



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: O'KUBASU, GITHINJI & WAKI, JJ.A)

CIVIL APPEAL NO. 137 OF 2005

BETWEEN

REPUBLIC APPELLANT

AND

- 1.THE ATTORNEY GENERAL**
- 2.THE MINISTER OF AGRICULTURE HON. KIPRUTO *arap* KIRWA**
- 3. PATRICK WANDABWA**
- 4.OBONGO NYACHAE**
- 5.LEOPOLD MUREITHI**
- 6.PETER MBOYA**
- 7.BENJAMIN BETT**
- 8.REUBEN OLEMBO**
- 9.THE AGRICULTURAL DEVELOPMENT CORPORATION**
- 10.KENYA FARMERS ASSOCIATION**
- 11.HOSEA KIPKEMBOI SITIENEI**
- 12.FRANCIS OYATSI**
- 13.SIMON NGILU**
- 14.JOSEPH OMOKAMBA**
- 15.NICHOLAS KIRITU**
- 16.ROSE CHAURI..... RESPONDENTS**

EX PARTE

- 1.KENYA SEED COMPANY LIMITED**
- 2.NATHANIEL K. TUM**
- 3.ZAKAYO K. CHERUIYOT**
- 4.GEORGE CHERUIYOT**
- 5.NELSON KIRIOR**
- 6.FRED WAFULA**

(An appeal from a judgment of the High Court of Kenya at Eldoret (Gacheche, J.) dated 6th April, 2005

in

KITALE H.C.MISC. APPL. NO. 1 OF 2004)

JUDGMENT OF THE COURT

Introduction

1. The record of appeal before us is fairly voluminous, containing as it does over 2000 pages of reading material, a memorandum of appeal alone running into 37 grounds and submissions of counsel made over several days. It seems to us, however, that the appeal rests on two central issues – one procedural, the other substantive-which we shall identify and deal with presently.

2. The appeal arises from the decision of the superior court (Gacheche J) made on 6th April, 2006, in which the learned Judge rejected prayers sought by the *ex parte* appellants for the issuance of Judicial Review orders of *certiorari*, *prohibition* and *mandamus*, on the basis that the application was *void ab initio* and that, in any case, it was devoid of merit.

The Parties

3. It is important on the outset that we understand who the protagonists in this matter are before we examine what precipitated the application before the superior court. At the epicentre is **M/s. Kenya Seed Company Ltd (KSC)**, which was incorporated under the Companies Act, **Cap 486**, as a private limited liability company some 54 years ago in 1956 by a small group of farmers in Kitale. Its main objective is the growing and merchandizing of several varieties of seed including seed maize, pasture seeds, sunflower seeds, seed wheat, barley seeds, legume seeds and horticulture seeds. It also operates a seed maize shelling and drying plant as well as importing, producing and distributing vegetable seeds under the banner of “Simlaw Seeds”. KSC is the 1st *ex parte* appellant before us.

4. By a special resolution made by the members in October 1960, KSC was converted into a public company limited by shares. Thereafter other members joined in the company through shares purchases. The most significant of those additional shareholders were **M/s. Agricultural Development Corporation (ADC)** and **M/s. Kenya Farmers Association (KFA)**. As at 31st December, 2000, there were 50 shareholders with ADC holding 52.88% (about 53%) of the total shareholding, while KFA held 14.85% (about 15%) although KFA asserts it was 28% before some shares were sold away in questionable circumstances. ADC and KFA are the 9th and 10th Respondents before us.

5. ADC came into existence through an Act of Parliament in 1965 (**The Agricultural Development Corporation Act, Cap 444**, originally **Cap 346, Laws of Kenya**) (ADC Act) in the interest of national food security and for the stated purpose of promoting the production of Kenya’s essential agricultural inputs such as seeds and pedigree and high grade livestock including hybrid seed maize, cereal seed, potato seed, pasture seed, and vegetable seed (**Section 12**). Pursuant to that objective ADC identified KSC for acquisition and through periodic purchases of shares and direct allotments by KSC, it achieved control of 53% by the year 2000. As ADC was wholly owned by the Government of Kenya (GoK), GoK claimed ownership and control of KSC by application of the **State Corporations Act, Cap 446**, Laws of Kenya.

6. KSC is run by a Board of Directors and a management team headed by a Managing Director and comprising the Company Secretary, Finance Director, Operations Manager and Chief Accountant, all of whom are appointed by the Board of Directors. Before 17th December, 2003, the Managing Director (MD) was Nathaniel Tum who is also a shareholder of KSC, and the Company Secretary was Zakayo Cheruiyot, also a shareholder. They are the 2nd and 3rd *ex parte* appellants respectively. The 4th, 5th and 6th *ex parte* appellants are individual shareholders of KSC.

