



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT AT NAIROBI**

**PETITION NO. 35 OF 2012**

**IN THE MATTER OF: ARTICLE 22 [1] OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS**  
**AND FREEDOMS UNDER ARTICLE 2[1], 3[1], 10[1], & 2, 19[2] 20[2] 26[1] & 3**  
**27[1], 28, 40 [1] 41[1] 47[1] & [2] &50[1] OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ILLEGAL APPOINTMENT OF PARALLEL BOARD OF DIRECTORS FOR NUMERICAL MACHINING COMPLEX BESIDES AND IN COMPETITION WITH THE BOARD OF DIRECTORS APPOINTED PURSUANT TO THE COMPANY'S ARTICLES AND MEMORANDUM OF ASSOCIATION**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF THE RIGHT TO HUMAN RIGHT, TO HUMAN DIGNITY, THE RIGHT TO PROTECTION OF THE LAW, THE RIGHT TO FAIR LABOUR PRACTICES, THE RIGHT TO ADMINISTRATIVE JUSTICE, AND THE RIGHT TO ACCESS JUSTICE**

**GEORGE S. ONYANGO. OGW.....**  
**PETITIONER**

**AND**

**BOARD OF DIRECTORS OF**  
**NUMERICAL MACHINING COMPLEX LIMITED.....1<sup>ST</sup> RESPONDENT**

**MINISTER FOR INDUSTRIALIZATION .....2<sup>ND</sup>  
RESPONDENT**

**THE HONOURABLE THE ATTORNEY- GENERAL.....3<sup>RD</sup>  
RESPONDENT**

**Rika J**

**CC. Leah Muthaka**

**Mr. J.O. Arwa Advocate instructed by Rachier & Amollo Advocates for the Petitioner**

**Mr. Imende Advocate instructed by Mohammed Muigai Advocates for the 1<sup>st</sup> Respondent**

**Mr. L. Muiruri Senior Principal Litigation Counsel instructed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents**

**JUDGMENT**

1. This Petition originated from the Constitutional and Human Rights Division of the High Court of Kenya at Nairobi, registered there as Petition Number 417 of 2012. It was transferred to the Industrial Court on the orders of the High Court delivered on 26<sup>th</sup> October 2012. It was registered at the Industrial Court as Petition Number 35 of 2012. On 14<sup>th</sup> November 2012, the Court issued an Order directing that the position of Managing Director of the Respondent, which was previously held by the Petitioner, remains unfilled until his Petition is determined.

2. On 14<sup>th</sup> May 2013, the Parties' Advocates agreed to dispose of the Petition by way of their respective pleadings, affidavits, and submissions. Submissions were filed and exchanged, and Mr. Arwa for the Petitioner, Mr. Imende for the 1<sup>st</sup> Respondent and Mr. Muiruri for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, highlighted these submissions on 3<sup>rd</sup> June 2013. The Court advised its Judgment would be delivered on notice.

3. The Petitioner's position is that Numerical Machining Complex Limited [hereinafter referred to as the Company] was incorporated on 4<sup>th</sup> January 1994 as a private company limited by shares. Its major shareholders are Kenya Railways Corporation and the University of Nairobi, who hold 51% and 49% of the shares respectively.

4. The Memorandum and Articles of Association of the Company provide for the appointment of the Company Chairman, Vice-Chairman and other Members of the Board. On 18<sup>th</sup> December 2011, vide gazette notice number 14701, the President of Kenya, in violation of the Memorandum and Articles of Association, and in breach of section 6 [1] [a] of the State Corporations Act Cap 446 the Laws of Kenya, appointed Prof. Nick Wanjohi to be the Chairman of the Company for a period of 3 years. This was followed by the appointment by the Acting Minister of Industrialization on 20<sup>th</sup> January 2012, of Abdi Hassan, Joseph Janga, Andrew Mitei, Bernard Ngore, Sarah Mbwaya, and Joyce Mulinge as Members of the Board of the Company for 3 years. There was already an existing Board, constituted in accordance with the Articles of Association of the Company.

5. The Petitioner submits that section 6 of the State Corporations Act used in making the appointments is in the nature of a default clause, and should only be used when there is no other law defining the mode of appointment. The President and the Minister violated the Constitution by disregarding the rule of law. The result was that there was a standoff between the legally appointed Board and the counterfeit appointed by the Executive. The counterfeit Members persistently threatened the Petitioner who remained the Managing Director, demanding for favours which were in the form of acts of corruption and impunity. The Petitioner refused to engage in corruption, and the counterfeit Board schemed to remove him from office. They desired to replace the Petitioner with a friendly Managing Director who could do their

bidding. The new Board hurriedly convened a Board meeting on 31<sup>st</sup> August 2012 excluding the Petitioner, and decided to terminate the Petitioner's contract of employment.

6. The refusal to renew the contract was contrary to the procedure which required the Board to have signed a performance contract with the Petitioner, which would form the basis for evaluating whether the employment contract should be renewed. The petitioner was not given a chance to be heard before the decision denying him extension of the contract was made. The Board was very young and did not fully grasp the role of the Petitioner in ameliorating the image of the Company. The Petitioner alleged he was being removed from the office before the expiry of his contract; was locked out of his office and denied the chance to remove his belongings; was humiliated and thrown out by the Company's security personnel; and was treated as persona non- grata in the company he worked so hard to build. The Company rushed to appoint Christine Mbando as the interim Managing Director.

7. The Petitioner's Right to Protection of the Law under Article 27 [1] was infringed by the Company through the ignoring of by the Company of the contract of employment subsisting between the Company and the Petitioner; the provisions of the Employment Act and all Labor related Legislations were not followed; termination was carried out by a Body which was illegally constituted; and the contract was terminated before its expiry date.

