

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. E276 OF 2024**

**BETWEEN**

**ISAAC SILA.....**  
**PETITIONER**

**VERSUS**

**KIMISITU INVESTMENT COMPANY LIMITED .....**  
**RESPONDENT**

**AND**

**SIMON MBURU..... 1<sup>ST</sup>**  
**INTERESTED PARTY**

**PATRICK ALUBBE ..... 2<sup>ND</sup>**  
**INTERESTED PARTY**

**J U D G M E N T**

**Introduction**

1. The Petition dated 3/6/2024 is supported by the Supporting affidavit of the Petitioner, ISAAC SILA of similar date, his further and supplementary affidavits sworn on 20/2/2025 and 26/3/2025 respectively.
2. In opposition, the Respondent (a limited liability company) and, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Party, all represented by Adra Advocates LLP filed Grounds of Opposition dated 20/11/2024 and a Replying affidavit of even date.

3. The Petitioner challenges the decision of the Respondent's Board of Directors to disqualify him from participating in the election of the Respondent's Board of Directors which were scheduled to be held on 20/4/2024 to replace two directors who were retiring on the grounds that vetting and nomination criteria applied by the Respondent not only contravened express constitutional and legal requirements, but was also neither provided for nor envisaged by the Respondent's Articles of Association that governs election of directors. The core of the Petition is that the Respondent failed give him notice of the allegations made against him or afford him an opportunity to be heard before disqualifying him from the elections.
4. The Petitioner thus seeks the following reliefs:
  - i. A Declaration that the Respondent's action of disqualifying the Petitioner from presenting himself as a candidate for elections of Director of the Respondent held on 20th April 2024 was a violation of Article 47 of the Constitution hence null and void.***
  - ii. A Declaration that the Respondents action of disqualifying the Petitioner from presenting himself as a candidate for the elections of Director of the Respondents held on 20th April, 2024 was a violation of Article 36 of the Constitution hence null and void.***
  - iii. As a consequence of Prayer (i) & (ii) the elections of the Respondents elections of***

***Directors held on 28th April, 2024 are hereby declared null and void.***

***iv. Costs.***

***v. Any other relief this Court may deem fit and just to grant.***

### **PETITIONER'S CASE**

5. The Petitioner deposed that he is a member and shareholder of the Respondent. He deponed that **Clause 83 of the Respondents Articles of Association** provides that the Election of Directors will be *held after every year during an Annual General meeting*. However, shareholders in a properly Constituted General meeting can shorten or lengthen the tenure of a director if the need arises as long as the reasons for shortening or lengthening the tenure of a Director for Two (2) years be explained in the General meeting and supported by a simple majority in the meeting.
6. He averred that **Clause 84 of the Respondents Articles of Association** provides that the candidate for elections of Director should be proposed and seconded by shareholders of the company while **Clause 86** provides that elections shall be by a show of hands and the candidates with the highest number of votes will be considered the winner.
7. He contended that the Respondents Articles of Association do not contain any provision for vetting of candidates. He

exhibited a copy of the Memorandum and Articles of Association of the Respondent "**IS1**" to buttress this position.

8. He further deponed that the Respondent sent a notice (*exhibit IS 2*) to all its shareholders informing them that two (2) Board of Directors positions would fall vacant in the upcoming *13th Annual General meeting (AGM) to be held on 20th April 2024* and that these vacancies were to be filled in the same meeting and thus invited applications from Interested and qualified candidates from shareholders to express Interest and get an opportunity to "**nominated**" as a Board member.
9. The Petitioner stated that the Notice specified that the candidates were required to undergo a nomination to be selected as members of the Board as it was the Respondents Board Policy to balance the skills and experiences of her directors considering special requirements of the company. Further, the Notice specified the Academic qualifications and personal qualities for the candidates.
10. The Petitioner stated that submitted his application (*annexure 'IS3'*) for the position of Director on 12th March, 2024.
11. He deponed that on 9th April 2024, he received a letter (*annexure 'IS4'*) from **Lumallas Achieng' & Kavere Advocates** on behalf of the Respondent informing him that

he had been disqualified from presenting himself as a candidate for elections as a director for the following reasons;

- a. *An internal audit report on the Ngelani Project, alleging that certain transactions transpired during my tenure and under my advisement.*
- b. *That the Board was still investigating policy and prudence lapses in the project and intended to sanction those found culpable.*
- c. *That my continued presence on the Board during investigations posed a conflict of interest.*

12. The Petitioner explained that he responded through a letter from his Advocates dated 11<sup>th</sup> April 2024 (*annexure 5*) indicating that he was neither served nor aware of *the alleged audit report* and asked for an opportunity to defend himself. He stated that no opportunity was accorded to him in that regard. He swore he was never issued with any show cause letter prior to this communication.

13. The Petitioner averred that on 20<sup>th</sup> April 2024, the Respondent held its Annual General meeting in which Item 6 of the agenda (*annexure IS 6*) was the retirement and Election of Directors that stated as follows:

*i) "Mr. Simon Mburu retires by rotation in accordance with*

*Articles 72 and 105 of the Company's Articles of Association*

*and being eligible offers himself for re-election.*

*ii. Mr. Patrick Alubee retires by rotation in accordance with*

*Article 72 and 105 of the Company's Articles of Association.*

*iii. Mr. Chris Miyinzi Mwingu offers himself for election as Director of the Company."*

14. The Petitioner contends that the Respondents action of purporting to conduct a vetting of the Petitioner's application to be presented as a candidate for elections as Director without giving the Petitioner a chance to participate in the vetting process is a violation make of the Petitioners Constitutional Right to Fair Administrative Action under Article 47 of the Constitution. He further goes on to protest that the decision to disqualify the Petitioner from participating in the elections of Director of the Respondent on 28th April, 2024 is a violation of the Petitioners Constitutional rights under Article 47 and 36 of the Constitution.
15. The Petitioner addressing the assertion in the Respondent's response that this is a mere commercial dispute requiring this Court invoke the doctrine of constitutional avoidance refuted the position taken by the Respondent.
16. He contended that the Board of Directors Charter, which provides for 'Nomination Committee' also *makes reference under annexure 1* thereof to the **Capital Markets**

**Authority Guidelines on Corporate Governance** - Gazette Notice 3362, and provides among others, that the functions of this *Committee* include conducting a *formal, and transparent procedure in nomination* of Directors of the Board (*annexure 'IS 1 & 2' of the Petitioner's Further affidavit*).

17. He deposed that at the time of his disqualification, no determination of any wrongdoing had been made against him and the Respondent failed to establish any direct or clear conflict of interest to justify his disqualification under clause **2.1.5 of the Capital Markets Authority Guidelines** and thus maintained the decision to bar him was arbitrary and a violation of Article 27 that guarantees him equal benefit and protection of the law.
18. He further asserted disqualification violated his human dignity under Article 28 as it was based on unverified audit report coupled with refusal to affording him an opportunity to be heard, thereby depriving him the dignity of a fair process.
19. He thus maintained that there is clear evidence of violation of his constitutionally guaranteed rights that properly fall within the exercise of this Court's jurisdiction under Article 22, 23 and 165 (3) (b) of the Constitution.
20. The Petitioner explained that he worked as the Operations officer of the 1<sup>st</sup> Respondent and his job description entailed identification of potential land for acquisition as the

Respondent's primary business was the acquisition and sale of land for profit.