7. By **Gazette Notice No. 8976** dated 17th December, 2003, the President appointed **Patrick Wadabwa** (3rd respondent) as the Chairman of KSC for 3 years and by another **Gazette Notice No. 3** of 24th December, 2003, which was effective from 17th December, 2003, the Minister for Agriculture (**Kipruto arap Kirwa**) (the 2nd respondent) appointed **Hosea Kipkemboi Sitienei** (11th respondent) as the new Managing Director of KSC together with a new Board of Directors comprising of **Obongo Nyachae, Prof. Leopold Mureithi, Peter Mboya, Benjamin Bett, Prof. Reuben Olembo, Managing Director ADC, General Manager KFA, PS, Ministry of Agriculture, PS Office of the President and PS Treasury**. The various officers serving in those public offices were named as “*interested parties*” in the superior court and are now among the respondents 3 to 8 and 11 to 16 before us (hereinafter “*The New Board*”). The 1st respondent is the Attorney General sued on behalf of GoK.

8. All the *ex parte* appellants are represented before us, as they were in the superior court, by Mr. Alfred King'oina Nyairo of Nyairo & Co. Advocates, while Gok and the Minister of Agriculture are represented by Mr. C. M. Mutinda, State Counsel, and the new Board was represented by M/s. Kibunja & Co. Advocates in the superior court, but by Mr. Kimamo Kuria of M/S. Ramesh Manek, Advocates before us.

The application for leave

9. On 17th December, 2003, an announcement attributed to GoK was made through the media that the entire Management staff and Board of KSC had been replaced. The appointment of a new Chairman of the Board was gazetted immediately and the new board was also named and gazetted on 24th December, 2003.

10. The *ex parte* appellants felt aggrieved by those developments since they had no notice of any wrong doing to warrant their replacement and were therefore being condemned unheard. They, and the three shareholders, were also of the view that neither GoK nor the Minister for Agriculture had anything to do with KSC and therefore the activities attributed to them were an arbitrary and gross interference with private property, irregular, malicious and dictatorial. They filed a notice with the Deputy Registrar of the superior court in Kitale on 24th December, 2003 and subsequently filed an *ex parte* chamber summons on 29th December, 2003, seeking leave to be heard during the court vacation due to the urgency of the matter.

11. Another *ex parte* chamber summons was filed on the same day under **Order 53 rules 1, 2 & 3** of the Civil Procedure rules and **sections 8 and 9** of the Law Reform Act seeking the following orders:

“1. That this application be certified as urgent and be heard on priority basis.

2. That leave be granted to the applicants to apply for the following orders of judicial review: -

I. An order of certiorari to remove into court and quash the decision of Government announced on 17.12. 2003 appointing new management staff of Kenya Seed Company Limited.

II. An order of prohibition to prohibit the contravention by the Government and the Minister of Agriculture of the provisions of the Companies Act, Memorandum and Articles of Association of Kenya Seed Company Limited and abuse of state power and machinery.

III. An order of Prohibition to restrain the Government appointees from entering into the offices of or assuming any responsibilities or in any way dealing with the affairs of Kenya Seed Company Limited.

IV. An order of Prohibition to restrain the Government from stationing members of the Police Force in the premises of Kenya Seed Company, for purposes of enforcement of the government decision.

V. An order of Prohibition to prohibit the Government and the Minister of Agriculture from interfering with day to day operations and management of Kenya Seed Company Limited.

VI. An order of Mandamus to compel the Government and Minister for Agriculture and/or their agents or servants to observe the provisions of the Company's Act Cap 486 Laws of Kenya, the Memorandum and Articles of Association of Kenya Seed Company Limited and to facilitate the operations of the Kenya Seed Company Limited in the way it has been done for the last 46 years.

3. That leave granted to operate as stay of enforcement of the Government decision made on 17th December, 2003 purporting to appoint new members of the board and the management of Kenya Seed Company Limited and maintenance of status quo as obtained prior to the 17th December, 2003.

4. That costs be in the cause.”

12. Both applications were placed before the superior court (Tanui, J.) sitting in Kisumu on 31st December, 2003 and the order for hearing during the vacation was granted. The learned Judge then proceeded to hear the submissions of learned counsel Mr. Nyairo on the application for leave, and Mr. Nyairo went on at some length to lay the basis for leave. In the end he stated:

“I therefore pray for orders of Judicial Review.”

The court thereupon made the following order:

Order

1. Let orders of judicial in the nature of (sic)

[(a) to (f) listed as sought in the chamber summons]

2. Let the leave operate as a stay of enforcement of the Government's decision of 17th December, 2003 purporting to appoint new members of the board and the management of Kenya Seed

Company Limited and maintenance of status quo as obtained prior to 17th December, 2003 pending the hearing and determination of the substantive application of judicial review.

3. Costs in the cause.”

13. The formal order extracted from those proceedings was however different as it depicted the first order as stating:

“That leave is hereby granted to the Applicants to apply for orders of Judicial Review in the nature of; - ”

14. The substantive notice of motion was filed on 5th January, 2004 in the superior court at Kitale, but had not been served by the time GoK and the new Board got wind of the grant of leave to seek orders for Judicial Review and stay. They were both alarmed at the confusion that would reign in KSC if the order for stay was maintained and so they filed their own *ex parte* applications seeking orders for setting aside the order of stay. They contended that the *ex parte* applicants had failed to disclose, as they were in law bound to do, relevant information to the court that the new Board had already taken over at the offices of KSC and even changed bank accounts and signatories since 17th December, 2003; that GoK had a direct interest through ADC in the affairs of KSC; that there were criminal proceedings filed against some of the *ex parte* applicants in relation to shareholding issues; that no leave, which is mandatory, was granted before the orders of stay were issued and therefore the stay was given without jurisdiction; and that the orders as granted by Tanui J were different from the orders extracted.

15. The applications were placed before Dulu J sitting in Eldoret who certified them urgent before hearing counsel for GoK and counsel for the new Board at length. In the end, the learned Judge declined to make a ruling on the validity of the application for leave and left the issue to be canvassed *inter partes* at the hearing of the main notice of motion. The learned Judge however granted the prayer for setting aside the order for stay in these words: -

“In the result I use my discretion under Order 53 rule 1 (4) Civil Procedure Rules, Section 3A Civil Procedure Act and Order 50 rule 17 and order that the stay and maintenance of the status quo as obtained prior to the 17th December, 2003 granted by the court is hereby vacated and the status quo to be maintained will be that obtained as at 17th December, 2003.

That was on 7th January, 2004. Leave to appeal against the order was sought by the *ex parte* appellants and was granted but nothing has been said about filing the appeal.

16. On the same day that the ruling was made, counsel for GoK and counsel for the new Board returned before Dulu J *ex parte* and pointed out that there was an accidental slip in the ruling when the order for maintenance of the status quo was stated to be effective from 17th December, 2003 instead of 31st December, 2003. They invoked the provisions of **section 99** of the Civil Procedure Act (CPA) to correct the error and the Judge obliged and amended the ruling.

17. Five days later, on 12th January, 2004, the *ex parte* appellants went before Tanui J in Kisumu and invoked the same provision of the CPA (**Section 99**) drawing the attention of Tanui J that he had overlooked to state clearly that leave was duly granted. The learned Judge then made the order, thus:

“The orders granted by me on 31.12.2003 are accordingly amended so that Order No. (1) thereof reads as follows: -

(1) “Leave is hereby granted to the applicants to apply for orders of judicial review in the nature of”

(2) This order is deemed to have been made on 31.12.2003 at the time leave was granted.

Tanui

JUDGE

12.1.2004”

18. The issue replayed itself at the hearing of the notice of motion before Gacheche J between 27th January, 2004 and 26th January, 2005 and we must therefore deal with it in *limine*. For it would matter not how weighty the other issues raised in this appeal are, if the application was not filed in accordance with the law and was therefore a nullity *ab initio*. That is the first major issue identified as stated in paragraph 1 of this judgment.

19. It was contended in the superior court by counsel for the new Board, Mr. Kimamo that upon appearing before Tanui J on 31st December, 2003, Mr. Nyairo, in his submissions, sought final orders of judicial review and not leave. The court then obliged and issued those orders and they were final. The order for status quo was also final. The subsequent filing of the notice of motion was therefore of no

effect and was a nullity. So was the attempt to amend the orders after the notice of motion was already filed since the chamber summons was already spent. In Kimamo's submission, the court had no jurisdiction to deal with the chamber summons any more as it was *functus officio*. Furthermore, he submitted, the extracted order was at variance with the ruling of the court and was also a nullity. As for the invocation of **section 99** of the CPA, he submitted that the Act does not apply to Judicial Review proceedings, which are special, and not civil proceedings. On those submissions Mr. Kimamo was supported by State Counsel for GoK, Ms. Muthoni Kimani.

20. Mr. Nyairo on the other hand contended that the entire application and the submissions of counsel before Tanui J had to be looked at in order to understand the intention of the Judge when he made the order. It is clear upon such perusal, he submitted, that there was a slip and it was proper therefore to invoke **sections 99** of the CPA which was intended precisely for that purpose. It did not amount to splitting the application for leave, and in any event an application for leave is not spent when the notice of motion is filed.

21. The learned Judge considered those submissions and agreed with the submission that **sections 99** of the CPA does not apply to Judicial Review proceedings. She also accepted and found that the order for leave as extracted was different from the order made on record and was therefore null and void as are all proceedings conducted subsequent to and pursuant to that order. She continued:

“Obtaining leave is a mandatory prerequisite to filing this type of application, for Order LIII rule 1 (1) of the Civil Procedure Rules require that “No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule”. Yet it is clear that by the time when they filed this application on 5/1/2004, they had no leave to do so. In my humble opinion, lack of such leave renders the whole application fatally and incurably defective, for the said leave cannot be obtained retrospectively after the substantive application has been filed by way of Notice of Motion.”

The learned Judge held on that ground alone that the notice of motion was *void ab initio* as it was filed without leave.