8. Article 28 with regard to the Petitioner's Right to Human Dignity was breached in that the Petitioner was locked out of office without reason; was subjected to humiliating treatment by being locked out and prevented from accessing his personal belongings; and the security guards were advised not to let him access his former office.

9 Article 41 on Fair labour Practices was breached on the ground that the Petitioner was denied remuneration even for the services already rendered; was denied employment benefits; had the contract of employment ended without reason offered by the employer in justification; and was not heard before termination.

10. Onyango's Right to Fair Administrative Action under Article 47 was disregarded through the unlawful appointment of a Board of Directors; the making of administrative decisions that affected the Petitioner, without advancing him any reasons thereof; the making of administrative decisions without affording the Petitioner the right to be heard; making of administrative decisions based on malice and personal interests rather than legitimate interests of the Company or the Public; making administrative decisions without following due process; failing to comply with the rule of law in making administrative decisions affecting the rights and interests of the petitioner; and making administrative decisions that were not justifiable having regard to the prevailing facts and circumstances.

11. The Petitioner suffered financially as a result of the premature termination of his contract of employment. The matter was glared before the media, publicly humiliating the Petitioner, and subjecting him to ridicule and public odium.

12. Mr. Arwa submitted that the Petitioner had applied for renewal of his contract of employment to the legally constituted Board. There was no response. The Petitioner reapplied for renewal to the reconstituted Board, again without success. The State Corporations Act did not govern the Company. Clause 86 of the Articles of Association made the mode of appointment of Board Members self-constitutive, based on the holding of certain offices, rather than appointment of individuals for specific terms. Section 6 of the State Corporations Act came into play only if the Articles had no regulations on the constituting of the Board. The Petitioner cited the High Court case of **Julius Nyarotho v. the Attorney- General and 3 Others [2013] e-KLR** in urging the Court to find it was not possible for the President to appoint a Chairman and have a superimposed Board, without attempting to revoke the previous Board. The President and the Minister violated the law.

13. The Petitioner disputed the Respondent's reliance on Section 7[3] of the State Corporations Act which states the President may revoke appointment. The appointment of the Board Members was made by the Minister. Section 7 only allowed the President to appoint and secondly, mandated the President to revoke.

To-date, no revocation has been done. Thirdly, this provision applied only in cases where the Corporation was governed by the Act. It did not apply to the Company.

14. It was alleged by the Respondents that the old Board was dormant. This was not correct. The old Board was shown to have met on 14<sup>th</sup> November 2011, just about 2 days before the President appointed Professor Nick Wanjohi. The new Board was illegal and no decision made by that Board could have legal effect. All decisions including the refusal to renew were null and void. Even assuming the Board was legal, it had no power to refuse to renew; only the Government of Kenya under Clause 111 of the Articles of Association could appoint or revoke appointment of the Managing Director, not the Board. Only the Minister could terminate the contract of the Managing Director, not the Board. The purported request to the illegal Board for extension was made by the Petitioner in error. The valid Board allowed the Managing Director to continue serving, the contract thereby being extended by the operation of the law. There was legitimate expectation, a principle well established in law. The Petitioner asked the Court to apply the principle as discussed and adopted in the Industrial Court of Kenya Case *of Isabel Wayua Musau v. Copy Cat Limited [2013] e-KLR*, and the *Supreme Court of India case of J.P. Bansal v. State of Rajasthan & Anor [Civil Appeal 5982 of 2001]*. The Company did not respond to the Petitioner's application for renewal of contract, and therefore created in him legitimate expectation that he would go on working.

15. None of the Shareholders- Kenya Railways and the University of Nairobi- is represented in the new Board. The Petitioner's rights and the Shareholders' rights were compromised. Article 22 of the Constitution of Kenya allows any person to challenge a violation on behalf of another. The two could not challenge the President's decision as they were Government Institutions. The dispute was properly filed as a Constitutional Petition. The allegation by the Respondents that the Petitioner should have filed an application for Judicial Review was misconceived. Judicial Review dealt with the failure to follow due process; the case here was one involving an illegal body, not amenable to Judicial Review. It was not a correct submission that the Petitioner accepted the legality of the new Board because he sent a request for extension. Engaging an illegal body in error could never turn that body into a legal body.

16. The Petitioner's contract did not expire. A request was made to the valid Board, with no response. The fact that the Petitioner thought the new Board was legitimate is not relevant; legitimacy is a matter of the law. The legal Board is chaired by the Chairman of Kenya Railways. Judicial Review would not override a Petition, and this Court is empowered to grant appropriate reliefs. The Petitioner urges the Court to rely on Article 23 [3] in granting him the following prayers:-

- a. A declaration that the President of Kenya and Acting Minister for Industrialization both contravened the law by appointing a Board pursuant to Section 6 of the State Corporations Act, thus rendering such appointments unlawful;
- b. A declaration that the 1<sup>st</sup> Respondent is unlawfully created thus annulling all decisions they have made since their appointment including their decision to dismiss the Petitioner from service;
- c. An order of prohibition to restrain the 1<sup>st</sup> Respondent being the illegally constituted board by themselves, servants and /or agents from purporting to carry on, or executing the functions of the Board of Directors of Numerical Machining Complex Limited;
- d. An Order declaring the decision of the President in appointing Chairman of the Numerical Machining Board of directors vide legal notice number 14701 dated 18<sup>th</sup> November 2011 illegal and consequently null and void;
- e. An order declaring the decision of the then Acting Minister of Industrialization vide legal notice number 450, dated 20<sup>th</sup> January 2012, illegal and consequently, null and void *ab initio*.
- f. Restraining order be issued against the 1<sup>st</sup> Respondent from interfering with the Petitioner's duties as Managing Director of the said company;

- g. An order that the Petitioner be compensated for the losses and damages he has suffered and continues to suffer, by reason of the aforesaid interference with his contract of employment with the Numerical Machining Company; and,
- h. Costs of the Petition.

17. The 1<sup>st</sup> Respondent opposes the Petition. The Board relies on the affidavit of Abdi Mohamud Hassan, a Member of the Board, sworn on 19<sup>th</sup> October 2012. He states that he is conversant with the issues in dispute, namely- the appointment of the Chairman and Members of the Board of Directors of the Company; the non-renewal of the Petitioner's contract of employment as the Managing Director of the Company which was set to expire in November 2012; and the recruitment of a new Managing Director.

18. Mr. Hassan explained that the Petitioner was initially employed as a General Manager of the Company on 27<sup>th</sup> March 2008. He was then appointed the Managing Director for a period of three years, starting 9<sup>th</sup> November 2009. The appointment was made through Gazette Notice Number 11796. He was given a written contract, which he signed on 4<sup>th</sup> February 2010. The contract required that if the Petitioner desired to renew his contract of employment, he would make a written request to the Board at least six months in advance of the expiry date. His performance would be reviewed regularly by the Board. The President appointed a Chairman of the Company on 16<sup>th</sup> November 2011, while the Acting Minister for Industrialization appointed Members of the Board of Directors on 10<sup>th</sup> January 2012. Prior to these appointments, the Company did not have a legally constituted Board. There was no parallel Board, and no-one came forward complaining that the new Board had been appointed illegally. The Petitioner reported to the new Board without any complaints. He attended Board meetings and signed minutes as the Secretary to the Board without raising any queries.

19. The Petitioner wrote to the Company Chairman on 9<sup>th</sup> July 2012, expressing his interest in renewal of the contract. This was not six months in advance of the expiry date. He acknowledged the contract was due to expire on 9<sup>th</sup> November 2012. He stated in this letter that there was slow progress in the implementation of proposals for restructuring, which he attributed to the absence of a properly constituted Board. He acknowledged that there now was in place, a properly constituted Board, with which he could work and move together in the desired direction. He was referring to the Board which he now characterizes as illegal.

20. In a Circular dated 23<sup>rd</sup> November 2010, the Office of the President had given guidelines for the appointment of CEOs of State Corporations which were: in cases of sitting CEOs wishing renewal, to express their wish six months before expiry of their subsisting contracts; be appraised by the Board with recommendation for renewal or termination accompanying the appraisal report; proceed on terminal leave where the Board did not recommend renewal and pave way for recruitment and appointment of an acting CEO; and the Board would recruit an acting CEO in consultation with the parent Ministry and the State Corporations Advisory Committee [ SCAC] as provided for under Section 27 [1] [c] of the State Corporations Act.

21. The Kenya National Audit Office [KENAO] conducted an audit in the affairs of the Company for the year 2011/ 2012 and unearthed various malpractices. The Board appraised the Petitioner, and found him unsuitable for renewal. The Chairman wrote to the Petitioner, informing him his contract would not be renewed, in a letter dated 3<sup>rd</sup> September 2012. He was placed under terminal leave. He continued to enjoy his full employment benefits pending the expiry of the contractual term. The Board appointed an acting Managing Director on 3<sup>rd</sup> September 2012. The Petitioner did not have any axes to grind with the Board for 8 months since its inauguration. It was only after the refusal to renew the Petitioner's contract that he started to question the legitimacy of the Board and instigated legal action. He was motivated by bad faith and malice, and came to Court through a Petition, to avoid the six month time limit imposed by Statute in bringing application for Judicial Review.

22. The Company advertised for the position on 11<sup>th</sup> October 2012. The Petitioner was not barred from

applying for the position and suffered no loss or damage. Mr. Imende submitted that the Petition was disguised as a Constitutional Question, but was aimed at securing a contract of employment, a contract which lapsed on 9<sup>th</sup> November 2012. If renewal of the contract was granted by the Board characterized as illegal by the Petitioner, this Petition would not have been filed. The Petitioner had no issue with the Board, so long as it worked to his advantage. He worked with the Board for 8 months. He summoned its meetings and acted as its Secretary. He affirmed the two Gazette Notices which he has now opted to impugn. He wrote to the Board assuring there was now in place a properly constituted Board. The Board became illegal only upon its refusal to renew his contract.

23. He has no ground to claim to be acting for Kenya Railways and the University of Nairobi. His invocation of Article 22 and 258 of the Constitution in doing this was neither here nor there. The Articles only allow a person to act for another, where that person cannot act in his own name. He presumes the two Institutions suffer some legal incapacity. He has sued the Board. The Company is a limited liability company, and even on the face of it, his Petition is a legal flop.

24. Clause 86 of the Articles of Association and Sections 6 and 7 of the State Corporations Act are clear on the manner of appointment. The previous Board was not gazetted, and revocation could only be made if there was gazette notice on appointment. The orders of prohibition and quashing which the Petitioner seeks are the classical orders given in Judicial Review. Such orders should have been sought within six months. The Petitioner seeks an escape route through the Constitution. Every grievance must include an element of breach of the Constitution, but not all grievances should warrant the filing of a Petition.

Constitutional jurisdiction must not be trivialized. The 1<sup>st</sup> Respondent relies on the ***High Court of Kenya at Nairobi Petition Number 564 of 2004 between Alphonse Mwangemi Munga & 11 Others v. Africa Safari Club***, among other decisions, which holds the value of the Constitution would be diminished, if it is allowed to be used as a general substitute for the normal procedures for invoking judicial control of administrative action. Breach of contract has a remedy.

25. The Petitioner's submission that under Clause 111 of the Articles the Board had no mandate to refuse to renew his contract is self-defeatist; it would imply the Board did not have the mandate to appoint the Petitioner as Managing Director in the first place. He would have no contract to preserve. The prayers sought are not available and would only have been considered within six months of the decision. The Court cannot issue an order extending a lapsed contract. The Petitioner can apply for the job like any other person. The 1<sup>st</sup> Respondent urges the Court to decline the Petition.

26. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents associate themselves fully with the position given by the 1<sup>st</sup> Respondent. They adopt the Grounds of Opposition filed on 17<sup>th</sup> October 2012, and the submissions filed on 29<sup>th</sup> May 2013. The issues raised by the Petition, according to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are whether the dispute raises issues that relate to interpretation and application of the Constitution and enforcement of fundamental rights; whether renewal of the contract is a moot issue; and whether the Petitioner has approbated and reprobated. The High Court referred the dispute to the Industrial Court because in issue is an employment contract. The dispute is a Petition by name, but in reality is a quest for enforcement of a contract. There is no linkage to the Constitution on all the issues raised to by the Petitioner. Certain Articles of the Constitution have been sprinkled here and there, but there is no nexus with the facts availed to the Court by the Petitioner. The Petitioner should not merely mention Articles; he must show by evidence how these Articles were violated. The Petitioner must show how the Kenya Railways and the University of Nairobi are handicapped, so as to bring in play Articles 22 and 258 of the Constitution. Constitutional jurisdiction must not be trivialized.

27. 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submit that renewal of the contract is no longer in issue. The Petitioner's contract lapsed. He made an application for renewal. It could be renewed, or renewal declined. Legitimate expectation went both ways. Even in the intervening period, the Board could terminate the contract in terms of the termination clause. The Petitioner served for three years and the matter ended there. Parties must be held to their agreements. When it suited him, the Petitioner was willing to recognize the legitimacy of the Board. He wishes to rely on the Constitution to enforce a contract. He took a position and should not be allowed to somersault and change position. He should have come to Court eight months

ago to ask for the quashing of the illegal Board. He dined with that Board, and when the relationship soured, acted like a jilted lover.

28. Relying on High Court decisions of *Uhuru Muigai Kenyatta v. Nairobi Publications Limited [2013] e-KLR* and *Alex Malikhe Wafubwa & 7 Others v. Elias Nambakha Wamita & 4 others [2012] e-KLR*, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submit that where there is a remedy in Civil Law, a party should pursue that remedy. Public law is not about private rights; it is about misuses of public power. The Petitioner avoided Judicial Review to escape the limitation imposed by Order 53 of the Civil Procedure Rules 2010. The contract was for a period of three years. The Board had the right under the contract to terminate the contract prematurely, depending on his performance. His relationship with the Board was predicated on the subsistence of the contract. He was bound by the terms of the contract which he signed. These were un-ambiguous. In his letter of 9<sup>th</sup> July 2012, the Petitioner affirmed the legitimacy of the new Board. He cannot approbate and reprobate, and is bound by the maxim that he who comes to equity must come with clean hands. He is not entitled to any reliefs. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents pray the Court to dismiss the Petition, and the Petitioner be ordered pay the costs.

29. The issues as understood by the Court are these-:

**[a] Whether the Petitioner properly invoked the Constitutional Jurisdiction?**

**[b] Whether the Company is fully governed to the State Corporations Act Cap 446 the Laws of Kenya?**

**[c] Whether the Board of Directors of the Company was properly constituted so as to render its employment decisions concerning the Petitioner legitimate?**

**[d] Whether the prayers contained in the Petition should be granted?**

**THE COURT FINDS -:**

**[a] Constitutional Jurisdiction**

30. It is generally accepted through a catena of judicial precedents, that the Constitution should not be used for settlement of everyday litigation, as discussed in *High Court Petition Number 564 of 2004, Alphonse Mwangemi Munga & 11 others v. Africa Safari Club*. The Industrial Court adopted this approach in the Petition involving *East African Portland Cement Company Limited v. the Attorney-General & Another [2013] e-KLR*, concluding that Courts must guard against the distortion or manipulation of the constitutional jurisdiction. To characterize everyday dispute as a constitutional violation, transforms the Constitution from a blueprint of fundamental freedoms and rights to a document for litigating everyday disputes. Its moral force is diminished. This is the thread running through the decisions cited by the Respondents, in particular *Uhuru Muigai Kenyatta v. Nairobi Publications Limited [2013] e-KLR* and *Alex Malikhe Wafubwa & 7 Others v. Elias Nambakha Wamita & 4 Others [2012] e-KLR*. Where a fundamental right is regulated by legislation such as the Employment Act 2007, such legislation and not the underlying constitutional right becomes the primary means of giving effect to the constitutional right. The principle was discussed by this Court in the recent decision involving *GMV v. the Bank of Africa Limited [2013] e-KLR*. If an employer adopts a labour practice thought to be unfair, an aggrieved employee would at first instance seek remedy under the relevant legislation. If the employee finds no remedy there, the legislation might come under scrutiny for not giving adequate protection to a constitutional right. The dominant principle in cases where a wrong is thought to touch on the Constitution, Common Law and Legislation, is that the remedy should be pursued from the first port of entry. The first impression to be made from these decisions is that, the Petitioner Mr. Onyango wrongly invoked the constitutional jurisdiction, and should have searched for remedy from his contract of employment and the legislation governing that contract.

31. This is not however, an immutable legal proposition. It is accepted that every exercise of state power is subject to constitutional review. All law derives its force from the organic law, and all conduct sourced in law, must as a logical matter be consistent with the organic law. There are common considerations in

private and public law claims. Although the bewitching perception of the Constitution is that it defines the relationship between the State and its Citizens, there is a growing seepage of fundamental rights into common law disputes between private parties. Interpretation of the law is not necessarily contingent upon the parties to the case. An act which is deemed unconstitutional when raised by an individual against the state may still be deemed unconstitutional when raised by the individual against another individual. Some of the most notorious violators of fundamental freedoms and rights in the labour market today are not states; they are individual and corporate employers.

32. Legal Philosopher Laurence Tribe- in **‘the Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics, 1989 103 Harvard LR 1, 7, 8 and 20’** states, **‘Just as space cannot extract itself from the unfolding story of physical reality, so also the law cannot step back, establish an Archimedean point of detached neutrality, and selectively reach in, as from the outside, to make fine tuned adjustments to highly particularized conflicts. Each legal decision restructures the law itself.’** Private disputes are therefore not beyond the reach of the Bill of Rights. The State is not always viewed as something separate from its inhabitants, but viewed as a locus of relationships, rules, norms and ideas that determine the way we understand each other.

33. In the South African decision of ***Carmichele v. Minister of Safety and Security [2001] [4] SA 938, 2001 [10] BCLR 995***, the Court embraced this philosophy holding that **‘ every common- law case is potentially a constitutional matter.’** Where the Court determines that rights asserted by a party do not apply directly to the dispute, it may still apply the Bill of Rights to the dispute. Secondly the Court must always infuse any law with the general spirit, purport and objects of the Bill of Rights. The Court is not confined by pleadings filed by the parties; it must be prepared to raise of its own accord constitutional issues that may affect a legal relationship, interpretation of legislation or the development of the common law. However, simply because an interpretation of a statute, or common law rule could, in the abstract raise some kind of constitutional issue, does not mean that parties adopt constitutional argument in every dispute, or that the Court must provide constitutional analysis of the status of common law, or a piece of legislation in every case which such rule is dispositive.

34. The Court does not see the Petitioner’s invocation of constitutional jurisdiction as misplaced. His contract was the first port of entry, and he may well have sought remedy from within the common law, or relevant legislation. He questions the decision of the President and the Minister in placing an illegitimate Board in place, whose actions had profound effect on his contract of employment, and on the corporate governance of an asset which belongs to Kenyans. He questions the governance practices of a State Corporation, which is owned by two other public entities. The Court does not attach great weight to the submission that the Petitioner was confined to redressing his grievance through Judicial Review. The Constitution has expanded access to justice, and it is proper for a party to use the vehicle that best suits his / her circumstances in achieving that end. The short time limits placed in filing of Judicial Review in checking governmental excesses is normally justified on public interest. It argued that such limits assist in avoidance on uncertainty for the concerned public authority and the public, as well as give effect to the principle of certainty. The unstated downside is that, the rushed period within which to bring Judicial Review also creates a hurdle for victims of governmental excesses, who may not be prepared to move their dispute immediately to Court, for protection. Short time limits in Judicial Review can create barriers to Parties who have suffered the effects of governmental excesses, in challenging Public Authorities. The additional requirement for leave of the Court to bring Judicial Leave is likewise limiting. The Judicial Review limitations present fertile seed-bed for dictatorial regimes, who would wish to put barriers in the way of Citizens who desire to challenge governmental excesses. The Constitution offers no such limitations. It is oriented towards facilitation of access to justice. There is no grievance under the Constitution, without a remedy. The remedies available under Judicial Review are made accessible through Article 23 of the Constitution.

35. Article 22 and 258 allow persons who feel that their rights or fundamental freedoms, or the Constitution have been violated or threatened with violation, to bring a Petition in their own name or on behalf of persons who cannot act in their own names. The Petitioner alleged to have come to Court on behalf of the Kenya Railways and the University of Nairobi. Clearly these Institutions have the capacity to come to Court on their own as submitted by the Respondents. The Petitioner did not show that he had

the concurrence of the two Institutions or the Board he says was the legitimate Board, in bringing the Petition. The Court as suggested elsewhere however finds the Petitioner would have solid ground to stand on his own, even without dragging other affected Parties to the Petition. After all the Company subject matter is a property of the People of Kenya, and there is Public Interest in seeing the Company properly governed. The Petitioner invoked the two Articles correctly, but attempted to drag non-parties in the Petition, in the hope that his Petition would be bolstered. He did not even name the Kenya Railways and University of Nairobi as Parties on whose behalf he filed the Petition. The names of the two Institutions are not in the Petition, and the Petitioner appears to have floated their names in his submissions merely to add weight to the Petition. He need not have claimed to be speaking for the old Board, or the Shareholders. The Constitution allows him to speak for the People of Kenya, which he has done boldly in his Petition.

### **[b] Application of the State Corporations Act**

36. Numerical Machining Complex was registered on 4<sup>th</sup> January 1994 as a Private Company Limited by Shares. Kenya Railways Corporation holds 51% of the shares, and University of Nairobi 49% of the shares. There was a bold submission by the Petitioner that the State Corporations Act Cap 446 does not govern the Company. The Act only applies where there are no Articles to regulate the constitution of the Boards. A State Corporation under the Act is defined as:-

- a. A corporation established under Section 3 of the Act.
- b. A body established before or after the commencement of the Act, by or under an Act of Parliament- excluding Permanent Secretary Treasury, Local Authorities, Cooperative Societies, and Building Societies etc.
- c. It also excludes a company incorporated under the Companies Act Cap 486 the Laws of Kenya which is not wholly owned or controlled by the Government, or by State Corporation.

Numerical Machining Complex is wholly owned by two Government Institutions- Kenya Railways and the University of Nairobi, and though registered as a Private Company under the Companies Act, is fully governed by the State Corporations Act. Section 3 allows the President to establish State Corporations, while Section 5A allows the President to exempt State Corporations not created by the President under Section 3, from any of the provisions of the State Corporations Act. There was no material availed by the Petitioner to suggest that the Company was exempted from any provisions of the Act. The Act applies in full to the Company

### **[c] Constitution of the Board**

37. Clause 86 of the Articles of the Company states:

***“ As long as the Kenya Railways Corporation and the University of Nairobi shall hold 51% and 49% respectively of the issued shares of the Company:-***

- a. ***The Executive Chairman or Managing Director, for the time being of the Kenya Railways Corporation shall be a Director of the Company and the Chairman of the Board.***
- b. ***The Vice-Chancellor for the time being, of the University of Nairobi, shall be a Director of the Company and Vice-Chairman of the Board.***
- c. ***The other Directors of the Company shall be:***
  - i. ***The Permanent Secretary, Office of the President, Secretary to the Cabinet and Head of the Public Service or his representative.***
  - ii. ***The Head of Department of Defence or his representative.***

- iii. ***Each of the Permanent Secretaries of the Ministries under the direction of the Ministers for the time being responsible for transport and communications, and science and technology.***
- iv. ***Four other persons appointed by the Government by virtue of their experience and expertise in legal, financial, business or administrative matters.***

38. The Act states, of constitution of State Corporation Boards under Section 6 [1]-:

***“ Unless the written law by, or under which a State Corporation is established, or the articles of association of a State Corporation otherwise require, a Board shall, subject to sub-section 4 consist-:***

- a. ***Chairman appointed by the President who shall be non-executive unless the President otherwise directs.***
- b. ***The Chief Executive.***
- c. ***The Permanent Secretary of the Parent Ministry.***
- d. ***The Permanent Secretary to the Treasury.***
- e. ***Not more than eleven members, not being employees of the State Corporation, of whom not more than three shall be public officers appointed by the Minister***

39. The Court understands Section 6[1] of the State Corporations Act to apply in general to all State Corporations in the establishment of their Boards. The exceptions are where, the Corporation’s constitutive law, or the Articles of Association, give specific qualities for persons to be appointed to the Board. Section 6[1] of the Act is therefore qualified by the Articles of Association of the Company, and persons appointed to the Board, would have to meet the specifications given under the Articles. The Appointing Authority’s hands are tied by the Articles of Association.

40. The Chairman of the Numerical Machining Company cannot be any other person, other than the Executive Chairman or Managing Director of the Kenya Railways. The Vice-Chancellor of the University of Nairobi must be a Director in the Board. These are the voices and faces of the two Shareholders. Prior to 18<sup>th</sup> November 2011, the Chairman was Gen. Julius Kianga, Chairman of Kenya Railways. The Vice-Chancellor of the University of Nairobi was a Member of the Board. On 18<sup>th</sup> November 2011, the President appointed Professor Nick Wanjohi as Chairman. The Respondents in this Petition did not explain to the Court what relationship Professor Nick Wanjohi had with the Kenya Railways. The shareholding of the Company did not change. On 20<sup>th</sup> January 2012, the Minister for Industrialization appointed six Board Members. It was not explained to the Court under what provision of Clause 86 of the Company’s Articles of Association, these six persons were appointed Members. Clause 86 suggests the Minister can only appoint 4 persons. Their backgrounds are not known, and there was no suggestion that they are persons with experience and expertise in legal, financial, business or administrative fields. The Petitioner submits and the Court finds nothing to contradict him, that the University of Nairobi Vice-Chancellor is no longer a Member of the Board. The President did not revoke the appointment of the sitting Chairman and Board Members, and it was never alleged that those Members had failed to discharge their mandates as contemplated by Section 7 of the Act. The Articles of Association were not amended through presidential directive or otherwise, prior to the appointment of Professor Wanjohi, and it is hard to understand how his appointment could find any justification under the existing legal framework governing the Company.

41. The Court finds that the appointment of Professor Nick Wanjohi as the Chairman of Numerical Machining Complex set in motion the process by which an illegitimate Board of Directors was ushered in at the helm of the Company. This was in violation of Section 6[1] of the State Corporations Act which mandates the appointing authority to follow the Articles of Association of the Company. The Minister followed suit, and appointed Board Members. What became of the old Chairman, and his Board? The establishment of the new Board was carried out in a manner to suggest theirs were the pioneer Board at

the Company. The Respondents submitted there was no properly appointed Board prior to the 18<sup>th</sup> November 2011. The truth is that even after 18<sup>th</sup> November 2011, there was no validly created Board. It was not made clear why the previous Board was not, in the eyes of the Respondents, properly in office. There was nothing reversing the instruments by which the first Board was established. The Court is convinced the Board Chaired by Professor Nick Wanjohi, which is the subject matter of the Petition, has no legal validity. The Court agrees with the holding in **Julius Nyarotho v. the Attorney-General & 3 Others [2013] e-KLR**; - any decisions made by the illegally constituted Board were illusory and have no effect in law. Decisions made relating to labour and employment at the workplace; the recruitment, supervision, promotion, demotion, and administration of contracts of employment carried out in the name of the Board constituted after 18<sup>th</sup> November 2011, are not worth the paper they are written on. There was no capacity to consider the Petitioner's application for renewal of contract, or indeed advertise and interview for the filling of the Managing Director's position. This would hold true in the recruitment of the Acting Managing Director, and other lower cadre employees of the Numerical Machining Company, after 18<sup>th</sup> November 2011. The Government ought to adhere to the Articles of the Company, if the Company is to be placed at the heart of the industrialization agenda, driving Kenya to the attainment of vision 2030.

42. Clause 111 of the Articles of Association states: ***“ The Government may, from time to time, appoint one [1] or more of the Directors to the Office of the Managing Director [s] or Managers for such period and upon such terms as it thinks fit and subject to the provisions of any agreement entered in any particular case, may revoke such appointment. The appointment of such Director to hold such Office shall [ without prejudice to any claim he may have for damages for breach of any contract of service between him and the Company] ipso facto determine if he ceases from any cause to be a Director.”*** The Petitioner argued that it was for the Government, not the Board to appoint, or revoke his appointment under the Articles. The term ‘Government’ is used loosely in the Articles, but the reading of the Court is that ‘Government’ is synonymous with the Board properly constituted under Clause 86. It is the Board which enters into the contract of employment with the Managing Director or Managing Directors, and only the Board and its employee, who are parties to the contract, would have the mandate to terminate the contract. It would not make sense if the Articles and the Act went at length to define the requirements for the Board composition, which composition reflects the governmental component of the Board, and at the same time, allowed other government reincarnations to ride roughshod, imposing Managing Directors on the Company, without any reference to the Board. The Articles intend that the Government, represented by a properly constituted Board, appoints one or more of the Directors, as the Managing Director[s] of the Numerical Machining Complex Limited. The Managing Director should come from the pool of the Board of Directors in accordance with Clause 111 of the Articles. He or She does not first become the Managing Director before ascending into Directorship; he or she must be a Director, before being appointed from the pool, as the Managing Director. Advertisements calling for applications to the position of the Managing Director should, in accordance with the Articles, give as a prequalification, that the candidate is a legally appointed Member of the Board. Clause 111 must be read with Clause 86 on appointment of Directors, and Section 6[1] of the Act. The view of the Court is that there should be a legally constituted Board in the first place. This is where the qualities demanded for the Members appointed by the Minister i.e. financially, legally, administratively savvy- come in, for eventually, the Managing Director or Directors of the Company must be chosen from the pool of the legally appointed Board. This Court found in **Industrial Court Cause Number 886 of 2010 between Julie Topirian Njeru v. Kenya Tourist Board** that ***“the employment of Staff of State Corporations, including the CEO, is not in law the function of the Chairman or the Minister. Under Section 5[3] of the State Corporations Act, the role is exercised by the Corporations themselves.”*** The Minister and State Corporations Advisory Committee only come in at the stage when appointment is approved. Logically, it would not be expected that the Permanent Secretaries in the Board, the Chairman or Managing Director of Kenya Railways, of Vice-Chancellor of the University of Nairobi, would serve as Managing Director[s] of the Numerical Machining Complex, and the inference must be that the Articles intend the Managing Director comes from among the 4 technocrats appointed as Directors through the Minister. The Circular from the Office of the President of 23<sup>rd</sup> November 2010 should be seen in the context of the Articles of Association of the Company. It is an addendum to the covenant concluded between the Shareholders, and between the Shareholders and the Company. Competition for the position of the Managing Director should come from within a properly constituted Board, which amplifies the

need for a properly constituted Board. The Court finds that the appointment and renewal of the contract of service of the Managing Director, of the Numerical Machining Complex must be guided by Clause 111 of the Articles of Association of the Company. The submission by the Petitioner that only the Government could appoint the Managing Director, and not the Board, was self-centred and thought to bolster the Petition. He did not attempt to define the term 'Government.' The position is that appointment of Managing Director, or Managing Directors of the Company should conform to Clause 111, read together with Clause 86. The Articles are a covenant entered into between the Shareholders, and between them and the Company, and must be respected, and enforced for the benefit of the Kenyan People.

43. It may be asked if the prayers sought by the Petitioner are labour and employment issues, whether for instance, it is for the Industrial Court to rule on the validity of the Board of a State Corporation. The answer to this is firstly to be suggested by the transfer by the High Court of the entire dispute for determination by the Industrial Court. Secondly, both the High Court and the Industrial Court have ruled that under the Constitution and the Industrial Court Act, the Industrial Court has the exclusive jurisdiction to hear and determine disputes relating to labour and employment relations, *and disputes regardless of their nature, which arise in the context of employment*, a principle forcefully crystallized in the decision of my brother Justice Nelson Jorum Abuodha in the ***Industrial Court Cause Number 1065 of 2012 between Dr. Anne Kinyua v. Nyayo Tea Zone Development [2012] e-KLR***. There are disputes that are cross-jurisdictional. The Court looks at the forum that has the closest connecting factors. This Court has pointed out that disputes such as relate to the safety and health of the workers, fall as much within the jurisdiction of the Environment and Land Court, as they do in the jurisdiction of the Industrial Court. It is never possible to administer justice in such disputes by resort to truncated proceedings. The President employed a Chairman of the Board contrary to the law. The Minister followed suit, employing Board Members contrary to the Articles of Association. The Board thereafter went about evaluating the Petitioner, considering his application for renewal, and advising the Petitioner that his contract would not be renewed. The Board appointed a caretaker Managing Director and intended to compound the chain of illegalities, by appointing a new substantive Managing Director. There was a previous Board employed to serve the people of Kenya; its contract of employment with the People of Kenya was mysteriously terminated, and a new Board put in place. The core issues in dispute can easily be legally geo-mapped in the labour and employment jurisdiction. . At the heart of the dispute is whether the Board as constituted was employed in accordance with the contract between the shareholders, between the shareholders and the Company, and whether that Board's decisions had any validity. Collateral to this is the question whether the Board as currently constituted can go on running the human resource component of the Company, and make other decisions as intended by the People of Kenya, without getting bogged in a gum pot of illegitimacy; the answer in the view of the Court, is that it cannot. Numerical Machining Complex cannot achieve its objectives, as long as the illegalities of 18<sup>th</sup> November 2011 remain un-reversed. This is a Company which belongs to the People of Kenya, and the Petitioner must be lauded even if his motive is self-centred, for bringing the issues to the fore. State Corporations are not part of the personal estates of the Presidents and Ministers, to be dangled as rewards for political support, affection, friendships, or kinship; they are intended to belong to the People of Kenya, vehicles through which the resources of the Country can be harnessed and utilized for the good of the People.

44. The fact of the Petitioner having approbated and reprobated has no effect at all on the illegality of the Presidential and Ministerial appointments. It does not change the position of the State Corporations Act and the Articles of Association. The Court has characterized the position of the Petitioner as self-centred, but the issues raised by him, whatever his purpose, concern the well being of an enterprise that belongs to the People. His approbation and reprobation can be explained in the context of his personal interest, which can be severed and dealt with at a distance from the public interest. His approval and subsequent rejection of the Board appointed after 18<sup>th</sup> November 2011 cannot be taken as a measure of the legality and validity of the actions of the Executive. The conduct by the Petitioner in the view of this Court was an act of self-preservation. He thought that by saying the right things for the consumption of the new Board, he stood the chance to go on serving as the Managing Director. This has been a common feature of our governance culture; saying the right things, even when the law is as clear as a pikestaff, in order to preserve our treasured positions. The doctrine of homologation requires that a Party does not change from an assumed position in contractual relationships. It also requires that the other Party must show it was materially prejudiced by the other Party's change of position. The notion of blowing hot and cold is not

just an idiomatic expression, made for the love of legal jargon-mongering; it is rightly a principle of the law of contract, to be argued within the context of the contract. The Respondents should have shown that as a result of the Petitioner's blowing hot and cold, they ended up holding the wrong end of the stick.

**[d] Prayers**

45. As stated elsewhere, the first port of entry is the contract of employment dated 4<sup>th</sup> February 2010. The contract was to run for 3 years, commencing 9<sup>th</sup> November 2009, and expiring 9<sup>th</sup> November 2012. Clause 6 required the Petitioner to make a written request to the Board, at least 6 months before 9<sup>th</sup> November 2012, expressing his interest for renewal. The Petitioner complied with this requirement, and wrote to the Board on 24<sup>th</sup> May 2012 [see appendix GO1 of the Petitioner's affidavit sworn 11<sup>th</sup> March 2013]. The new Chairman was appointed on 18<sup>th</sup> November 2011, and new Board Members on 20<sup>th</sup> January 2012. The request for renewal was directed to this Board. He wrote a second letter of request dated 9<sup>th</sup> July 2012, which would be seen as a reminder to the first request. The Board replied on 3<sup>rd</sup> September 2012 advising the Petitioner, his contract would not be renewed, and placing the Petitioner on terminal leave, decisions which sparked this dispute.

46 Plainly, the Board lacked the legitimacy to make these decisions. Professor Nick Wanjohi was not legally in the position of the Chairman, and the other Board Members were not shown to have been appointed in accordance with the Articles of Association. Their decisions were illusory. The Court agrees with the Petitioner that the appointment of the new Board was in violation of the principles of the rule of law and good governance under Article 10 of the Constitution; the decision not to renew the Petitioner's contract was made by an illegal Board, which was not in consonance with fair labour practices under Article 41; the Petitioner was ill treated and his right to human dignity violated in the manner he was ejected from office through the instrumentality of an illegal Board; and his contract was ended in a manner that deprived him of fair administrative action. The expiring contract contained in it a Clause creating the possibility of renewal; the decisions made by the President and the Minister in appointment of the Board made it impossible for the Petitioner to see through his contract of employment in the way intended by the Parties to the contract. He was to seek renewal; performance appraised; and a decision by the Board communicated to him on the request for renewal. These terms of the contract presupposed the presence of a legally constituted Board. Supervening impossibility, which came, in the form of the change in the Board, frustrated the contract of employment. It was not possible for the Petitioner and the new Board to engage in a legally binding way, and the contract was ended in a way not envisaged by the Parties, the Articles of Association or indeed the State Corporations Act.

47. The Petitioner nonetheless has no reason to consider himself as the Managing Director to-date. His contract was for a fixed term of three years, which lapsed on 9<sup>th</sup> November 2012. He should have expected the contract to lapse on 9<sup>th</sup> November 2012, in equal measure to his expectation that he would be granted a renewal. Legitimate expectation went both ways. There was nothing in the expired contract to suggest that the Petitioner would in any event continue holding over after 9<sup>th</sup> November 2012, even if the Board, whatever its legitimacy, failed to answer his requests for renewal. The terms that were frustrated were the exit terms, and in particular, the renewal clause. It is not possible that he would go on being the Managing Director by default. The Court would be making him a beneficiary of the violations he has ably brought to the fore, by upholding his submission that he is still the legitimate Managing Director of the Company. Even without the letter communicating non-renewal, the Petitioner was aware of the expiry date of his fixed term contract. There was reasonable chance he would not have a second term. The illegal Board did not make a decision to terminate the contract of employment; they decided not to renew a lapsed contract. To direct the 1<sup>st</sup> Respondent is restrained from interfering with the Petitioner's role as the Managing Director would result in the Court renewing the Petitioner's contract, or giving him the benefit of holding over. His recourse is in damages for violation of his fundamental rights and breach of the terms that governed the end of his contract. He also is not barred from returning to the Managing Director's role, but only through the mode set out under the Articles of Association of the Company. The Petition is upheld, and the following prayers granted:-

***[a] It is declared that the President of Kenya and the Acting Minister for Industrialization***

***contravened the Articles of Association of the Numerical Machining Complex Limited, the State Corporations Act, and the Constitution of Kenya by appointing Professor Nick Wanjohi as Chairman to the Board of Numerical Machining Complex Limited on 18<sup>th</sup> November 2011, and by appointing Abdi Mohammad Hassan, Joseph E.T. Tanga, Andrew Cheruyiot Mitei, Engineer Bernard M'Mutirithia Ngore, Sarah Mbwaya and Joyce Kavindu Mulinge as Board Members of the Numerical Machining Complex Limited, on 20<sup>th</sup> January 2012.***

***[b] The Board of the Numerical Machining Complex Limited is declared to have been unlawfully created.***

***[c] The Legal Notice No. 14701 appointing the Chairman, and Legal Notice No. 450 appointing the aforesaid Board Members, are declared null and void ab initio.***

***[d] The Petitioner shall be compensated by the Respondents for violation of his fundamental rights and for breach of his contract of employment by payment of coalesced damages assessed at Kshs. 600,000.***

***[e] The Respondents shall bear the costs of the Petition.***

Dated and delivered at Nairobi this 16<sup>th</sup> day of January 2014

**James Rika**

**Judge**