21. He clarified that after identification of the property, would then prepare a project proposal to the General Manager for approval and presentation to the Investment and Business Development Committee of the Respondent Board of Directors after which the Investment and Business Development Committee (IBDC) would conduct due diligence including visiting the property, meeting the seller, negotiating the prices and once satisfied, table the report to the full Board of Directors for approval
22. He disclosed that the Board of Directors of the Respondent would then approve the IBDC report and the property would be purchased.
23. He stated this procedure actually complied with in relation to Ngelani project as well as all other projects of the Respondent as the it was procedurally approved and oversighted by the Respondent's General Manager, IBDC and Board of Directors as per the procedures of the Respondent.
24. He contended that it was unprocedural that the same Board of Directors that approved the project that investigating that very project and further that, the Respondent's Board of Directors was never disqualified from their positions as directors pending the alleged investigations into the project.

25. He deposed that he was the only one who was affected by the alleged investigations into the Ngelani project without any communication from the Respondent or documentation to supporting the alleged audit.
26. The Petitioner stated that he handled over 25 projects during his tenure as the Operations Officer of the Respondent without any allegations of impropriety, including the Ngelani Project, ever being made against him.
27. He thus maintained that the decision to clandestinely disqualify him from vying for the directorship was unsubstantiated, unprocedural and a violation of his right to a fair hearing and an attack to his integrity
28. He deposed that the Respondent has now changed tact and has withdrawn the allegations against him, in that on 21<sup>st</sup> March 2025, (*annexure 'IS 3' of the Supplementary affidavit*) he received an email from the Respondent together with a letter stating as follows:

*"Please note that the investigation into the acquisition of L.R No. 8914/ 208 Ngelani ('the Property') is now complete. The Board has resolved not to pursue any further action."*

29. He asserted that the Respondent's Board's resolution to take no further action confirms that there was no wrongdoing on his part, and therefore, the disqualification from participating in the said elections was malicious, unlawful and unconstitutional as it did not only adhere to the Articles and

Memorandum of Association of the Respondent but also the Capital Markets Authority Guidelines on Corporate Governance and the Constitution.

30. He states that following the unfair disqualification, he has suffered mental anguish arising from public humiliation and reputational damage caused by the baseless allegations, unwarranted legal costs, defending himself against unsubstantiated claims, the loss of opportunity to serve as a Director of the Respondent and constitutional violations already alluded to in this Petition.

### **RESPONDENT AND THE 1<sup>ST</sup> AND 2<sup>ND</sup> INTERESTED PARTIES' CASE**

31. In response to the Petition, the Respondent and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties filed grounds of Opposition dated 20/11/2024 and the Replying affidavit of even date.

32. The Grounds of Opposition were as follows:

1. *The Petition offends the doctrine of Constitutional Avoidance which espouses that a court will not determine a constitutional issue when a matter may be properly decided on another basis.*
2. *The Petition discloses nothing more but a pure commercial dispute pertaining to the Respondent's internal affairs and in particular, the Respondent's vetting process.*
3. *The Respondent's internal affairs are governed by the provisions of the Company's Act No. 7 of 2015 and the Respondent's articles of association.*

4. *The Respondent's articles of association are a binding contract between the Respondent and all its shareholders, and any claim should be brought under the principles of contract law.*
  5. *The Petition does not raise constitutional questions, rather it is a commercial dispute that can be properly decided by way of an ordinary plaint.*
  6. *The Honourable Court therefore lacks the jurisdiction to determine the Petition.*
  7. *The Petition is frivolous, vexatious and an abuse of the Honourable Courts time and process and ought to be struck out with costs to the Respondent and the 1st and 2<sup>nd</sup> Interested Parties.*
33. The replying affidavit of the Respondent was sworn by CAREN KUTTO, the Administration and Digital Marketing Officer of Kimisitu Investment Company PLC (the Respondent).
34. She restated that the Petition discloses nothing more but a pure commercial dispute pertaining to the Respondent's internal affairs and in particular-the Respondent's vetting process hence the Petition offends the doctrine of constitutional avoidance.
35. The Respondent confirmed that it notified its shareholders that two Board of Directors Positions were to fall vacant in the Annual General meeting that was to be held on 20 April 2024 and invited any interested and qualified candidates to express interest and get an opportunity to be nominated as

a board member ( *per exhibit CK 1*), which disclosed the criteria with which all the candidates were to be subjected to and included- academic and professional qualifications as well as personal qualities which included inter alia, that the Candidate had to meet the requirements of Chapter six of the Constitution.

36. The deponent went further to state that following the notification of vacancy, the Petitioner submitted his application dated 12 March 2024 for consideration and nomination for the position of Director (CK 2).
37. The Respondent notes that, from the Petitioner's own application document, the Petitioner was fully aware that all applicants had to undergo nomination and vetting process based on disclosed criteria in the vacancy notice, prior to presentation to shareholders elections. She stated:

*"... From the Petitioner's application, he understood that all the applicants had to go through a nomination and vetting process against the criteria disclosed in the vacancy notice prior to their presentation to shareholders for Director's election. In his application he wrote:*

***"Thanking you in advance and hoping to be given an opportunity to present myself to the shareholders during the forth-coming AGM..."***

38. The Respondent confirmed that the process of appointment of Directors at the Respondent company is well laid out under Clause 83 of the Respondent's Article of Association dated 4 August 2010 (*exhibit CK 3*) which provides inter alia:

*“83. The Election of Directors will be held after every year during an Annual General Meeting (AGM) but the Shareholders in a properly constituted General Meeting can shorten or lengthen the tenure of a director if the need arises. Reasons for shortening or lengthening the tenure of a director from two years must be explained in the General Meeting and supported by a simple majority in the meeting.”*

39. The Respondent however noted that the Petitioner had failed to disclose that the process of appointment of Directors is also laid out in the Respondent’s Board of Directors Charter (the Charter) -*exhibit CK 4* where under chapter 2 of the Charter- clause 2.4 that provides:

**“2.4 There shall be clear formal and transparent procedure for nomination and appointment of new Directors to the Board.** *In this regard, the Board shall:*

*all Directors will be required to submit themselves for election by shareholders by rotation periodically, but in any event within a period not exceeding two years.”*

40. The deponent further disclosed that the **Notice of Director’s vacancy by the Respondent made reference to the Respondent’s Board Charter** and informed the shareholders that all candidates were to undergo a nomination and election process to be selected as members of the board as follows:

*“The candidates will go through nomination and election process to be selected as members of the Board, it is the Kimisitu Board Policy to balance the*

*skills and experiences of her directors yet considering unique or special requirements of the company.”*

41. Moreover, the Respondent went on to state the **chapter four** of the ‘The Charter’ provides for the Roles and Functions of the Board which include inter alia:

*‘4.1.3 (b) Ensure that, through a managed and effective process, Board*

*appointments are made that provide a mix of proficient Directors, each of whom is able to add value and bring independent judgment to bear on the decision-making process.’*

42. The Respondent deposed that ‘**The Charter**’, under **chapter eleven**, provides for Board Committees and their terms of reference. The Charter provides for a minimum of five standing committees of the Board, with one of the Committees being the **Nomination Committee**.

43. The Respondent pointed out that **annexure 1 of the Charter**, subscribes to **the Capital Markets Authority Guidelines on Corporate Governance Gazette Notice No. 3362**. (the Guidelines). These Guidelines under clause **2.1.5** provide for the appointments to the Board as follows:

*“There should be a formal and transparent procedure in the appointment of Directors to the Board and all persons offering themselves for appointments, as Directors should disclose any potential area of conflict that may undermine their position or service as Director.”*

44. She went further to cite Clause 3.1.3 which provide for the appointment of a nominating Committee with the

responsibility of proposing new nominees for the Board as well as assessing the performance and effectiveness of Directors of the company, and further provide the responsibilities of the nomination committee which includes *inter alia* that:

*“c. The nomination committee shall consider only persons of calibre, credibility and who have the necessary skills and expertise to exercise independent judgment on issues that are necessary to promote the company’s objectives and performance in its area of business.”*

45. The Respondent maintained that it was based on all the foregoing provisions that the Respondent’s nominating committee, upon receipt of the applications, vetted all the applications against the disclosed criteria and based on the findings of the vetting process, determined that it would not proceed with the Petitioner’s application and the Petitioner was informed of the decision of the Nomination Committee through a letter dated 9<sup>th</sup> April 2024 (*exhibit CK 5*) from its then Advocates, Lumallas Achieng & Kavere Advocates which stated *inter alia* as follows:

- a. *“The internal Audit Report on the Ngelani Project reveals that the transaction under review transpired during your tenure and under your advisement on some aspects.*
- b. *That the company is investigating related lapses in policy and prudence and may propose sanctions against those found culpable for the financial loss occasioned by the project.*

c. *That your being on the Board during the said investigations poses a conflict of interest.”*

53. The deponent disclosed that the Petitioner in his application for the Director’s post, indicated as part of his experience that he worked as an Operations Officer for the Respondent from 2011 to March 2020 and his duties included pension matters, shares registration and company secretarial, finance, accounts, human resource and administration, sales and marketing, real estate, public relations, investment and portfolio management, legal and customer service. Further, in his performance review of 2016, he had indicated that he was involved in the Ngelani Land project which did not perform well.
46. The Respondent had also issued the Petitioner with a letter indicating its concern over his performance in 2017 (see *exhibits CK 6 & 7*).
47. The Respondent deposed that due to the poor performance of the Ngelani project, which was admitted by the Petitioner, the Respondent tasked its internal auditor to audit the project and share its findings as part of its investigations to determine the reasons for the poor performance.
48. The Respondent explained that due to the pending investigations and the potential conflict of interest that the Petitioner’s election as Director would have posed to the investigations, the nominating Committee, in performing its role to promote the independent judgment of all nominated candidates, decided not to proceed with the Petitioner’s

candidacy. The Respondent averred that the Nominating Committee's decision not to proceed with the Petitioner's application was thus communicated to him with the reasons given for the decision and advising the Petitioner that it would be prudent to await the outcome of the ongoing investigations and be cleared first prior to offering himself for the election in the best interest of the Company.

49. The Respondent stated that upon conclusion of the nomination and vetting process, the Respondent presented the 1st and 2nd Interested Parties to the Shareholders during the Annual General Meeting held on 20 April 2024, to be elected as Shareholders. The details of the new directors were forwarded to the Registrar of Companies and the register was updated accordingly (*per CR 12- exhibit CK 8*).
50. The Respondent reiterated and affirmed that it duly complied with the processes provided in its own internal documents that govern the elections of its Board of Directors, namely: the *Articles of Association, the Board Charter and the Guidelines by the Capital Markets Authority* in arriving at the decision to bar the Petitioner, in that:
- a. *It invited its shareholders to apply for the vacant position of Director of the Company and set out the qualifications required on the notice.*
  - b. *The Board of Directors constituted a nominating Committee as per the Charter, with powers to determine the appointment criteria which was made known to all applicants and against which all applicants were assessed.*

- c. *After the assessment, the Petitioner was informed of the committee's decision and the reasons for the decision.*
- d. *There was a clear formal and transparent procedure for the nomination and appointment of the Directors and all the applicants were aware of the procedure.*

51. The Respondent thus refuted the Petitioner's contention that the Respondent violated his Right to fair administrative action and freedom of association terming the allegation false in the light of the fact that the Petitioner was given a chance to tender his application, and the nomination and vetting process was clear and transparent, and the Respondent adhered to it. The Respondent clarified that the decision by the Respondent does not Bar the Petitioner from participating in future elections of Directors, after the outcome of the investigations, cleared him.
52. The Respondent deposed that the Petitioner on 22/4/2024, and prior to filing the instant Petition, the filed a Judicial Review division Review Application, (*exhibit CK 9*), seeking to quash the Respondent's decision not to proceed with the Petitioner's application. The Respondent thus accuses the Petitioner of forum shopping contending that the Petitioner has deliberately avoided the appropriate avenue of settling disputes of this nature, which is by filing a plaint as the alleged grievances are founded on the law of contract.

### **PETITIONER'S SUBMISSIONS**

53. The Petitioner filed written submissions dated 12/5/2025 through Miller & Company Advocates. This Petitioner

contended the decision to disqualify him from vying for election as a Director of the Respondent during its Annual General Meeting held on 20<sup>th</sup> April 2024 was arrived arbitrarily, without lawful justification, and in a manner that violated the Petitioner's constitutional rights, including the right to fair administrative action, equality and freedom from discrimination, human dignity, and freedom of association.

54. Counsel reiterated the fact that the Petitioner is a shareholder and member of the Respondent, a public company registered under the Companies Act, 2015 whose affairs are governed by its Articles of Association subject to oversight by shareholders through annual general meetings and directorial elections.
55. He submitted that through a notice to all its shareholders, the Respondent notified that two Board or Directors positions would be falling vacant and invited interested and qualified shareholders to submit their nominations for election to the Board of Directors during its Annual General Meeting scheduled for 20<sup>th</sup> April 2024. The Petitioner, being qualified and interested, he submitted his nomination in accordance with the stipulated timelines.
56. However, on 9<sup>th</sup> April 2024, the Petitioner was informed by a letter on behalf of the Respondent that his candidature had been disqualified by the "vetting committee," purportedly due to an adverse mention in the "Ngelani Project Report" which despite multiple requests, the Petitioner was not

furnished with or any formal communication detailing the grounds of disqualification conveyed.

57. Further, that no hearing was conducted thus the Petitioner was denied a fair opportunity to be heard, contrary to the dictates of Article 47 of the Constitution. In addition, that process was overseen and influenced by individuals with personal stakes in the outcome of the election, including the Interested Parties who were candidates in the election.
58. Counsel submitted that the nomination and vetting process that led to the disqualification of the Petitioner had no legal foundation both under the Respondent's Articles of Association, the Companies Act, or Regulatory framework. He argued that the Articles of Association (Clauses 83-86) do make any provision for disqualification of candidates prior to the AGM, which vest the electoral power solely on the shareholders hence in purporting to bar the Petitioner from the elections, the Respondent acted ultra vires its Articles and violated the principles of good corporate governance and constitutionalism under Article 10 of the Constitution.
59. Counsel submitted that the Petitioner was selectively and discriminatorily targeted, in that, other individuals similarly alleged to have been involved in the Ngelani Project, comprised the current board members who were permitted to contest the elections without any vetting thus the Petitioner's constitutional right to equality under Article 27, dignity under Article 28, and freedom of association under Article 36 were violated. Counsel submitted that the process

to lock the Petitioner out of the election involved his direct competitors, namely, the 1st and 2nd Interested Parties, hence, creating a clear conflict of interest that rendered the process biased, unreasonable, and procedurally unfair.

60. The Petitioner submitted that the culmination of this unlawful and unconstitutional process was the conduct of the Respondent's election of Directors on 28<sup>th</sup> April 2024 where the Petitioner was excluded from participation.
61. The Petitioner further argued that the decision to bar him from contesting in the elections was based on vague and unproven allegations connected to the so called "*Ngelani Project Report*," which he had neither seen nor had he been afforded an opportunity to respond.
62. Counsel submitted that on 21st March 2025, the 1st Respondent issued a letter to the Petitioner exonerating him from any wrongdoing in relation to the '*Ngelani Project*' which he argued confirmed that the allegations underpinning the disqualification were baseless, and so was the process leading to the exclusion was factually and legally unfounded and a grave abuse of power and breach of procedural fairness.
63. Counsel further isolated and explicated the following specific issues:

- i) *Whether the disqualification of the Petitioner was in violation of his right to fair administrative action under Article 47 of the Constitution?*
- ii) *Whether the disqualification of the Petitioner was discriminatory and in contravention of Articles 27 and 28 of the Constitution?*
- iii) *Whether the Respondents acted ultra vires in disqualifying the Petitioner'?*
- iv) *Whether the election held on 28<sup>th</sup> April 2024 is null and void?*
- v) *Whether the Petitioner is entitled to the reliefs sought?*

64. Concerning the violation of right to fair administrative action under Article 47 of the Constitution, Counsel recited the provisions of Article 47 (1) & 47 (2) of the Constitution and also made reference to Section 4 (3) of the Fair Administrative Action Act, '2015, arguing that Section 4(3) imposes a mandatory duty on administrators to provide notice, reasons, disclosure of adverse material, and an opportunity to be heard before taking any adverse action and argued that the Petitioner was subjected to an opaque vetting process and disqualified from contesting as a Director in the elections held on 28<sup>th</sup> April 2024 as the Petitioner was never shown or asked to comment or any inquiry conducted on the "Ngelani Project Report" which was the reason for his disqualification. Counsel argued that this was a fundamental omission that contravened both procedural fairness and the substantive fairness. Counsel relied on the decision of **Dr Associates Ltd v Capital**

**Markets Authority & Another (2012/ eKLR** where it was held that failure to give notice of the allegation, an opportunity to respond and reasons for the decision rendered the proceedings procedurally unfair. Further reliance was placed on **John Florence Maritime Services Limited & another Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)** where the Court cited with approval the decision of *Evans Odhiambo Odero & 4 others v Ferdinand Ndunqu Waititu & 4 others Petition Noo 18 of 2014* as consolidated with Petition No 20 of 2014 (2014/ eKLR in arriving at similar finding.

65. The Petitioner further argued that the process was controlled by his competitors hence was neither fair nor objective and cannot therefore be described as having been arrived at based on fair and transparent criteria, applied by a neutral and lawfully constituted body. Counsel thus submitted that the disqualification of the Petitioner was unlawful, unreasonable, procedurally unfair, and contrary to both the Constitution and statute.
66. On the question of whether the disqualification of the Petitioner was discriminatory and in contravention of Articles 27 and 28 of the Constitution, Counsel upon restating the provisions of the two cited Articles that guarantee every person the right to equal protection and benefit of the law and inherent dignity of every individual to be respected and protected respectfully; contended that the Petitioner was the only person that was disqualified from participating in

the election of Directors held on 20th April 2024, allegedly because he was adversely mentioned in connection with the "Ngelani Project Report " yet other candidates, including current and former board members, who were also allegedly linked to the same project were allowed to contest unimpeded and no explanation for the Petitioner's being selectively targeted for disqualification while others in similar circumstances had been cleared was given. Counsel argued that the differential treatment, without any lawful or rational justification, constituted unlawful discrimination.

67. The Petitioner submitted that the announcement and implementation of his exclusion was based on vague and unverified allegations and this cast him in a negative light before fellow shareholders and the public thereby inflicting reputational damage that undermined his personal and professional integrity. The Petitioner relied on the **Kenya Human Rights Commission v Non-Governmental Organizations Co-ordination Board {2016/ eKLR**, where the Court emphasized that administrative actions that demean or stigmatize individuals offend the right to dignity under Article 28. Counsel argued that the disqualification humiliated the Petitioner and portrayed him as unfit for leadership, despite the absence of evidence and lack of due process hence was a violation of his right to inherent human dignity under Article 28 of the Constitution.

68. Counsel argued that the retrospective clearance, on 21/3/2025, which came long after the fact of disqualification

reinforces the fact that the Petitioner was targeted on the basis of suspicion and/ or perception rather than objective assessment or lawful procedure.

69. On whether the Respondents acted ultra vires in disqualifying the Petitioner; Counsel argued that the principle is codified in Part III of the Companies Act, 2015, which recognizes that the affairs of a company must be managed in accordance with its articles and general law. Further, Part IX of the Companies Act 2015 requires Directors to act within the powers given by the constitution and only for proper purposes. Referring to Clauses 83- 86 of the Respondent's Articles of Association, Counsel argued that Articles do not provide for any pre-election vetting mechanism, do not confer power on any nominations or vetting committee to disqualify candidates and that the electoral power is vested on the shareholders, who vote at the AGM hence the decision to disqualify the Petitioners was made ultra vires the Respondent's Articles of Association. Counsel argued that while the Capital Markets Authority (CMA) Guideline recommend good practices, they are not binding law and do not confer decision-making powers to override company constitutions. That in any event, the Guidelines only encourage transparency, integrity, and accountability but do not authorize informal or subjective vetting processes that override shareholder rights. The use of the Guidelines as a basis for disqualification was therefore misplaced. Counsel relied on ***Republic v Independent Electoral and Boundaries Commission.. Ex Parte***

***Gladwell Otieno & Another {2017} eKLR***, where the Court emphasized that statutory and constitutional bodies must operate strictly within the authority granted to them by the law as any decision made outside such authority is null and void *ab initio*. Further reliance was placed on ***Keroche Industries Ltd v Kenya Revenue Authority & 5 Others [2007] eKLR***

70. On whether the election held on 28th April 2024 is null and void, Counsel submitted that although the Respondent is a public company, its governance processes, including the election of directors, must adhere to constitutional values where such processes affect fundamental rights and public interest. Citing Article 36 of the Constitution that guarantees the right to freedom of association, which includes the right to form, join, and participate in the activities of any association, including its governance and leadership, Counsel submitted that a shareholder's right to seek elective office within a company is a protected right under the Constitution.
71. He submitted that the election of 28<sup>th</sup> April 2024 was the culmination of a process that was marred by illegality and procedural unfairness in which the Petitioner was wrongfully excluded from participating on account of a disqualification process that lacked any legal or contractual basis as it was not provided for in the Respondent's Articles of Association or any statutory or regulatory framework and violated the Petitioner's right to fair administrative action, equality,

dignity, and association. Counsel argued that the foundation of the election was tainted with illegality and should thus not be allowed to stand. Reliance was placed on **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**, the Court or Appeal held that a process tainted by constitutional violations cannot produce a valid outcome.

72. The Petitioner argued that the disqualification of a legitimately qualified candidate from an election without due process invalidates the result because it undermines the principles of corporate democracy, fairness, and good governance that require that elections be conducted inclusively, transparently, and in accordance with the rules of the organization. The Petitioner submitted the implication of unfairly excluding him from participating in the elections was that it:

- i) Denied the shareholders a fair choice of candidates;*
- ii) Substituted shareholder sovereignty with unilateral decision-making; and,*
- iii) Undermined the core tenets of participatory governance.*

73. He placed reliance on **Republic v IEBC Ex parte Gladwell Otieno & Another {2017/ eKLR**, where the Court stated that where an electoral process is compromised by procedural illegality or unconstitutional conduct, the results must be invalidated. Counsel argued that this holding

applies in equal force to corporate elections conducted under a framework that requires compliance with constitutional principles as in this instant case.

74. On the question of whether the Petitioner is entitled to the reliefs sought Counsel submitted that the Respondent's actions violated the Petitioner's constitutional rights and fundamental freedoms as demonstrated by the evidence presented before Court hence the reliefs sought are justified and necessary to vindicate his rights including deterring the Respondent from engaging in similar unconstitutional conduct in the future.
75. The Petitioner further submitted that the Respondents' actions caused him public embarrassment, reputational injury, and economic harm, which the court should consider in awarding appropriate compensation. In support, the Petitioner relied on **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others {2013/ [eKLR]}**, where the Court of Appeal affirmed that constitutional reliefs serve not only to vindicate the rights of the claimant but also to uphold constitutionalism and deter future violations.

### **Respondent's Written Submissions**

76. The Respondent filed written submissions dated 15/9/2025 through its Advocate, Adra Advocates LLP. The Respondent summarized the Petitioner's case as follows:

- a. *Conduct of not giving the Petitioner a chance to participate in the vetting process was a violation of the Petitioner's Constitutional Right to Fair Administrative Action under Article 47 of the Constitution.*
- b. *Action of disqualifying the Petitioner from contesting the elections of Director on grounds of alleged pending investigations without giving him notice of the allegations and giving him an opportunity to respond was a violation of the Petitioner's Constitutional Right to Fair Administrative Action under Article 47 of the Constitution.*
- c. *Action of allowing the 1st and 2nd interested parties who were Board members offering themselves for re-election to participate in the vetting of the Petitioner who was their competitor was a violation of the Petitioner's Constitutional Right to Fair Administrative Action under Article 47 of the Constitution.*
- d. *Action of not giving other shareholders an opportunity to participate in the vetting of the Petitioner was a violation of the Petitioner's Constitutional Right to Fair Administrative Action under Article 47 of the Constitution.*
- e. *Action of disqualifying the Petitioner from presenting himself as a candidate for elections of Director is a violation of the Petitioner's right of freedom of Association under Article 36 of the Constitution.*

77. The Respondent opposed the Petition based on the following reasons:

- a. *The Petition offends the doctrine of constitutional avoidance, which espouses that a court will not determine a constitutional issue when a matter may be properly decided on another basis.*
- b. *The Petition discloses nothing more but a pure commercial dispute pertaining to the Respondent's internal affairs and in particular, the Respondent's process of vetting, nomination and appointment of Directors.*

- c. *The proper procedure for the Petitioner to initiate his case against the Respondent should have been by way of a Complaint and not a Constitutional Petition.*
- d. *The Respondent complied with its internal policies as well as its Articles of Association in the vetting and nomination process prior to the appointment of its Directors.*
- e. *The Respondent's case is that the Petition lacks merit and ought to be dismissed.*

78. The Respondent reiterated that it notified the shareholders that two Board of Directors Positions were to fall vacant in the Annual General meeting that was to be held on 20 April 2024 and invited any interested and qualified candidates to express interest and get an opportunity to be nominated as a board member and the vacancy notice disclosed the criteria against which all the candidates would be vetted. According to the Respondent, the criteria was based on academic and professional qualifications as well as personal qualities which included inter alia, that the Candidate **had to meet the requirements of Chapter Six of the Constitution**. The Respondent submitted that the criteria was anchored on the Board Charter and the Capital Markets Authority Corporate Governance Guidelines, which applied to election of Directors.

79. The Respondent submitted that upon the notification of vacancy, the Petitioner submitted his application dated 12

March 2024 for consideration and nomination for the position of Director.

80. The Respondent subjected all the applications against the disclosed criteria and based on the findings of the vetting process, determined that it would not proceed with the Petitioner's application as there were ongoing investigations relating to a project known as **Ngelani Project** that the Petitioner was involved in when he was under the employment of the Respondent. Consequently, a letter was sent informing the Petitioner of the decision not to proceed with his application until when he was cleared after the investigations were completed.
81. The Respondent submitted that it is obliged to conduct elections for the office of Director annually and therefore, the Petitioner was only disqualified for the elections in 2024 pending investigations. He could however apply for subsequent elections once the investigations cleared him of any wrongdoing.
82. The Respondent after concluding the nomination and vetting process, presented the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties to the Shareholders during the Annual General Meeting held on 20 April 2024 to be elected as Directors. The details of the 1st and 2nd Interested Parties were then forwarded to the Registrar of Companies and the register was updated. Accordingly, the Respondent identified and submitted on the following issues:

- a. *Whether the Petition offends the principle of Constitutional avoidance.*
- b. *Whether the Respondent followed due process in the nomination, vetting and election of its directors.*
- c. *Whether the Petitioner is entitled to the reliefs sought.*

89. On submission that the Petition offends the principle of Constitutional avoidance, the Respondent submitted that this dispute arose from the nomination, vetting and election process of Directors of the Respondent. The Respondent submitted that the process of appointment of Directors of the Respondent as a company is laid out under **Clause 83 of its Articles of Association dated 4 August 2010** which it exhibited in the Replying affidavit sworn on 20 November 2024. The Respondent submitted that a Company's Articles of Association constitute a contract between the company and its shareholders and are the instrument that governs the internal affairs of a Company. Reliance was placed on the case of **Abdirahman Affi Abdalla V Osupuko Service Station Ltd & Another [2012] eKLR** where the Court stated:

*"... a Company's Articles of Association give rise to a contract not only between every member and the Company, but also among the members of the Company interse. The logical conclusion to be drawn from that principle is that the members of the 1<sup>st</sup> Plaintiff Company are bound by that Company's Articles among themselves..."*

83. Further, relying on **William Njiraini Nguru v Mununga Tea Factory & 3 others [2015]** the Respondent submitted

that management of companies whether private or public is governed by the Companies Act Cap. 486 which provides that all companies ought to have articles of association that provide for rules and regulations that govern the company's internal issues.

84. Accordingly, the Respondent contended that the dispute between the Petitioner and the Respondent is a purely commercial pertaining as it concerns the Respondent's internal affairs on appointment of its directors. The Respondent argued that the and the grievance of the Petitioner is raising that the Respondent acted ultra vires in disqualifying him from being nominated as a Director ought to have brought under the provisions of Companies Act through a plaint, not a Constitutional Petition because this matter does not disclose constitutional issues. Reliance was placed on the Supreme Court case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** which expounded on the doctrine of avoidance as follows:

***“The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:***

***“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”***

85. Further reliance was placed on the case of Court of Appeal **Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR.**
86. The Respondent argued that the Commercial Court can sufficiently hear and determine any dispute between the Petitioner and the Respondent with respect to the process of nomination, vetting and election of Directors without the need of invoking the Constitution. Counsel relied on the dicta in **Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot [2021] eKLR** where the Court quipped:

*“Although I have in my foregoing discussion adverted to grounds (c ) and (d) of the preliminary objection that there are no Constitutional issues that warrant adjudication by the Court and that the Petition may very well constitute an abuse of the due process of the court, I need to observe that parties are increasingly filing matters that are essentially Civil matters and christening the same as Constitutional Petitions which is not proper. Where there is the alternative remedy of filing a suit in the ordinary Civil Courts, a party ought not to invoke the jurisdiction of the Constitutional Court.”*

87. As to the question of whether the Respondent followed due process in the nomination, vetting and election of its directors, the Respondent reaffirmed to the position taken in its Replying affidavit and cited the provisions of Section 83 of the Respondent’s *Articles of Associations; the Respondent’s Board of Directors Charter (the Charter) in particular chapter 2- clause 2.4; Chapter 4 of the Charter - clause 4.1.3 (b); and, the Capital Markets Authority*

*Guidelines on Corporate Governance Gazette Notice No. 3362. (the Guidelines) clause 2.1.5. and, clause 3.1.3. In particular, Counsel emphasized Capital Market Authority Guidelines clause 3.1.3 which provides guidelines on the appointment and qualifications of Directors inter alia as follows:*

- a. *The Board of every public listed Company should appoint a Nominating Committee consisting mainly of Independent and Non-Executive Directors with the responsibility of proposing new nominees for the Board and for assessing the performance of Directors in the Company.*
- b. *The nomination committee shall consider only persons of calibre, credibility and who have the necessary skills and expertise to exercise independent judgment on issues that are necessary to promote the company's objectives and performance in its area of business."*

88. The Respondent asserted that all it did was to comply with its **Articles of Association, the Charter and the Capital Market Authority Guidelines** during the nomination and appointment process for the office of Director in the manner elaborately set out in its replying affidavit. It contended that the Respondent has the right to run its internal affairs based on its own set rules and guidelines without unnecessary interference from the Court. It relied on the High Court decision of **Joseph Mwangi Mbote & 2 others v Kenya Tea Development Agency (Holdings) Ltd & another; Kiru Tea Factory Limited (Proposed Co-Petitioner) [2020]** eKLR where the Court held thus:

***“... My humble view is that the orders sought by the petitioners in this case, to declare who is or who is not a duly elected director of the company or who should prepare the company’s election manual are clearly the company’s internal affairs which this court should not interfere with. Furthermore, I am inclined to hold the view that a company is justified in setting up the rules and guidelines to govern its elections...”***

57. Further reliance was placed on the Court of Appeal case of **Paolo Murri Vs Gian Battista Murri & Another [2000] KECA 56 (eKLR)** where the Court held as follows:

*“... Upon a careful consideration of the petition, it is plain and obvious that basically this is a dispute about the internal management of the company and a court does not interfere with the internal management of the company acting within its powers: see the rule in Foss v Harbottle (1843) 2 Hare 261, Facts necessary to support intervention by the court, e.g. ultra vires or fraud have not been pleaded. In view of the foregoing, I am persuaded that the petitioner's claims are bound to fail and that they are obviously unsustainable. Like the learned Judge, I have no doubt at all that it is an abuse of the process of the court and I would strike it out accordingly...”*

89. Counsel submitted that the Respondent’s investigation was still at a preliminary stage and could not afford to disclose more information at that stage to ensure the integrity of the investigation until it was concluded. The Respondent submitted that once its investigations were concluded, it duly notified the Petitioner that it will no longer pursue any further action in the matter, which means that the Petitioner can offer himself for nomination for the office of Director in

subsequent annual elections as he has been cleared of any wrongdoing.

90. As to the Claim by the Petitioner that the 1st and 2nd interested parties were board members who offered themselves up for re-election and participated in the vetting of the Petitioner who was their competitor, the Respondent termed this allegation false and submitted that an external party was appointed to undertake the vetting and thereafter tabled the recommendations before the Board.
91. Concerning the allegations by the Petitioner that he was discriminated against as he was the only candidate disqualified from participating in the election of Directors, Counsel relying on Section 108 of the Evidence Act, Cap 80 argued that the Petitioner had not provided any evidence to support his averment about the alleged discrimination and relied on the Supreme Court decision of **Gwer & 5 others v Kenya Medical Research Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR)** (Civ) (10 January 2020).
92. Regarding the allegation that the Petitioner suffered public humiliation as a result of his disqualification, the Respondent submitted that it did not publicise the disqualification nor the reasons for the disqualification. The notice and reasons for the Petitioner's disqualification were communicated directly to the Petitioner.

93. The Respondent further submitted that Director elections are carried out annually by the Respondent and therefore the instant Petition has been overtaken by events as the Respondent carried out its annual Director elections for the current year in May 2025.
94. In conclusion, Respondent submitted the Petition violates the doctrine of constitutional avoidance and is unmaintainable. It was further argued that the allegations contained in the Petition are unsubstantiated, hence the Petition lacks merit and does not warrant the granting of any reliefs this Court was urged to dismiss the Petition.

## **ANALYSIS AND DETERMINATION**

95. Having regard to the pleadings and the submissions of the Parties in this Petition, the Court considers the following to be the issues falling for determination:
- 1) Whether the Court should apply the principle of constitutional avoidance and decline jurisdiction and dismiss the Petition on grounds that it raises issues that can be resolved through non-constitutional means.**
  - 2) Whether the Petition is overtaken by events in view of the election conducted in May, 2025.**
  - 3) Whether, having regard to all the circumstances of this case, the disqualification of the Petitioner from participating in the elections of the**

**Respondent as a Director violated his Constitutional his rights and fundamental freedom to equality, human dignity, freedom of association and the right to fair administrative action and fair hearing under Articles 27, 28, 36, 47 and 50 of the Constitution.**

**4) Whether the Petitioner is entitled to the reliefs sought.**

**Whether the Court should apply the principle of constitutional avoidance and decline jurisdiction and dismiss the Petition on grounds that it raises issues that can be resolved through non-constitutional means.**

96. The doctrine constitutional avoidance requires that a Court should refrain from applying the Constitution to resolve legal disputes which are capable of being resolved by application of legislation or other existing legal principles or regulatory framework.
97. The Supreme Court in **Communications Commission of Kenya v Royal Media Service Limited (2014) eKLR** elaborated the principle as follows:

***“[256] The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his***

**minority Judgment as follows [at paragraph 59]:**

**“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”**

**[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).”**

98. Correspondingly, the Court in Lugo v Director of Public Prosecutions [2022] KEHC 10574 (KLR) held thus:

**“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights. Currie and de Waal opine that the principle of constitutional avoidance is of crucial importance in the application of the Bill of Rights. The author states: - When applying the Bill of Rights in a legal dispute, the principle of avoidance is of crucial importance. As we have seen, the Bill of Rights always applies in a legal dispute. It is usually capable of direct or indirect application and, in a limited number of cases, of indirect application only. The availability of direct application is qualified by the principle that the Bill of Rights should**

**not be applied directly in a legal dispute unless it is necessary to do so.”**

**11. An important and critical issue arises from the above statements by Currie and de Waal. It is a fact that every legal dispute is capable of either direct or indirect application of the Bill of Rights. Every dispute is essentially a constitutional issue when one looks at it. This arises necessarily because of the principle of constitutional supremacy. One needs to be aware, however, of the singleness of the legal system. This is embodied in the fact that the supremacy of the Constitution does not detract from the usefulness of the rest of the body of law. In essence, all other laws give full expression to the ideals of the Constitution until found to be inconsistent with it.**

....

**The exceptions to the application of the doctrine of constitutional avoidance are:**

-

- i. where the constitutional violation is so clear and of direct relevance to the matter,**
- ii. in the absence of an apparent alternative form of ordinary relief and**
- iii. where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.”**

99. Similarly, in **C O D & another vs Nairobi City Water & Sewerage Co. Ltd [2015] KEHC 7762 (KLR)** the Court stated:

**“11. Similarly, in Papinder Kaur Atwal -vs- Manjit Singh Amrit Nairobi Petition No. 236 of 2011 where after considering several authorities on the issue, Justice Lenaola remarked as follows:**

**“All the authorities above would point to the fact that the constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes... I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.” (Emphasis added)**

**12. The Supreme Court of India has also held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or as provided under statute. For instance, in Re Application by Bahadur[1986] LRC (Const) the Court expressed itself as follows at page 307;**

**“The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under the Constitution. This case highlights the un-wisdom of ignoring that advice.... The Constitution sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of the Constitution might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land,**

***it is not, “a general substitute for the normal procedures for invoking judicial control of administrative action.” (See Harrikissoon v A-G [1979] 3 WLR 62).***

***13. It was further observed in the case of Minister of Home Affairs vs Bickle & Others (1985) LRC Const(per (Georges C.J);***

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

100. In the present case, the Respondent contended that this matter is purely a commercial dispute whereby the grievance raised in the Petition is the disqualification of the Petitioner as a Director of the Respondent. The Respondent argued that the dispute is entirely an internal affair of the Respondent which can fully and adequately be resolved by application of the Articles of Association of the Respondent, the Board Charter and the Capital Markets Authority Corporate Governance Guidelines and the provisions of the Companies Act, 2015 and thus would not force or justify the application of the Constitution to resolve hence the Court should invoke the doctrine of Constitutional avoidance and dismiss the Petition.

101. The Petitioner however passionately opposed this characterisation of the dispute and maintained that the

Petitioner's constitutional rights were implicated by the actions of the Respondent and the interested parties who in utter disregard of the applicable constitutional and statutory principles of procedural fairness, made an arbitrary decision, to exclude him from the elections of the Respondent without affording him an opportunity to respond to the allegations purportedly contained in a an audit report that he was not shown or required to respond to and/or given an opportunity to be heard on the matter. The Petitioner further argued the Respondent impugned decision was also made in a discriminatory manner because other persons in similar circumstances as the Petitioner were not subjected to the same treatment and were instead allowed to take part the Respondent's impugned elections.

102. In my humble view, the issues raised in the Petition especially the violation of the right to fair administrative action under Article 47 (which is further and more elaborately reinforced by the provisions of the Fair Administrative Actions Act, 2015), as well as the alleged discriminatory conduct against the Petitioner by the Respondent are serious and genuine constitutional concerns which cannot dismissively be categorised as commercial disputes. I find the Petition as pleaded raises constitutional questions that perfectly fall within the jurisdiction of this Court under Article 165 (3) (b) as read with Article 23 (1) of the Constitution as it not a mere ordinary dispute between a shareholder and the Company. The mere fact that the dispute arose within a commercial or internal corporate

context does not oust the jurisdiction of this Court when the Bill of Rights is implicated. **Article 20(1)** of the Constitution is emphatic that the Bill of Rights applies to all law and binds all State organs and all persons. Further, **Article 2 (1)** provides that the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

103. I thus reject the proposition advanced by the Respondent that this is a matter which the Court should decline jurisdiction on the basis that it can fully and adequately be decided on non-constitutional grounds.

***Whether the Petition is overtaken by events in view of the subsequent elections allegedly conducted in May, 2025.***

104. In its submissions, the Respondent submitted that Director's elections are carried out annually by the Respondent and therefore the instant Petition has been overtaken by events as the Respondent carried out its annual Director elections for the current year in May 2025.

105. This is a factual assertion that was not pleaded to by way of any further or supplementary affidavit. It came through submissions of Counsel. The Court may thus entitled not to give much weight to such an allegation made from the bar.

106. However, I am prepared to take judicial notice of that fact given what is provided in the Respondent's Articles of Association, in particular Clause 83, and assume that indeed

the position as is put in the submissions, but even then, I do not see any material consequence that would affect the sustainability of this Petition. I say so for the following reasons.

107. Upon meticulous review of the instant Petition, it is apparent that the substance of the Petition is the denial of fair administrative action in the manner the decision to bar the Petitioner from participating in the elections was made, that is without notice of the allegations, an opportunity to respond to or be heard on those allegations and being discriminated against in consideration with others placed in similar situation as him.

108. The reliefs sought for the violations are thus broader and are not confined to the elections alone. They include other specific declarations and well as a prayer for any other appropriate relief to vindicate the constitutional violations meted against the Petitioner. The prayers include:

- 1.** *A Declaration that the Respondent's action of disqualifying the Petitioner from presenting himself as a candidate for elections of Director of the Respondent held on 20<sup>th</sup> April 2024 was a violation of Article 47 of the Constitution hence null and void.*
- 2.** *A Declaration that the Respondents action of disqualifying the Petitioner from presenting himself as a candidate for the elections of Director of the Respondents held on 20<sup>th</sup> April, 2024 was a violation of Article 36 of the Constitution hence null and void.*

3. *As a consequence of Prayer (i) & (ii) the elections of the Respondents elections of Directors held on 28th April, 2024 are hereby declared null and void.*
4. *Costs.*
5. *Any other relief this Court may deem fit and just to grant.*

109. The submission that the substratum of the Petition has been extinguished, thereby rendering the Petition moot just because elections of the Respondent were allegedly conducted in the month of March 2025 is misconceived and inconsequential to the viability of the Petition. The holding of those elections does not negate the individual claims of the violations against the Petitioner.

***Whether, having regard to all the circumstances of this case, the disqualification of the Petitioner from participating in the elections of the Respondent as a Director violated his Constitutional his rights and fundamental freedom to equality, human dignity, freedom of association and the right to fair administrative action and fair hearing under Articles 27, 28, 36, 47 and 50 of the Constitution.***

110. The core of the Petition is the Petitioners complaint that the Respondent barred him from participating in the elections of Directors of the Respondent scheduled to take place on 20<sup>th</sup> April, 2024 based on unproven and unsubstantiated document dubbed 'Ngelani Project Report' of which he had neither been given notice of the allegations, or shown the

report or in any way asked to respond to it which was a violation of his right to fair administrative action under Article 47 as read with the provisions of the Fair Administrative Act, 2015. The Petitioner further argued that the vetting and nomination criteria was not provided in the Respondent's Articles of Association and thus was ultra vires.

111. The Respondent in reply argued that the decision made by the Committee was upon evaluation of the Petitioner's suitability against the criteria set out in the **Respondent's Board Charter** and the **Capital Market Authority Corporate Guidelines** and thus the suitability of the Petitioner was an internal matter that the Board Nomination Committee was authorised to decide which decision the Court should refrain from interfering with as it was done in the best interest of the Company.

112. Although the Petitioner argued that the vetting and nomination criteria was not provided for in the Respondents Articles of Association, the Respondent was able to rebut that assertion by demonstrating that its actions were guided by other internal policy documents that governed the vetting and nomination of Directors of the Respondent and these included the Board Charter and the Capital Markets Authority Guidelines which specified the criteria to be met by applicants for the election of the Directorship. This Court is not prepared to discard these documents on grounds that they are created outside the articles of the Articles of the Association hence ultra vires. The principles are standards

that align with the principles of transparency and corporate governance expected of a regulated entity- (drawn from Capital Markets Authority Corporate Governance Guidelines) and the Board Charter. Further, the vacancy notice that was sent out contained this requirement making those standards an integral part of the election process for the Directors of the Respondent on which basis the Petitioner tendered his application. In my view, the Petitioner, the Petitioner submitted himself to the nomination and vetting process by tendering his application against those standards ( hence by conduct accepted) the process and the standards and the Respondent acted in belief of the Petitioner's acceptance and vetted the nomination against that criteria hence the Petitioner cannot now be heard to attack the vetting and nomination criteria after availing himself the benefit of applying for the directorship based on those standards that were referred to in the Notice only to turn back later and attack the same standards on grounds that they are ultra vires, he is estopped from approbating and reprobating.

Section 120 of the Evidence Act provides thus:

***"120. General estoppel.***

*When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or*

*his representative, to deny the truth of that thing.”*

113. Moreover, the Petitioner’s contended that the he was barred from the elections based on unproved and unsubstantiated allegations in the Ngelani Project report for which an investigation was pending.
114. The Respondent responded in the affirmative and stated that this decision was made in the best interest of the Company and actually informed the Petitioner about the same and told him that it was prudent to await clearance from the ongoing investigations hence his candidature was found unsuitable at the time.
115. As far as this Court is concerned, the assessment of the Petitioners suitability for Directorship was based on the applicable standards in the Board Charter and the Capital Markets Corporate Governance Guidelines. The mandate to carry out the assessment was the sole responsibility of the Nominating Committee. As long as the Nomination Committee complied with procedural fairness, and its decision is not irrational as to beat the sense of logic or illegal, the Court will not interfere. Consequently, the Court cannot be invited to venture into the domain of the Nominating Committee by substituting by its own opinion for that of the Committee. If the Nominating Committee properly seized of the matter objectively considered the relevance and weight of a pending investigation against the

Petitioner and formed the view that due to the adverse nature of the allegations in the report, the Petitioner was not suitable and disqualified his candidature for the Directorship of the Respondent, so be it, as that was matter within its decisional independence. The Court would respect the decision as long as it complies constitutional and statutory dictates of procedural fairness, and if the decision was not outrightly irrational or unlawful.

116. As was held in **Law Society of Kenya v Attorney General & Another; National Commission for Human Rights & Another (Interested Parties) (2020) eKLR**

***“...Where the Constitution has reposed specific functions in an institution or organ of the State, the Court must give those organs sufficient time or leeway to discharge their constitutional mandate and only accept an invitation to intervene when those organs or bodies have demonstrably been shown to have acted contrary to their constitutional mandate or in contravention of the constitution...”***

117. Echoing similar sentiments, the Court in **Captain (Rtd) Charles Masinde V Augustine Juma & 8 others [2016] eKLR** held:

*“The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must*

*therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.”*

118. The question thus becomes, did the process of disqualifying the Petitioner from vying for the Directorship comply with the Constitutional safeguards under Article 47 and the provisions of the Fair Administrative Review Act, 2015?

119. The **Constitution provides** for the right to fair administrative action.

**Article 47 provides:**

**(1) *Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

**(2) *If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

**(3) *Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall -***

***a) provide for review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and***

***b) promote efficient administration.***

120. The Fair Administrative Actions Act, 2015 protects the rights of a person likely to be affected by an administrative decision.

**Section 4 - Administrative action to be taken expeditiously, efficiently, lawfully etc**

- (1) *Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.*
- (2) *Every person has the right to be given written reasons for any administrative action that is taken against him.*
- (3) *Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-*
  - (a) *prior and adequate notice of the nature and reasons for the proposed administrative action;*
  - (b) *an opportunity to be heard and to make representations in that regard;*
  - (c) *notice of a right to a review or internal appeal against an administrative decision, where applicable;*
  - (d) *a statement of reasons pursuant to Section 6;*
  - (e) *notice of the right to legal representation, where applicable;*
  - (f) *notice of the right to cross-examine or where applicable; or*
  - (g) *information, materials and evidence to be relied upon in making the decision or taking the administrative action.*

- (4) *The administrator shall accord the person against whom administrative action is taken an opportunity to-*
- (a) *attend proceedings, in person or in the company of an expert of his choice;*
  - (b) *be heard;*
  - (c) *cross-examine persons who give adverse evidence against him; and*
  - (d) *request for an adjournment of the proceedings, where necessary to ensure a fair hearing.*
- (5) *Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.*
- (6) *Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.*

121. It is thus manifest that the Constitution together with the Fair Administrative Actions Act provide for prior notice, reasons for the decision, an opportunity to be heard as key defining standards of any reasonable and procedurally fair administrative action. Administrative actions that do not abide by these constitutional and statutory benchmarks are, unless specifically limited by law, of which the limitation must meet the threshold of being reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and taking into account the nature of the fundamental freedom, the importance and purpose of limitation, the nature and extent of limitation among others

as provided in Article 24 (1), any action taken in violation of these fundamental principles would not only be unlawful but also unconstitutional.

122. It was the Petitioner's contention that there was no prior notice of the allegations made against him before the decision to bar him from vying was communicated via the letter of 9/4/2024. Moreover, even after receiving the letter and his Advocate wrote to the Respondent to ask for the report - Ngelani Project Report which allegedly contained the allegations that the Nomination Committee considered in disqualifying him, the Respondent did not avail it. In essence, the Petitioner was neither shown the report nor afforded an opportunity to respond or comment on it, let alone being afforded a chance to be heard. The Respondent argued the decision not to provide the report was to preserve the secrecy of the investigation.

123. Considering that the Report had already been applied to make substantial adverse inference against the right of a candidate to compete in the upcoming elections, such a stand was unreasonable as the Petitioner was entitled to defend himself against such drastic sanction that was made against his candidature.

124. Moreover, this Court is also very apprehensive about the existence of that report. It was not availed to the Petitioner then and even before this Court after the filing of this case,

no such report was exhibited, only letters alluding to existence of the report. No one therefore knows the content of that report and whether in fact it mentioned the Petitioner adversely is itself a subject of speculation.

125. On the same breath, there is also no Report of the Nomination Committee in term of the actual report or Minutes of the Committee that were annexed or even subsequent Board resolution adopting the Report that was exhibited for the examination of the Court.
126. The Petitioner's claim that the decision of the Respondent was thus arbitrary was thus not effectively rebutted.
127. It is thus the finding of this Court that the Petitioner's right to fair administrative action under Article 47 (1) has been established on a balance of probabilities.
128. Concerning the claim for discrimination under Article 27, I am of the view that the Petitioner did not tender sufficient proof of this issue as for discrimination to occur, it has to be shown that he was treated differently from others in similar circumstances without any valid justification. The Petitioner merely mentioned names without providing evidence that they were equally adversely mentioned in the alleged Ngelani Project Report and were also under investigation but cleared to run for the Directorship.

129. The allegation that his right to inherent human dignity under Article 28 was violated by public humiliation of the disqualification of his candidature. This was effectively rebutted by the Respondent who stated the decision to bar the Petitioner was not made public and was communicated directly the Petitioner individually. This evidence was not controverted by the Petitioner hence I find the violation to his right to inherent human dignity through public humiliation was not substantiated.
130. In regard to the violation of right of association, Article 36 (1) provides:

**36 (1) Every person has the right to freedom of association which includes the right to form, join or participate in the activities of an association of any kind.**

131. That the Petitioner was a shareholder of the Respondent, (a Public Limited Company limited by shares) is not denied. As such, the Respondent qualifies the meaning of an 'association of any kind'. The Petitioner was a shareholder but to vie for the Directorship of the Respondent, he had to undergo a nomination process and meet the suitability requirements as outlined in the Board Charter and the Capital Market Corporate Guidelines. The right to participate in the activities of the Respondent was thus not a direct ticket merely because he was a Shareholder as disqualification of the candidature if properly done in accordance with the laid down Internal standards upon observing constitutional and statutory standards was still a

possibility. At this juncture, there is no way to telling if the Nomination Committee, even if it had fully complied with the Constitutional and statutory safeguards, that it would have certainly been satisfied the all candidature of the Petitioner would have satisfied all the requirements of the eligibility criteria which is an assumption that this Court would therefore want to desist from making.

132. I thus find that Article 36 (1) of the Constitution was not violated by the Respondent as against the Petitioner.

133. This Petition thus succeeds partially on the ground that the Constitutional and statutory rights of the Petitioner under Article 47 (1) and Section 4 (3) of the Fair Administrative Action Act were violated by the Respondent.

***Whether the Petitioners is entitled to the reliefs sought.***

134. Under the Article 23 of the Constitution, this Court is permitted to grant an appropriate relief if it considers it necessary depending on the circumstances of each case.

135. The South African case of **Hoffmann v South African Airways (CCT17/00) [2000] ZACC 17** explained the rationale behind granting constitutional reliefs as follows:

***“The objectives of an appropriate relief are to:***

- (i) address the wrong occasioned by the infringement of the constitutional right;*

- (ii) *deter future violations;*
- (iii) *make an order that can be complied with; and*
- (iv) *of fairness to all those who might be affected by the relief.”*

136. The Court of Appeal addressing itself on the nature of a constitutional relief in **Gitobu Imanyara & 2 others vs Attorney General [2016] KECA 557 (KLR)** stated:

***“...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”***

137. The Respondent arbitrarily failed to subject the Petitioner to an objective and procedurally fair nomination and vetting process the effect of which was that the Respondent was knocked out of elections of the Respondent. The Petitioner is thus entitled to remedies for the unconstitutional and unlawful decision of the Respondent.

- 1. A declaration is hereby issued that the decision to disqualify the Petitioner from presenting himself as a candidate for elections of Director of the Respondent held on 20<sup>th</sup> April 2024 was arrived at in violation of Petitioner's right to fair administrative action under Article 47 of the Constitution.***

**2. Compensation of Kenya Shillings Eight Hundred Thousand (Kshs.800,000/-) is hereby awarded to the Petitioner against the Respondent.**

**3. Costs of this Petition.**

**Dated, signed and delivered virtually at Nairobi this 16<sup>th</sup> April, 2026.**

.....  
**L N MUGAMBI**

**JUDGE**

ORIGINAL