22. That finding is the subject matter of grounds 20 – 30 of the memorandum of appeal which were argued as one by Mr. Nyairo. He submitted that there could be no doubt as borne out by the record that the subject matter of the application which Tanui, J was seized of was seeking leave under **Order 53 (1) (1)** of the Civil Procedure Rules. The submissions made by counsel before Tanui J were to the same effect and it could not be right to say that counsel sought final orders for Judicial Review. Mr. Nyairo referred to the order issued by Tanui, J., the first part of which was not intelligible but was clarified by the last order which granted stay pursuant to the leave granted. The fact that the applicants went back for clarification on 12th January, 2004 did not, in his submission, mean that a fresh order was being issued, or that the order was being obtained retrospectively since there was clarification by the Judge that it was effective from 31st December, 2003. In his view, Gacheche J erred in sitting on appeal against the orders of Tanui J when both Judges had concurrent jurisdiction.

23. As for the application of section 99 of CPA, Mr. Nyairo submitted that the court's intention was the guiding principle and the intention, whenever ascertained, would go back to the date of the original order. He cited the case of **Raniga vs Jivraj [1965] EA 100** in support of that submission. The superior court was therefore wrong in holding that the section was not applicable in Judicial Review applications. He also referred to this Court's decision in **The Commissioner of Lands vs Kunste Hotel Ltd (1995 – 1998) I EA 1** which was followed by the superior court and submitted that nowhere in that case was it stated that the Civil Procedure Act was not applicable to **Order 53**. In his view, **Order 53** was enacted pursuant to **section 81** of CPA and it would be absurd therefore if it was inconsistent with any part of the Act.

24. Finally Mr. Nyairo submitted that the prayer for leave and the prayer for stay were not split as erroneously found by the superior court; that the case of **Shah vs Resident Magistrate [2000] I EA 208**, was misapplied; and that the extracted order and the order made by Tanui J were not at variance since the extracted order captured the court's intention on 31st December, 2003 as read with the order of 12th January, 2004.

25. The response to those submissions by Mr. Mutinda and Mr. Kimamo was largely a rehash of the objections raised and upheld before the superior court. They reasserted that the grant of leave was mandatory before the main motion was filed (**R vs Commissioner of Co-operatives & Another [1999] I EA 245**); that an extracted order that was at variance with the court record was a nullity (**Commissioner General, Kenya Revenue Authority vs Silvano O. Owaki, C A No. 45/2000 (UR)**); that **section 99** was

not applicable in Judicial Review applications (*the Kunste case (supra)*); that even if it was applicable, only minor clerical and arithmetical mistakes would be corrected and not substantive omissions or review; that **Order 53** was not enacted under the Civil Procedure Act but under **section 9 (1)** of the Law Reform Act; that the mere statement that leave would operate as a stay without an express order granting leave was ineffectual (**Julius M'Ethangata & 3 Others vs The District Land Adjudication Officer & Another C A No 161/1996**); that the proceedings before Tanui J on 12th January, 2004 were a nullity since they ought to have been conducted *inter partes* after the filing of the notice of motion; and that in obtaining an order for leave on 12th January, 2004 after grant of stay on 31st December, 2003, the application was split contrary to this Court's decision in the *Shah case (supra)*.

26. We are grateful to learned counsel for their extensive and incisive submissions on the issue of leave and for the authorities cited which we have carefully considered. In the end, however, we have come to the conclusion that the appeal on that ground is meritorious and ought to be allowed.

27. The starting point is the construction of **section 99** of the CPA which we must now reproduce: **"99. Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."**

It is a codification of the common law doctrine dubbed "*the Slip Rule*", the history and application of which has a wealth of authorities both locally and from common law jurisdictions. It is a rule that applies as part of the inherent jurisdiction of the court, which would otherwise become *functus officio* upon issuing a judgment or order, to grant the power to reopen the case but only for the limited purposes stated in the section.

28. Some of the applications of the rule are fairly obvious and common place and are easily discernible like clerical errors, arithmetical mistakes, calculations of interest, wrong figures or dates. Each case will of course depend on its own facts, but the rule will also apply where the correction of the slip is to give effect to the actual intention of the Judge and/or ensure that the judgment/order does not have a consequence which the Judge intended to avoid adjudicating on.

The Australian Civil Procedure has provisions *in pari materia* with **section 99**. As was stated in the case of **Newmont Yandal Operations Pty Ltd v The J. Aron Corp & The Goldman Sachs Group Inc [2007] 70 NSWLR 411**, the inherent jurisdiction extends to correcting a duly entered judgment where the orders do not truly represent what the court intended.

29. Nearer home the predecessor of this Court in **Lakhamshi Brothers Ltd v R. Raja & Sons [1966] EA 313** endorsed that application of the rule, that is, to give effect to the intention of the court when it gave its judgment or to give effect to what clearly would have been the intention of the court had the matter not inadvertently been omitted. *Spry JA in Raniga Case (supra)* also stated as follows: -

"A court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention."

30. What is certainly not permissible in the application of **section 99**, is to ask the court to sit on appeal on its own decision, or to redo the case or application, or where the amendment requires the exercise of an independent discretion, or if it involves a real difference of opinion, or requires argument and deliberation or generally where the intended corrections go to the substance of the judgment or order.

31. In this matter, the application before Tanui J was expressly for leave under **Order 53 (1) (1)** and the extensive submission made before him by counsel laid a basis for grant of leave to pursue the six orders of judicial review listed thereunder. In granting the order: "*Let orders of judicial in the nature of.....*" and listing down the six orders, the wording made no sense and cried out for correction even by the court on its own motion. It did not matter when that correction was sought or made since **section 99** provides for "*any time*" and is not confined to amendments or corrections prior to perfection of the judgment or order. In our view, the amendment of the order made on 12th January, 2004 went back to the date of the original order made on 31st December, 2003 and was not a fresh order capable of independent extraction. We reject the argument that the correction went to the substance of the application, and find and hold that it was necessary in order to give effect to what clearly would have been the intention of Tanui J who did not reject the application for leave, and indeed made a further order that the grant of leave would operate as a stay.

32. Having so found, it only remains for us to reject the contention that **section 99** is not applicable in Judicial Review applications. The side note to the section refers to "*Amendments of judgments, decrees*

or orders” and we think it was the intention of Parliament to apply it in all civil courts as stated in the preamble to the Act. To that extent, we find little, if any, relevance to the application of the *Kunste Case* as it did not deal with the provisions of CPA. **Order 53** was introduced into the Civil Procedure Rules by the Rules Committee appointed under **section 81** of the Civil Procedure Act after the enactment of the **Law Reform Act, Cap 26** which came into effect on 18th December, 1956. The Act provided in section 9 for the power to make rules, and that is why the preamble to LN 299/1957 which brought in **Order 53**, among others, stated:

“IN EXERCISE of the powers conferred by section 81 of the Civil Procedure Ordinance, and by virtue of the provisions of section 30 of the Crown Proceedings Ordinance, 1956, and section 9 of the Law Reform (Miscellaneous Provisions) Ordinance, 1956, the rules Committee hereby makes the following Rules: -”

The rules under **Order 53** are largely self regulating. As stated earlier, we allow the ground of appeal relating to leave.

Was KSC a State corporation at the time of the orders of the President and the Minister for Agriculture?

33. That is the second major issue identified as the fulcrum in the appeal. It was raised in grounds 7 to 15 and 18 to 19 of the memorandum and once again, they were argued at length as one ground by Mr. Nyairo.

The *ex parte* applicant’s case as stated in the application, supporting affidavits and submissions of counsel before the superior court was simply this: “KSC was not and has never been a State Corporation”. The reasoning was that it was originally registered under the Companies Act, **Cap 486** as a private limited liability company and the only change was made in 1960 when it resolved to convert itself into a public company limited by shares. It otherwise remained throughout, until the illegal intrusion of GoK, as a company governed by its Memorandum and Articles of Association. GoK was not a member of KSC, nor was any other State Corporation except ADC which like any other shareholder was a member, governed by the Memorandum and Articles of Association.

34. It was further submitted that the shareholding of ADC, even at the majority level of 53% did nothing to convert KSC into a State Corporation as defined under **section 2 (b) (v) and 2 (d)** of the Act, which provides that a company not wholly owned or controlled by the Government or State Corporation is not a State Corporation. When KSC took a decision through its Board of Directors and its members in Extra Ordinary General Meeting (EGM) to increase its nominal share capital in the year 2001 and to float 4 million shares for “*in house*” sale to existing shareholders, staff, seed growers, sub-agents and stockists, it did so in accordance with its Memorandum and Articles of Association. ADC however declined to buy any more shares although it was part of the resolution to float the 4 million shares and was a beneficiary of the exercise, with the result that its majority shareholding was diluted to 40% in the Company’s books. The activities of GoK were therefore unlawful and amounted to nationalization of private property.

35. On the other hand it was argued for the respondents before us as it was in the superior court, that by the statutory nature of ADC being wholly owned by GoK, and by virtue of the **State Corporations Act** (The Act) which came into effect on 1st November, 1986, KSC fell fairly and squarely within the Act and all the provisions thereunder; at any rate from the date of commencement of the Act. That is why under **section 6** of the Act the President was entitled to appoint the Chairman of the Board, while 11 other members were appointed by the Minister for Agriculture and such appointments were made periodically after commencement of the Act. Numerous other references were made to the record to illustrate that KSC, through correspondence, meetings, by deed and by conduct, acknowledged its status as a State Corporation.

36. Some examples were cited, thus: -

· the 33rd Annual General Meeting of KSC held on 19th February, 1990 where the status of the Company was explained to members as follows: -

“It was explained that while the Company will operate as a “private” Company under the Companies Act, it was now subject to the State Corporation Act by virtue of the 52% shareholding by Government via Agricultural Development Corporation. However payment of the audit fees is made to one auditor Deloitte Haskins and Sells, who are auditing the accounts on behalf of the Auditor General, Corporations.

.....

Mr. Aradi enquired as to whether the status of the company had changed from “Private” company to a

parastatal.

It was explained that the Company was operating as a private concern under the Companies Act but was subject to certain rules and regulations applying to parastatal organizations by virtue of the State Corporation's Act of 1986.

Mr. Shimechero enquired as to who made the first move to make the Company fall under the control of the Government. It was explained that it was a result of government legislation and since Agricultural Development Corporation holds 52% of the Company's shares we have to comply with the State Corporations Act."

- The audited accounts of KSC were periodically subjected to examination by the Public Accounts Committee of Parliament.

- Exemption was granted from privatisation in 1998 when other parastatals were slated for divestiture of GoK investment. It was explained in the 181st Board meeting held on 28th October, 1996, as follows: - "Shareholding status of Kenya Seed Company Ltd.

Mr. Kiptui also enquired as to whether the company could take advantage of the on-going privatization of parastatals so as to have the Government divest its shares held through the ADC.

It was stated that the government still considered KSC as a strategic corporation in view of the sensitive nature of the seeds in the Agricultural cereals sector.

The ADC representative however, clarified that their shares were not for sale at the moment."

And in the 40th AGM held on 16th December, 1996, it was explained to members:

"Mr. Shimechero raised the issue of the company Chairman suggesting that in future, the shareholders be allowed to elect the Chairman of Kenya Seed Company.

It was clarified that the current Chairman was properly appointed since the Government had majority shareholding through ADC. Hence the direct election of the Chairman will only be done after the Government divests its interests from Kenya Seed Company."

- Seeking authority from GoK before floatation of new shares in the year 2001 as confirmed in KSC Board Paper discussed in the 193rd Board Meeting on 3rd November, 1999 where it was resolved:

"In summary, the steps to be followed were:

- (a) Obtain Board approval.
- (b) Obtain Government approval.
- (c) Obtain shareholders approval at an EGM.

The Chairman wondered whether the proposed issue would require parliamentary approval so that the 53% shareholding held by the ADC is covered under the divestiture (sic) programme of the Government. However, it was clarified that the proposed new issue will not affect the status of the shares held by both the ADC and the KFA."

37. In sum, counsel for the respondents submitted that it was improper and in bad faith for the *ex parte* appellants to contend that KSC was not and has never been a State Corporation, at any rate between 1986 when the Act came into effect, and 1st December, 2001 when there was a purported floatation of shares which diluted the shareholding of ADC.

38.

As for the floatation and the period thereafter, it was submitted that it was in contravention of the Act which required in **section 11 (2)** that the approval of the Minister for Agriculture and the concurrence of the Treasury be obtained for any proposal for funding projects. The expressed objective of floating the 4 million new shares was admittedly to raise capital for projects as explained to the EGM in its meeting held on 15th December, 2000, thus:

"...to inject fresh capital in order to finance the capital expansion programme that the Company had undertaken namely the purchase of new factory machinery to be installed at Seed Driers at a cost of Kshs.50 million; the purchase of Elgon Downs Farm from Lands Limited at a cost of Kshs. 155 million; construction of a new Industrial building and storage facilities at Seed Driers at a cost of Kshs.20 million; and purchase of new power generators to alleviate the power-rationing programme at a cost of Kshs.20 million.

Since the interest on overdraft had proved to be too expensive, the management did not foresee any other source of funds to finance the planned acquisitions hence the need for the Company to increase the ASC in order to be able to issue 4 million shares to the public."

39. A flurry of correspondence was exchanged between KSC and GoK in respect of the floatation but no approval was ultimately granted. The objections registered by GoK were summarized by Mr.

Mwangazi Mwachofi, Financial Secretary/Treasury in his letter to Dr. Richard Leakey, PS, and Head of Public Service dated 12th April, 2000, stating in part:

“However, I have serious reservations on the proposal to issue new shares by private placement. In the spirit of transparency, it is necessary to offer the opportunity to invest in the Kenya Seed Company to all interested Kenyans. It is also absolutely necessary to expose the whole process to the scrutiny and accountability required by the Nairobi Stock Exchange. It will be unfortunate if the proposed issue of new shares is seen as an attempt by a small group of existing shareholders to secretly expand their shareholding at very generous terms without giving the rest of the Kenyans an opportunity to acquire shares.

The proposal to issue new shares at the par value of shs.20 is both curious and very unusual. Well established and on-going businesses usually issue new shares based on current valuation of the business. Issuing new shares at par value of Shs.20 would most likely allow the existing and some privileged new shareholders to acquire the new shares at substantially below their fair market value. Clearly this would be unfair to the rest of the Kenyans.

Finally, it is my firm belief, that the process of privatization should be handled by the government privatization unit and left to the management of the units being privatized. It is a well established fact that a conflict of interest exists whenever management is allowed to lead the privatization process. The threat that the new owners would wish to change management makes management reluctant to expedite the privatization process and often motivates management to compromise the interest of the shareholders (the Government). As we move forward with our privatization program, it will be in everybody’s interest to ensure that the control and leadership of the privatization process is not given to the management of the units being privatized.”

40. KSC was directed to discuss the matter with the Board and revert to GoK. Subsequently the Board went ahead in June 2000 and resolved to proceed with the floatation after endorsement by the EGM held on 15th December, 2000. Apparently a letter written to KSC by GoK on 17th July, 2000 supporting the sale with reservations against private placement was ignored. It stated in part:

“However, the sale of 4,000,000 to the public will have the effect of reducing Government interest (through ADC from 53%; thus converting the company to a privately controlled company. This is a privatization exercise that ought to be handled by the Executive Secretariat and Technical Unit (ESTU) of the Ministry of Finance and Planning.”

41. There were other letters exchanged and ultimately, GoK advised on 23rd October, 2001 that *“the process be halted until Government approval was obtained.”* A further letter from GoK dated 14th November, 2001 confirmed discussions held with KSC and an agreement reached, that:-

“...the best course of action would be to restructure the share offer into a Rights issue as a first step. If you fail to raise adequate capital through rights issue, you would as a second step issue shares to the public through a public offer, giving all Kenyans an opportunity to buy some shares. Please keep us informed of the progress you make in implementing this transaction.”

The sale went ahead anyway, that agreement notwithstanding, and the majority of shares, reportedly 66.8% of the subscribed 3,370,000 new shares worth over Kshs.90 million, ended up with the Managing Director, his three children and a company in which he and his wife are the shareholders. What ensued thereafter were Board room wars between GoK and some KSC members which came to a head in December, 2003, with the decisive action taken by GoK and protested by the *ex parte* appellants, when criminal charges were preferred against them and a new Board appointed to office.

42. The position taken by the respondents was therefore that the purported dilution of the majority shareholding of ADC with the intention of converting KSC into private company was fraudulent and contrary to public policy since a threat to food security in the country is a threat to national security.

43. Upon consideration of all the material on record and the submissions of counsel on the issue, the superior court agreed with the respondents and delivered itself as follows:

“The State Corporation Act Cap 446 of the Laws of Kenya hereinafter referred to as “the Act”), was enacted in 1986 and revised in 1987

It is common ground, that at that time ADC, which was a state corporation, had majority shares in KSC. This meant that KSC was a subsidiary of ADC by virtue of the fact ADC held more than 50% of the nominal value of its equity share capital, and the obvious interpretation would be that being a subsidiary of a state corporation, KSC was governed by the Act, and it therefore fell within the full ambit of the Act, for it is clearly stipulated that a “state corporation” under section 2 (c) of the Act includes “a subsidiary of a state corporation.

It is common ground that ADC was established as a body corporate and it would be required “to comply with such general or special directions as the Minister may from time to time issue in the performance of its functions” (section 3 of the ADC Act). In my opinion, that requirement is couched in mandatory terms, and having found that KSC was a subsidiary of ADC, therefore fell within the mandate of the Minister, and that it was required to comply with his special and general directives.

The Companies Act does not require a private company to submit its audited accounts to Parliament. Indeed, it is only a company which is classified as a state corporation that is under an obligation to comply accordingly, which state corporation is also required to submit its quarterly reports, and annual budgets, and also to appear before the Public Investments Committee, to explain matters pertaining to its affairs, something that would not be required of a firm which was not a state corporation. I find that KSC therefore acknowledged that theirs was a state corporation, and without creating a farce, acted in compliance with the particular statutory requirements as is required of all state corporations. It can therefore only be concluded that by its conduct, in word and deed, it acknowledged that it was a state corporation, a fact which is supported by GoK’s action in appointing the Chairman of KSC over the years, as well as other members of its board by virtue of the provisions of section 6 of the Act, which provides for the composition and appointment of boards of state corporations. It is also clear from the pleadings herein that it’s Managing Director (the 2nd applicant) was a government appointee, and that he held his term at the GoK’s pleasure. He was also required to obtain authority to travel out of the country.

Of interest is the fact that members acknowledged at several board Meetings that it was necessary to seek GoK’s authority before the floatation of the shares, and the privatization, especially because they acknowledged that KSC was considered to be strategic, and it was clear from the exhibits on record that it had not been listed amongst those which GoK intended to privatize.”

The learned Judge found and held that GoK and the Minister were entitled to take the action they took to appoint the new management to protect the interest of the public, in a matter affecting KSC, which was considered a strategic company.

44. We have given anxious consideration to this issue after reassessing and re-evaluating the documentary evidence on record as we must do on a first appeal, in order to arrive at our own conclusions in the matter. In the end, we have found considerable force in the submissions put forward by the respondents and therefore register our concurrence with the superior court, that, in all probability, KSC was a State Corporation.

45. In making that finding, we are mindful that the internecine war on shareholding within KSC may be fought and determined in different and more appropriate fora. But for purposes of the application made before the superior court, which is in the realm of public law, and seeks discretionary remedy, we find no basis for faulting the respondents in the circumstances of this case.

46. The starting point once again is the law governing the status of KSC. It was indeed originally a private limited company under the **Companies Act, Cap 486**, but it deliberately converted into a public company, invited ADC into membership and created additional shares for it because “ADC’s greater holding is indeed meant to improve services and thus help maintain the levels of profitability” (EGM held on 21st July 1976). They were aware of the legal status of ADC which was a creature of statute (**Cap 444**) with specific functions and that it was wholly owned by GoK. They were not strangers to the gradually increasing shareholding of ADC until it acquired the controlling shareholding of 53% of the company.

47. The companies Act defines a subsidiary under **section 154 (1)** as follows: -

“154. (1) For the purposes of this Act, a company shall, subject to the provisions of subsection (3), be deemed to be a subsidiary of another if, but only if –

(a) That other either –

(i) is a member of it and controls the composition of its board of directors; or

(ii) holds more than half in nominal value of its equity share capital; or

(b)”

KSC was therefore a subsidiary of ADC. That happy business relationship would perhaps have persisted beyond the year 1986, but in that year, Parliament enacted the State Corporations Act for purposes of “*establishing State Corporations, for control and regulation, and connected purposes*” (preamble).

48. State Corporation is defined in **section 2** and as far as is relevant to this case, states:

“2(b) a body corporate established before or after the commencement of this Act by or under an Act of Parliament or other written law but not-

(i)

(ii)

(iii)

(iv)

(v) **A company incorporated under the Companies Act which is not wholly owned or controlled by the Government or by a state corporation.**

and

(d) a subsidiary of a state corporation.”

So that, ADC was a body corporate established before the Act under an Act of Parliament and was therefore a State Corporation. KSC was a company incorporated under the Companies Act, and would not have fallen under the definition if it was not controlled by a State Corporation. But it was controlled by ADC and was therefore a State Corporation. It would also be a State Corporation because it was a subsidiary of a State Corporation.

49. But that clear definition applies only up to the controversial floatation of the new shares of KSC in 2001, and the consequent dilution of ADC share holding. As is evident from the records, the stated objective of the floatation was to raise capital and therefore the provisions of **section 11 (2)** of the Act kicked in. It provides:

“(2) No annual estimates and proposals for funding projects shall be implemented until they have been approved by the Minister with the concurrence of the Treasury.”

As we have seen, that procedure does not appear to have been followed to the letter, thus precipitating a *coup* against ADC by declaring in a letter addressed to GoK on 15th November, 2002, thus:

“...KSC has ceased to be a state corporation within the meaning of sections 2 (b) (v) and 2 (d) of the State Corporation Act.”

50. There was also another claim made by KSC that it had been exempted by the President in 1994, from the operations of the Act pursuant to a **Legal Notice No. 495/94** invoking **section 2** of the Act. On that claim, the superior court stated:

“A glance at section 2 of the Act which is referred to in the above notice shows that it is the interpretation section of the Act. The section can only seek to define ‘exemption’ which in any event it has not. It cannot be used as a base for an exemption or exemptions, for it does not grant the President or any other person the power to exempt. In my opinion, the said ‘exemption’ was a nullity, and of no legal consequence, and thus void ab initio.”

That finding was the subject matter of the third issue raised by the *ex parte* appellants covering grounds 16 and 17.

51. We think for ourselves that the superior court was right in its appreciation of the purported exemption. There was no power donated to the President under the Act to confer exemptions to Parliamentary enactment on the control and regulation of State Corporations. The express power to “*exempt*” was only introduced by **section 5A** of **Act No. 2/02** which amended the original Act. The President initially could only “*declare*” by notice in the Gazette that any other body corporate was not a State Corporation, but there has never been any such lawful declaration.

At all events in the 33rd AGM held on 19th February, 1990, it was reported that:

“...the management had lobbied for the company to be exempted from certain provisions of the State Corporations Act so that the company could only operate under the Office of the President.”

It was exemption sought for a limited purpose only, but KSC remained a State Corporation as illustrated in correspondence, by its deeds and conduct, even after the purported exemption.

52. Being of the frame of mind that the issue raised is not meritorious, we are of the view that the remaining issue raised by the *ex parte* appellants as to whether the conditions for grant of the orders of certiorari, mandamus and prohibition were satisfied, becomes wobbly. The issue was summarized in grounds 31 – 37. The orders of certiorari would not issue because on a balance of probability KSC was a State Corporation and there was legal basis for the actions of the President and the Minister for Agriculture. Prohibition would not issue because it is powerless against a decision which has already been made before the issuance of the order. And mandamus would not issue because the Companies Act does not provide for any duties to be performed by the Minister which he failed to perform. In sum we agree with the conclusions made by the superior court in respect of the three prayers sought.

53. The net result of our decision is that this appeal must fail despite the partial success by the *ex parte* appellants on one ground. We order that it be and is hereby dismissed, but the *ex parte* appellants shall

bear two thirds of the costs, both here and in the court below.
Orders accordingly.

Dated and delivered at Nairobi this 10th day of December, 2010.

E. O. O’KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

P. N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR