fully discharged its mandate and became *functus officio* so that for the learned judge to reopen, vary and disturb the orders that had already crystallized was *"to descend to a comical farce."* It was submitted that the 1st respondent wilfully considered citing **section**

80 of the **Civil Procedure Act** and **Rule 45(1)** of the **Civil Procedure Rules** because he knew he had exhausted the statutory avenue of review. The provision he came under could not accommodate the kind of prayer he sought and the learned judge was faulted for concluding that the term *"interlocutory"* in **section 63(e)** denotes a temporary order during the pendency of supplemental proceedings, which counsel terms as *"erroneous jurisprudential reasoning"* and *"a fundamental misapprehension"* of the meaning and effect of supplemental proceedings. We were referred to the opinion of Wanjiku Karanja, J. (as she then was) in ***NYAMIRA F,C.S. Vs. CHIEF LAND REGISTRAR & ANOR [2005] eKLR*** in which she stated that **section 63(e)** of the Civil Procedure Act is only of interlocutory application and does not apply when a suit has already been finalized. The learned judge was criticized for paying lip service to our decision in ***TELKOM KENYA LTD Vs. JOHN OCHANDA*** ***[2014] eKLR*** which barred

her from making a

merit-based decisional re-engagement with the case once final judgment had been entered yet going ahead to overturn Mabeya, J's decision and grant the 1st respondent fresh orders masquerading as interlocutory reliefs under section 63(e) of the Civil Procedure Act. Counsel also referred to the Supreme Court case of ***RAILA ODINGA & 2 OTHERS Vs. INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 3 OTHERS [2013] eKLR*** which cited with approval Daniel Malan Pretorius' article ***"The Origins of Functus Officio Doctrine with Special Reference to its Application in Administrative Law"*** (2005) 122 SALJ 832 on finality and conclusiveness of decisions which cannot be reviewed or varied by the decision maker. In setting aside Mabeya, J.'s final orders, the learned judge *"exceeded her authority, resulting in judicial overreach."*

Next the learned judge was called out for holding that the 1st respondent had established a case of unfair prejudice to justify her orders, yet the suit filed and concluded before court was on intended derivative claim under **section 238** of the **Companies Act**. No commercial petition had been filed based on oppression or

unfair prejudice as a required under **sections 780** and **782** of that Act and she therefore had no jurisdiction.

Finally, the learned judge was criticized for making adverse findings against RSM without giving them the right to be heard. It was argued that she condemned them unheard against the cardinal tenets of natural justice and the right to fair hearing under the Constitution.

The appeal was supported by the 3rd respondent whose advocates on record Michael David & Associates filed submissions dated 29.10.23. In so far as they are generally in tandem with what was submitted by the appellant, we need not rehash them at length. They identified the following two issues, which they answered in the affirmative, namely:

1. *Whether the High Court erred in entertaining, the application dated 15th September 20225 as it amounted to a second review and was res judicata.*
2. *Whether the High Court was functus officio after the 3rd of June 2022, as final judgment had been perfected and fully executed.*

Citing ***SAMUEL KAMAU MACHARIA & ANOR Vs. KENYA COMMERCIAL BANK LTD & 2 OTHERS*** (supra), they accused the learned judge of *"arrogating to [herself] jurisdiction exceeding*

that

which is conferred on [her] by law," specifically the Order 45 Rule 6 bar to second reviews. It was submitted that she entertaining the 1st respondent's application of 15.9.23 which, however framed, was an appeal in disguise whereby she purported to rehear and correct Mabeya, J's allegedly erroneous decision contrary to this Court's warning against such in ***NYAMAI & 291 OTHERS Vs. SOUTHERN UNIVERSITY COLLEGE & ANOR [2023] KEELC 21234 (KLR***). Also cited were ***NATIONAL BANK OF KENYA LTD Vs. NDUNGU NJAU [1997] eKLR*** to the effect that a judge having proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law is no ground for review, which deals with an error apparent on the record which must be *"self-evident and not one that requires elaborate argument to establish."*

Counsel faulted the learned judge for treating the matter as though it arose under **section 780** of the Companies Act which was *"a fundamental mischaracterization" as no suit was ever filed under that section, and "parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce ... a decision founded on matters not pleaded is a nullity"* as we stated in ***IEBC & ANOR Vs. STEPHEN MUTINDA***

MULI ***[2014] eKLR***. They

asserted that the High Court *"was not only barred by Order 45 Rule 6 Civil Procedure Rules from entertaining a second review but also lacked jurisdiction to transmogrify the cause into a statutory unfair prejudice petition under the Companies Act."* The learned judge, therefore, entertained a second review application without jurisdiction, and her orders were made *per incuriam* both statutory law and binding precedent.

Citing authorities from this Court and the Supreme Court already referred to in the appellant's submissions, counsel asserted that the learned judge violated both the *functus officio* and *res judicata* doctrines and her reopening the buy-out decree that had been fully executed under the guise of supplemental proceedings offends both jurisdictional finality and the rule of law. The 1st respondent's allegation of negligence, bias, dishonesty and reliance on management figures was a red-herring. Moreover, a view that the valuation was *"unfair"* is not a jurisdictional ground and could only be raised on appeal, not review - and especially of a decree that was already perfected, and the High Court *"could not re- engineer the by-out nine months later."* Counsel submitted to permit repeated reviews would undermine the principle of finality, legal

certainty and expedition as enshrined in **Articles 159(2)(b)** and **50(1)** of the **Constitution**. We were urged to allow the appeal.

Also supporting the appeal was the 4th respondent through submissions filed by its advocates Kemboy Law on 3.11.25. After giving a background of the protracted litigation they made the following assertions in support of the position that the learned judge was not clothed with the requisite jurisdiction to hear and determine the 1st respondent's second review application, namely;

> *(i) The issues raised in that 2nd review application were res judicata in support of which our decision in WILLIAM KOROSS (Legal Personal Representative of Elijah C.A Koross) Vs. HEZEKIAH KIPTOO KOMEN & 4 OTHERS [2015] KECA 906 KLR was cited.*
>
> *(ii) The High Court was functus officio with respect to the valuation undertaken by RSM after the delivery of the ruling of 3rd June 2022 which determined with finality all the issues concerning the valuation of a company. After a confirmation order made on 9.7.22 by Mabeya,*
>
> *J. the 3rd respondent deposited the share purchase sum into the Judiciary Account the Deputy Registrar signed the share Transfer Forms and the 1st respondents share in the company were transferred to the 3rd respondent thereby perfectly the orders of 3rd June 2022. The learned judge therefore irregularly and unlawfully exercised appellate jurisdiction over the decisions of Mabeya, J.*

(iii) *Misapplication of section 63(e) of the Companies Act which, though intended to prevent the ends of justice from being defeated, does not give power to re- adjudicate a matter or sit on appeal over a decision made by a court of coordinate jurisdiction. She thus misapplied the cases of HABIBA SHARUHIRBO Vs. IBRAHIM SHARU HIRBO & ANOR [2021] KEHC 2990 KLR, the TELKOM KENYA LTD (supra) and BELLEVUE DEVELOPMENT COMPANY LTD VS. VINAYAK BUILDING LTD & ANOR [2014] KCHC 5507 (KLR). The learned judge was lambasted for "simply quoting a selective portion of [our] decision in TELKOM KENYA (supra) without providing context and thereby misunderstanding .. and misapplying the same" so that she ended up doing what we had in that case deemed to be impermissible. The company also urged that the learned judge "blindly relied on a selection passage in the BELLEVUE case but failed to differentiate the facts of that case from the facts of the instant case and further neglected to provide the essential context. To them, the learned judge in allowing the 1st respondents application, was not exercising supplemental jurisdiction but impermissibly re-adjudicated and overturned the determination of a judge of equal status."*

(iv) *The 1st respondent did not have locus standi to bring the 3rd review application as he ceased to be a director/shareholder of the company once his shares were transferred to the 3rd respondent in implementation of Mabeya, J's orders. He thus could not bring derivative suit or under sections 238 & 239 of the Companies Act nor seek Ministry protection under sections 780 and 782 as he had no legal interest in the affairs of the company. It prayed that the appeal be allowed and the 1st respondent bear*

the costs.

The 1st respondent opposed the appeal through submissions by H&K Law Advocates dated 8.8.25 which opened with reference to William Howard Taft's statement that next to the right of liberty, the right of property is the most important right guaranteed by the Constitution," as well as William Blackstone's opinion that *"so great moreover, is the regard of the law for private property that it will not authorize the least violation of it, no, not even for the general good of the whole community."* Then followed the background already captured herein.

As to the issues and the law, the 1st respondent protested that its application of 15.9.22 was not a second review application but sought to set aside and/or vary the court's decisions delivered on

3.6.22 which adopted the valuation report prepared by RSM calling the subject matter, legal questions and reliefs sought in the two applications as wholly distinct, he condemned the appellants *"attempt to conflate them [in] a blatant misrepresentation of the procedural history of the matter.*" Citing Indian authorities and **Order 47 Rule 9** of their Civil Procedure Code they urged that the provision only stops a review of an

order that was itself made

during or after a previous review [but] does not stop someone from

filing another review application against the original decree or order.

Counsel denied the contention that the learned judge usurped the jurisdiction of Mabeya, J. because the latter did, as Presiding Judge of the Commercial and Tax Division, *"expressly direct that [she] hear the application dated 15.9.22."* The appellant participated in the hearing of the said application and could not be heard to complain *ex post facto*.

It was denied that RSM were condemned unheard because they were independent experts not parties. ***LONDON UNDERGROUND LTD Vs. WENCHINGTON FUND PLC & OTHERS***

[1998] was cited on the centrality of the independence and neutrality of experts although we must admit struggling to discern the exact relevance of the case to the issue. The learned judge's setting aside of the valuation report of RMS was then defended at great length for having been justified for the various complaints that had been levelled against it in the 1st respondent's application. Those issues go to the merits of the report and we do not consider it necessary to go into them given the specific character of the

grievances presented in the appeal, which are jurisdictional in scope.

Those submissions concluded with a plea that a second valuation, as the 1st respondent sought, would not cause prejudice to the appellant but would in fact be *"the most fair, just and proportionate way to resolve the dispute and restore confidence in the buyout process that was ordered by the court."* We were urged to dismiss the appeal.

At the hearing of the appeal, learned counsel, **Mr. Sagana** appeared for the appellant, **Mr. Lorot** held brief for **Mr. Kibet** for the 1st respondent, **Ms. Jan Mohammed, SC** appeared for the 2nd respondent, while **Mr. Kemboy** appeared for the 4th respondent. There was no appearance for the 3rd respondent notwithstanding service of the hearing notice having been effected on the firm of M. Dawood & Co. Advocates for him. They each highlighted the submissions we have already summarized and we will not repeat the same even though we have perused and considered them with meticulous care.

Having done so, we think that a determination of the following

3 issues should be on dispositive of this appeal, as they are jurisdictional in scope;

(i) Whether the learned judge had jurisdiction to sit on appeal, modify and overturn the previous decision of Mabeya, J.

(ii) Whether the application dated 15.9.22 was a second review and therefore res judicata

(iii) Whether the High Court was functus officio final judgment having been perfected and fully executed.

The first issue, that of the learned judge's seeking to sit on appeal over, modify and overturn the orders of Mabeya, J. a judge of concurrent jurisdiction, has troubled us greatly. As we read the submissions on this aspect of the case, perused the record and considered the tabular juxtaposition of the learned judge's holding on various points against Mabeya, J's prior findings on precisely the same issues, we were struck by the oddity of that mode of proceeding the reason that judges never try to second guess their peers and avoid making pronouncements on matters already pronounced on, less still make orders that effectively reverse or vary those previous orders. Only if they are sitting on appeal over the decisions of lower courts or exercising

supervisory jurisdiction over

subordinate courts and judicial or quasi-judicial bodies and persons can judges overturn orders-made. To alter, modify question or reverse, expressly or by implication, the orders of a judge of co- ordinate jurisdiction and equal status is a strict no-go zone, and a judicial anathema. A High Court judge's supervisory powers under **Article 165(6)** do not extend to fellow judges. No matter how wrong or misguided another judge's orders, rulings or exposition of the law or understanding of the case may be, no judge of equal jurisdiction may make "corrective" orders. To do so would be to engage in blatant and impermissible overreach. We think this point is too plain for serious disputation and the consequence of any judicial adventurism of the sort has to be appellate rebuke for actions without jurisdiction, which are therefore *null* and *void ab initio*.

Whereas the learned judge delved into the question of the validity of the report by RSM principally because it contained an Asset Valuation Report by Lloyd Masika Ltd which was allegedly unsigned, the record shows that the same complaint had been raised by the 1st respondent and Mabeya, J. in his ruling adopting the RSM report made a specific finding that there was, in fact, a

signed copy of the report and valuation of the assets of the company including the land, buildings and 17 aircraft. The learned judge, therefore, effectively purported to set aside and reverse Mabeya, J's finding on the point, which is untenable.

Regarding the consent that appointed RSM, the learned judge in her ruling ordered its setting aside notwithstanding that Mabeya,

J. had been asked to set it aside by the 1st respondent but found that a valid consent did exist between the parties and that the 1st respondent had failed to illustrate any of the grounds to vary or discharge a consent such as fraud, collusion or lack of sufficient material facts at entering the consent. Mabeya, J. found categorically that the 1st respondent had *"failed to prove any foul play on the part of the Defendants and to vide any evidence as to why the valuation is not correct."* The learned judge's diametrically appositive finding is a perfect example of the embarrassment that ensues when a judge gives in to the plea to sit in judgment over findings of a judge of equal jurisdiction.

This same untenable outcome applies to the learned judge's finding that the 1st respondent was unreasonably denied access to the company's audited financial statements for FY 2017 to 2021.

Suffice to say that Mabeya, J. had made a specific finding that there was no substance to those allegations and the 1st respondent had not provided any proof of them

The last example of this unseemly state of affairs relates to the question of alleged influence by the other shareholders over the valuer. Whereas Mabeya, J. sustained the valuation report on finding that the 1st respondent had not provided any proof of the allegations, Njoki Mwangi, J. on her part arrived at a diametrically opposite position that the management which comprised the other shareholders were *"closely involved in the preparation of the report"* because they gave business projections when they should have, ironically, *"stayed at arms length and only provided the audited principal statements and other documents that were going to assist the valuer to arrive at a just decision."*

We think, with respect, that the learned judge fell into avoidable error when she should have seen, plain on the record, that Mabeya, J. had already pronounced himself on precisely the same matter she was invited to adjudicate. She had no jurisdiction to do so, and needlessly courted the accusations of setting a precedent sanitizing forum shopping and an abuse of process.

Indeed, it is precisely to avoid such outcome that the doctrines of *res judicata* and *functus officio*, and the statutory bar to second reviews were designed to avoid.

Starting with the question of a second review, the same is expressly debarred by **Order 45 Rule 6** in these terms;

> ***"6. No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained."***
>
> (Our emphasis)

It is the appellant's complaint that the learned judge acted *ultra vires* and egregiously discharged this clear, binding procedural rule when she entertained the 1st respondent's application dated

15.9.22. The record shows indubitably that after his application dated 30.3.16 seeking permission to bring a derivative suit was dismissed in entirety by Mabeya, J. vide his ruing dated 29.7.21, the 1st respondent filed a new application dated 23.8.21. The said motion was brought under various provisions of the law including, crucially, **Order 45, Rule 1** seeking review and setting aside of the dismissal. An alternative prayer was that the dismissal order of

29.7.21 be substituted with an order that he be bought off after

a

reputable firm valued the company to determine the value of his shareholding and unpaid dividends. Whereas Mabeya, J. in the

ensuing ruling dated 1.10.21 rejected the prayer for review and granting permission to bring a deviation suit, he made order (b) thus;

> "***The alternative prayer is allowed and the ruling and order of 29.7.21 that dismissed the application dated 30.3.16 <u>is hereby reviewed</u> and substituted with an order that the plaintiff be bought off."***
>
> (Our emphasis)

Mabeya, J. proceeded to give timelines for the appointment of the valuer and the valuation was eventually done as we have already addressed in this judgment. It seems to us plain that the application that Njoki Mwangi, J. entertained and granted was most definitely a second review application and therefore incompetent for running afoul the express bar in **Order 45 Rule 6**.

We are unpersuaded by the reliance by the 1st respondent on a decision of the High Court in Calcutta (now Kolkata) India to the effect that second reviews are not prohibited. In the circumstances of the case there was a clear order previously made on review by Mabeya, J., and it was not open to the learned judge to entertain another application to review that order touching on the appointment of a valuer. At any rate, a look at

the second review application reveals that what was sought was not appropriate for

review. The 1st respondent invited the learned judge to go into the substance and merits of the decision of Mabeya, J. and did not seek a merely address any self-evident error on the face of the record. Rather, what was sought required in-depth analysis of the correctness or otherwise of Mabeya, J's decision and would have invited elaborate arguments as in fact it did. It was in every sense an appeal in disguise whereby an allegedly erroneous decision was being re-heard and corrected contrary to this Courts jurisprudence as exemplified in the ***NYAMAI*** and ***NDUNGU NJAU*** decisions

already referred to.

This brings us to the complaint that the learned judge violated the jurisdictional bar of *res judicata* in entertaining and delving into matters that had been conclusively decided by Mabeya, J. The place to begin is the statute itself. The Civil Procedure Act provides in section 7 as follows;

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

Res judicata is a matter of uncommon importance because the Legislature in its wisdom proceeds in one of the few instances in the CPA and rare in all of statute law, to provide some six (6). Explanations, for the better understanding and application of the doctrine. These include Explanations (3) and (4) which we deem relevant to the matter before us. They are that;

> ***"(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.***
>
> ***(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."***

The term *res judicata*, Latin for *"a thing adjudicated [or decided]"* captures the idea that once an issue has been dealt with by a competent court, it is not open to any of the parties involved in the dispute or those claiming under or through them, to raise the same issue so decided in those proceedings by way of a subsequent case or re-agitation of that same issue. It is grounded on finality of determination thus bringing an end to litigation while creating certainty on issues in dispute and assuring rest from vexation to the parties. It is the Law's way of

saying. *“You had your day in court*

to ask all your questions and say your all on that subject, and you got your answer. Now live with that answer and forever keep your peace."

Blacks Law Dictionary 10th Edn. at P1504 defines res judicata as;

> ***"1. An issue that has been definitively settled by judicial decision.***
>
> ***2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim or any other claim arising from the same transaction or series of transaction and that could have been – but was not raised in the first suit. The three essential elements on the merits are;***
>
> *(1) An earlier decision on the same.*
> *(2) A final judgment on the merits, and*
> *(3) The involvement of the same parties, or parties in privity with the original parties."*

The learned authors go on to cite this passage from Prof. Charles Alan Wright's **The Law of Federal Courts** (5th Ed.1994) at P722-23;

> ***"Res judicata has been used in this section as a general term referring to all of the ways in which one judgment will have a binding effect on another. That usage is and doubtless will continue to be common, but it lumps under a single name two quite different effects of judgements. This first is the effect of foregoing any litigation of matters that never have been litigated because of the determination that they should have***

been advanced in an earlier suit. The second is the effect of foreclosing re-litigation of matter that have once been litigated and decided. The first of these, preclusion of matters that were never litigated has gone under the name true res judicata or the names 'merger' and bar. The second doctrine preclusion of matters that have since been decided, has usually been called collateral estoppel.' Professor Allan Vestal has long argued for the use of the names 'claim preclusion and 'issue preclusion for these two doctrines (Vestal Rationale of Preclusion, 9 St. Louis U. L.J. 29 (1964) and this usage is increasingly employed by the courts as it is by Restatement Second of Judgments."

It is interesting that, properly understood, true *res judicata* involves the bar or preclusion of matters that were never litigated, which is the antidote to the scourge of piecemeal litigation or litigation by instalments which courts must set their face firmly against. This is the essence of the Henderson Principle' about which counsel for the appellant drew our attention to the highly persuasive decision of the Indian Supreme Court in ***CELIR LLP Vs. SUMATHI PRASAD BAFNA AND OTHERS*** (supra)

"The Henderson Principle, in the same manner as the principles underlying res judicata is intended to ensure that grounds of attack or defence in litigation must be taken in one of the same proceeding. A party which avoids doing so does it as its own peril …. In holding that a matter ought to have been taken as a ground of attack or defence in the earlier proceedings, the court is indicating that the matter

is of such a nature and character and bears such a connection with the controversy in the earlier case that the failure to raise it

in that proceeding would debar the party from agitating it in the future. The doctrine itself is based on public policy flowing from the age-old legal maxim interest reipublicae ul sit furis litium' which means that the interest of the State there should be an end of Litigation and no party ought to be vexed twice in a litigation for one and the same cause." *(Emphasis added)*

Our own Supreme Court has spoken of *res judicata* in

COMMUNICATION COMMISSION OF KENYA & 5 OTHERS Vs. ROYAL MEDIA SERVICES LTD & 5 OTHERS (SUPRA) as follows;

"[317] The concept of res judicata operates to prevent causes of action, or issues from being re-litigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings

…

[319] There are conditions to the application of the doctrine of res judicata:

i. The issue in the first suit must have been decided by a competent Court;
ii. The matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and
iii. The parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title."

We need only cite our own decision in ***KOROSS Vs. KOMEN***

(supra) to underscore that the law on *res judicata* in this country

and the applicable principles governing it is and the rationale

underpin is, as righty pointed out by learned counsel for the company, quite settled. In that case, we stated the following which we reiterate;

> ***"37. With all due respect, we very much doubt that the distinctions the learned judge referred to can hold. Res judicata, which means, literally and simply 'the case is decided is embodied in Section 7 of the Civil Procedure Act, 2010 in peremptory exclusionary terms;***
>
> *'No court shall try any suit or proceeding in which the matter in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.'*
>
> ***38. The philosophy behind the principle of res judicata is that there has to be finality; Litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.***
>
> ***39. Speaking for the bench on the principles that underlie res judicata, Y.V. ChandraChud J in the Indian Supreme Court case of LAL CHAND Vs. RADHAKISHAN, AIR 1977 SC 789 stated and we agree;***
>
> *'The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also*

founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a

multiplicity of proceedings involving determination of the same issue.'"

Applying the principles we have referred to herein, there really cannot be escaped the self-evident conclusion that the 1st respondent's application dated 15.9.22 raised matters, that were *res judicata*. As is clear from the record, what was sought and the grounds upon which it was sought had been fully agitated before Mabeya, J. when dealing with the appellant's application dated 9.2.22 seeking adoption of the RSM valuation report and the **1st respondent to transfer his 25% there is in the copy it determined value of Kshs.320,912,500.**

The 1st respondent filed a detailed replying affidavit in opposition to that application contending, in relevant part, that there was a defective report on account of not being signed or sealed by the author; RSM was influenced by the other shareholders; he was denied access to the audited financial report, and the report did not meet international accounting standards. The 1st respondent made a specific request that the court do appoint a different valuer to undertake a fresh valuation.

Mabeya, J. considered those grounds of objection to the RSM

report and, not persuaded by them, he proceeded to reject the

plea

for a fresh valuation by a different valuer. He adopted the RSM report as an order of the court and ordered that the 1st respondent transfer his 25% shareholding in the company to the 2nd respondent upon receipt of the sum of Kshs. 320,912,500 being the established share of his holding.

Given Mabeya, J's engagement with and decision on those points raised in the 1st respondent's replying affidavit, we have no difficulty finding that it was wholly impermissible for the Njoki Mwangi, J. to entertain the application dated 15.9.22 which was grounded on the very same averments. The issues sought to be urged were most definitely *res judicata* and it matters not that they were now being raised as grounds for setting aside the RSM report while they had previously been raised as objections to the adoption of the same report. We think, with respect, that the learned judge fell into error in accepting the 1st respondent's contention that his application, brought 103 days after Mabeya, J's ruling of 3.6.22, was different and distinct from what was previously ruled on when, in actual fact, the two were the same in substance and detail. The distinction sought to be drawn was more apparent than real, a mere phantom and a chimera, a paint job calculated to deceive.

This kind of scenario is what led Kuloba, J. to state in ***MWANGI NJANGU Vs. MESHACK MBOGO WAMBUGU & ANOR (HCCC NO. 2340 of 1991]*** (unreported);

> ***'If a litigant were allowed to go on forever re-litigating the same issue with the same opponent before Courts of competent jurisdiction, merely because he gives his case some cosmetic face-lift on every occasion he comes to a Court, then I do not see what use the doctrine of res judicata plays.'"***

We conclude on the issue of *res judicata* with these our words from ***KOROSS Vs. KOMEN***, which are as apt here as they were there:

> ***"44. That the 1st respondent and his alleged co-defendants were allowed to engage the plaintiff and the appellant in endless rounds of this litigation for decades after the issue had been determined by Scriven J is not particularly complimentary of our courts and clearly amounted to a vexatious abuse of process. The learned judge (and his colleagues before him) ought to have put a stop to the rigmarole at the earliest opportunity that presented itself. In failing to do so he erred and in entertaining the counterclaim and rendering a second judgment while well-aware of the existence of Scriven J's judgment of 2nd April 1980, he acted on wrong legal principles thus inviting our interference as held in a long list of authorities including EPHANTUS MWANGI Vs. DUNCAN MWANGI***

WAMBUGU [1985] eKLR cited to us by counsel for the respondents.

45. As res judicata constitutes a mandatory bar that injuncts and precludes any fresh trial or reconsideration of a concluded issue (See this Court's

decision in NGUGI Vs. KINYANJUI &3 OTHERS, [1989] KLR 146 where Apaloo JA referred to a later reference of a concluded issue to arbitration as "unorthodox proceedings that effectively reversed an earlier judgment of the High Court "by the back door", which could aptly be applied to this case) we find and hold that the learned judge's decision was on that basis also a nullity and cannot be countenanced."

Given the findings we have come to, which are dispositive of this appeal, we shall say very little on *functus officio*, another doctrine of jurisdictional import. Simply put, once a judicial officer or the court has performed his office by rendering a decision on a dispute before him, his role is spent, his duties and functions having been fully completed and accomplished and he is bereft of any further authority or competence regarding the subject. Having established from the record that Mabeya, J. had rendered a decision on the matters that were subsequently brought before the learned judge, which were then *res judicata*, the conclusion is inescapable that the court was *functus officio* and she had no jurisdiction to entertain the latter application. This is especially so because, from the record, the orders of Mabeya, J issued on 3.6.22 were perfected and fully implemented by 29.7.22 and there was nothing left for the court to engage with in an

adjudicatory sense.

Given the law on *functus officio* as expressed by this Court in ***OCHANDA*** (supra) and the Supreme Court ***RAILA & OTHERS Vs. IEBC & 3 OTHERS*** (supra) the learned judge erred in hearing the

application absent jurisdiction when she ought to have downed her tools and not take a further step because jurisdiction is everything, in the phraseology of Nyarangi, JA in the famed ***OWNERS OF THE MOTOR VESSEL LILLIAN 'S' [1989] KLR 1*** which is also authority

that jurisdiction cannot be conferred by consent, acquisition or waiver as the 1st respondent seems to suggest out of the appellant and the other respondents' having participated in the proceedings before the learned judge. Their participated was, in fact, in the form of a vigorous objection to that court's jurisdiction.

In all the circumstances of the case we find that the learned judge's acceptance that **section 63(e)** of the **CPA** donated jurisdiction to her to deal with the application as a supplemental proceedings was as erroneous as her reliance on passages from our decision in ***OCHANDA*** and Gikonyo, J's sentiments in the ***BELLAVUE*** case. Neither case was authority for the learned

judge

to assume a non-existent jurisdiction to deal afresh with an application the content whereof had been exhaustively dealt with by

Mabeya, J. That was an unfortunate case of second-guessing her fellow judge and reversing him when she had no jurisdiction to do so. Her ruling was in no way a giving effect to the ruling of Mabeya,

J. Rather it was a most audacious reversal and setting aside of the findings and final orders of Mabeya, J. and constitutes a reversible error.

The upshot of our consideration of this appeal is that it is for allowing. The ruling and order of Njoki Mwangi, J. dated 25.4.23 is accordingly set aside. We substitute therefor an order that the 1st respondent's motion dated 15.9.22 be struck out with costs.

The 1st respondent shall bear the costs of this appeal.

Dated and delivered at Nairobi this 13th day of March, 2026.

P. O. KIAGE

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..... JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

..... JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR