



REPUBLIC OF KENYA



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**Awino & another v Mburu & 10 others (Environment & Land Petition
004 of 2023) [2023] KEELC 678 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 678 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 004 OF 2023**

**JO MBOYA, J
FEBRUARY 9, 2023**

BETWEEN

FRANCIS AWINO 1ST PETITIONER

NGUGI MBUGUA 2ND PETITIONER

AND

JOHN MAINA MBURU 1ST RESPONDENT

JOHN GITHINJI MWANGI 2ND RESPONDENT

CRAC'E WACHINGA MUCHAI 3RD RESPONDENT

PETER MWANGI MUTURI 4TH RESPONDENT

PIHILLIP KARIUKI GATHENGE 5TH RESPONDENT

CHARLES NGUGI NJENGA 6TH RESPONDENT

**GITHUNGURI CONSTITUENCY RANCHING COMPANY LIMITED 7TH
RESPONDENT**

REGISTRAR OF COMPANIES 8TH RESPONDENT

CHIEF LANDS REGISTRAR 9TH RESPONDENT

DIRECTOR-GENERAL OF SURVEYS 10TH RESPONDENT

ATTORNEY GENERAL 11TH RESPONDENT



RULING

Introduction and Background:

1. The Petitioners herein filed and mounted the subject Petition dated the January 23, 2023 and in respect of which same have sought various, albeit numerous reliefs. For clarity, the Petition has itemized assorted/plethora of reliefs, whose details are quite perplexing and interesting, at the same time.
2. For coherence, the reliefs which have been sought at the foot of the instant Petition are as hereunder;
 - i. That the 1st , 2nd, 3rd, 4th, 5th, 6th and 7th Respondents immediately table to the Court and all parties a copy of the Articles of Association, Memorandum of Association and any Membership register hitherto relied on.
 - ii. That the 8th Respondent immediately table to the Court and all Parties a copy of the Articles of Association, Memorandum of Association and any membership register hitherto relied on.
 - iii. That the Board of directors acting on behalf of GCRC engages all members without discrimination on all matters.
 - iv. That the Members register be immediately reconstituted as per the Company's Articles and Memorandum of Association.
 - v. That after Due Notices there be a General meeting for all members as a prelude to the Board of director elections.
 - vi. That the Board of directors acting on behalf of GCRC engage in elections only with leave of the Honourable Court after satisfying that the membership reconstitution exercise has met the legal standard.
 - vii. That the Board of directors acting on behalf of GCRC be immediately prohibited from performing any functions that can affect title to land until authentic elections are conducted based on the reconstituted members register.
 - viii. That further to (vi) above the 9th and 10th Respondents be served
 - ix. That the Board of directors acting on, behalf of GCRC immediately stay all activities that involve sale, lease or charge of GCRC assets until elections are conducted.
 - x. That consequent to the grant of the prayers above, the honorable Court be pleased to make further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.
 - xi. That the Honourable Court be pleased to Join Parties necessary for the determination of the instant Petition on its own merits.
 - xiii. That this Honourable Court be pleased to award the Petitioners costs of and incidental to these proceedings on a full indemnity basis.
3. Contemporaneously with the Petition, the Petitioners also filed and lodged a Notice of Motion Application dated the January 23, 2023; and in respect of which same have sought for the following reliefs;



- a. That the 8th Respondent immediately table to the Court and all parties a copy of the Articles of Association. Memorandum of Association and any membership register hitherto relied on.
 - b. That the Board of directors acting on behalf of GCRC engages all members without discrimination on all matters.
 - c. That the Members register be immediately reconstituted as per the Company's Articles and Memorandum of Association.
 - d. That after Due notices there be a general meeting for all members as a prelude to the board of director elections.
 - e. That the Board of directors acting on behalf of GCRC engage in elections only with leave of the Honourable Court after satisfying that the membership reconstitution exercise has met the legal standard.
 - f. That the Board of directors acting on behalf of GCRC' be immediately prohibited from performing any functions that can affect title to land until authentic elections are conducted based on the reconstituted members register
 - g. That further to (vi) above the 9th and the 10th Respondents be served with orders as due notice for compliance.
 - h. That the boards of directors acting on behalf' of GCRC immediately stay all activities that involve sale. lease or charge of GCRC assels uniiil elections are conducted.
4. The instant application is premised and anchored on various grounds, which have been enumerated at the foot of the Application. Besides, the application is further supported by the affidavits sworn by Francis Awino and Ngugi Mbugua, respectively.
 5. Upon being served with the subject Petition and the attendant application, the 1st, 3rd, 5th and 7th Respondents duly filed a notice of appointment of advocate. However, same did not file any further pleadings.
 6. On the other hand, the 2nd Respondent duly entered appearance and filed a Replying affidavit, on his own behalf and behalf of (sic) the 7th Respondent, wherein same have averred, inter-alia that the elections of the directors of the 7th Respondent that was carried out and undertaken on the August 14, 2009 was irregular, fraudulent and illegal insofar as no notice was duly issued.
 7. Be that as it may, the instant application came up for hearing before the court on the February 8, 2023, and whereupon, the court pointed out to the parties that there was a jurisdictional question pertaining to and concerning the issues raised at the foot of the Petition as well as the application.
 8. In the premises, the court impressed upon the Parties and in particular the Petitioners to address the question/issue of jurisdiction. For clarity, all the parties agreed that the question/issue of Jurisdiction is paramount and goes to the heart of the subject matter.

Submissions by the Parties

A. Petitioners' submissions:

9. The 2nd Petitioner addressed the court and raised four pertinent issues, which same invited the court to take into account and to consider prior to and before making a determination in respect of the subject Petition.



10. Firstly, the 2nd Petitioner admitted that jurisdiction of a court goes to the heart of a particular matter. In this regard, the 2nd Petitioner affirmed that without the requisite jurisdiction, a court of law cannot entertain or adjudicate upon a dispute laid before it.
11. Essentially, the 2nd Petitioner was conceding that in the event that the court finds and holds that same is devoid and divested of jurisdiction, then it behooves the court to down her tools.
12. Secondly, the 2nd petitioner submitted that the 1st Petitioner and himself have approached this honourable court with a view to protecting and vindicating the rights and fundamental freedoms of Mr Wilson Njuguna Kinuthia, whom same have contended to be a person incapable of acting for himself.
13. In addition, the 2nd Petitioners has contended that the environment and land court, which the 1st Petitioner and himself have approached, is seized and possessed of unlimited jurisdiction, just like the High Court and hence (the court) is conferred with the competence, mandate and jurisdiction to entertain the dispute beforehand.
14. Thirdly, the 2nd Petitioner has submitted that even though a number of issues raised and captured at the foot of the Petition, as well as the application, touch on and concern the management and affairs of a limited liability company, it must not be lost on the court that ultimately the issues in question will percolate down to ownership and title to land.
15. To the extent that the 7th Respondent is a land buying company, which has wrangles in her management, it is imperative to note and take into account that the 7th Respondent was constituted for purposes of buying Land and not otherwise.
16. In the premises, the 2nd Petitioner has therefore impressed upon the court to find that the ultimate issue that belies the dispute is land, which falls within the competence, mandate and jurisdiction of the environment and land court.
17. Fourthly, the 2nd Petitioner also submitted that though there exists other statutory avenues for resolving the dispute pertaining to and concerning the management/affairs of the 7th Respondent, those existing statutory mechanism are dysfunctional.
18. Consequently, and in this regard, the 2nd Petitioner added that same were therefore entitled to approach this honourable court for purposes of pursuing their rights and fundamental freedoms as stipulated and enshrined in the *Constitution*, 2010.
19. Finally, the 2nd Petitioner admitted and confirmed that there exists yet another Petition, which the 1st petitioner and himself, have filed before this honourable court. However, the 2nd Petitioner has hastened to state that the other petition has different Respondents and does not concern the management of the affairs of the 7th Respondent herein.
20. In a nutshell, the 2nd Petitioner has therefore implored the court to find and hold that same has the requisite competence and jurisdiction to entertain and adjudicate upon the subject dispute.

b. Submissions by the 1st, 3rd, 5th and 7th respondents

21. Learned counsel for the named Respondents raised and ventilated four pertinent issues for consideration by the court.
22. First and foremost, learned counsel submitted that jurisdiction is so essential and integral in the hearing and adjudication of each and every dispute laid before the court. In this regard, counsel contended that



without jurisdiction the honourable court cannot venture to and entertain any dispute, the subject Dispute, not excepted.

23. Furthermore, learned counsel added that the jurisdiction of a court is conferred by the Constitution and Statute or by both. Consequently, counsel stated that unless the court is conferred with the requisite jurisdiction by the constituting Charter, then the court must not engage with or entertain a matter that falls outside her jurisdiction.
24. To amplify the foregoing submissions, learned counsel referred the court to the Supreme Court of Kenya decision in the case of *SK Macharia v Kenya Commercial Bank Ltd* (2012)eKLR. In this regard, learned counsel invited the court to take cognizance of paragraph 68 of the said decision.
25. Secondly, learned counsel submitted that the issues which have been raised and adverted to in both the Petition and the current application, are issues that touch on and concern the management of the affairs of a limited liability company, inter-alia the veracity of the register of members, the legitimacy of the current directors of the 7th Respondent and the convention of (sic) Annual general meetings with a view to electing *bona-fide* directors.
26. Additionally, counsel also contended that the other issue that has also been adverted to in the body of the Petition concerns declaration that the board of directors who had (sic) elected on the September 12, 2009 and December 17, 2015, were illegitimate and unlawful.
27. In short, learned counsel invited the court to take cognizance of paragraphs 54, 55, 56, 57 and 58 of the Petition, which delineates and demarcates the issues in dispute and upon which the court has been invited to adjudicate upon.
28. Thirdly, learned counsel submitted that the issues which have been raised at the foot of the current Petition have been addressed and ventilated before various courts and that the said courts have since determined the issue pertaining to the directorship of the 7th Respondent.
29. Nevertheless, counsel further added that currently there is yet another suit that is pending before the High court vide Milimani HCCOM No 277 of 2016, touching on and concerning the question of the directorship of the 7th Respondent.
30. Consequently, counsel has therefore submitted that the Petitioners herein are alive to and aware of the various proceedings that have hitherto been taken as pertains to the issues that have been raised before the Honourable court herein.
31. For the avoidance of doubt, Learned Counsel invited the Honourable court to take cognizance of paragraph 34 of the Petition filed before the honourable court.
32. In view of the foregoing, learned counsel has therefore submitted that the Petition before the court thus constitutes a flagrant and utter abuse of the due process of the court.
33. As a result of the foregoing, learned counsel has therefore invited the court to find and hold that the subject Petition as well as the attendant application are not only premature and misconceived, but that same are also Bad in law.

Issues For Determination

34. Having reviewed the Petition dated the January 23, 2023, the supporting affidavit thereto as well as the Notice of Motion Application filed on behalf of the Petitioners and upon taking into account the contents of the Replying affidavit filed on behalf of the 2nd and 7th Respondents; and upon considering



the submissions tendered on behalf of the named Parties, the following issues are pertinent and thus worthy of determination;

- i. Whether the Petitioners herein have the requisite *Locus Standi* to commence, originate and mounting the instant Petition.
- ii. Whether the honourable court is seized and possessed of the requisite Jurisdiction to entertain and adjudicate upon the subject dispute.
- iii. Whether the instant Petition constitutes and amounts to an abuse of the Due process of the court.

Analysis And Determination

Issue Number 1 Whether the Petitioners herein has the requisite Locus Standi to commence, originate and mounting the instant Petition.

35. The Petitioners herein have contended that same have mounted and lodged the subject Petition for and on behalf of one Wilson Njuguna Kinuthia, who is stated to be unable to act on his own behalf.
36. For coherence, paragraphs 1 and 2 of the Petition herein are pertinent. In this regard, it is appropriate to reproduce the contents of the named paragraphs.
37. For ease of reference, the said paragraphs are reproduced as hereunder;
 1. The 1st Petitioner is a Kenyan adult male of sound mind. a concerned Law abiding citizen who presents the petition as a Constitutional right as per Article 258(2)(a) of the Constitution of Kenya 2010, acting on behalf of Wilson Njuguna Kinuthia, who cannot act on his own behalf.
 2. The 2nd Petitioner is a Kenyan adult male of sound mind. concerned law abiding citizen who presents the petition as a constitutional right as per Article 258 (2) (a) of the Constitution of Kenya 2010, acting on behalf of Wilson Njuguna Kinuthia, who cannot act on his own behalf.
38. Other than the contention that the said Wilson Njuguna Kinuthia is a person who cannot act on his own behalf, the petitioners herein have not availed, attached or exhibited any evidence to show in what manner the said Wilson Njuguna Kinuthia, is incapable of acting on his own behalf.
39. In addition, it is imperative to state and observe that no medical evidence has been placed or laid before the court to authenticate and confirm whether the said Wilson Njuguna Kinuthia, (sic) is mentally capacitated or otherwise.
40. Additionally, it is also imperative to note that the Petitioners have also not disclosed or showed what is the affinity, nexus or relationship, if any, that exists between same (read Petitioners) and the said Wilson Njuguna Kinuthia, to (sic) warrant same purporting to act on behalf of the said Wilson Njuguna Kinuthia.
41. Furthermore, it is not lost on the court that the Petitioners herein have also not proffered or availed any written authority of whatsoever nature to show that the said Wilson Njuguna Kinuthia, is indeed aware of or better still, has indeed mandated or authorized same to mount or lodged the instant Petition on his behalf.
42. Suffice it to state that it is not open for any other person, the Petitioners herein not excepted, (without any authority or sufficient basis) to purport to commence and institute a Petition (sic) on behalf of another, under the guise that the person on whose behalf the Petition is being mounted cannot act on his/her own behalf.



43. Furthermore, it is my considered view that even in situations of incapacitation, the intending Petitioner must exhibit and establish that same has some affinity or nexus with the person on whose behalf the Petition is being filed or better still, that same has procured the requisite authority.
44. Premised on the foregoing, it is difficult to understand and comprehend how the two Petitioners herein, are purporting to act for and on behalf of Wilson Njuguna Kinuthia, yet same have not even established any scintilla of affinity, nexus or relationship of whatsoever nature, with the Person, on whose behalf same are purporting to act.
45. Whereas the provisions of Article 22 and 258 of the Constitution, 2010, have expanded the latitude pertaining to and concerning the question of *locus standi*, however, it is not lost on this court that despite the relaxation of the Legal strictures that hitherto governed the question of Locus standi, it still behooves every Petitioners to exhibit and display some semblance of affinity, nexus and connection to the issues in dispute before the court.
46. To this end, it is worthy to recall, restate and reiterate the holding of the Court of Appeal in the case Mumo Matemu versus Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, where the Honourable court stated and observed as hereunder;

“Apart from this, we agree with the superior court below that the standard guide for *locus standi* must remain the command in Article 258 of the Constitution, which provides that:

“258. Every person has the right to institute court proceedings, claiming that this
(1) Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

a. a person acting on behalf of another person who cannot act in their own name;

a. a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.”

(28) It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view, the hitherto stringent *locus standi* requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22 (3) aforesaid, the Chief Justice has made rules contained in Legal Notice No 117 of 28th June 2013 – The Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013—which, in view of its long title, we take the liberty to baptize, the “Mutunga Rules”, to *inter alia*, facilitate the application of the right of standing. Like Article 48, the



overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person other than a person whose right or fundamental freedom under the Constitution is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under Articles 22 (2) and 258 of the Constitution.

- (29) It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of the Constitution.
- (30) It is our consideration that in filing the petition the 1st respondent was acting not only on behalf of its members and in accordance with its stated mandate, but also in the public interest, in view of the nature of the matter at hand. The 1st respondent, its members and the general public were entitled to participate in the proceedings relating to the decision-making process culminating in the impugned decision.
- (31) However, we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice. Where a person acts for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be seized at the instance of such person and must reject their application at the threshold.

47. From the contents of the Petition and the totality of the documents placed before the honourable court, it is apparent and evident that the issues in question pertains to and concerns (sic) the alleged Rights and Fundamental Freedoms of, one Wilson Njuguna Kinuthia. For coherence, it is the said person whose rights and fundaments freedoms are alleged to have been infringed upon or otherwise violated.
48. Notwithstanding the foregoing, the Petitioners have not exhibited any authority or mandate to warrant same acting for and on behalf of the said Person. In this regard, it is my conclusion that that the instant Petition has not been mounted for and on behalf of the alleged Person.
49. Furthermore, it is also apparent that the Petitioners herein, are not pursuing a genuine public interests litigation and if at all, none has been exhibited or displayed. Consequently and in this regard, the obvious and inescapable observation is that the subject Petition is driven by *mala-fides* and malevolence.
50. In a nutshell, it is my humble finding and conclusion that the Petitioners herein, who have neither exhibited nor displayed any source of authority to anchor their claim to be acting on behalf of one Wilson Njuguna Kinuthia, have no stake or Interest in the matter beforehand.
51. In view of the foregoing considerations, I find and hold that the Petitioners are Busybodies, divested of the requisite Locus standi.



ISSUE NUMBER 2 Whether the Honourable court is seized and possessed of the requisite Jurisdiction to entertain and adjudicate upon the subject dispute.

52. The Petitioners herein have sought for various reliefs, whose details were captured, enumerated and reproduced at the onset of the instant ruling.
53. Looking at the various and numerous reliefs that have been alluded to and contained at the foot of the Petition, what becomes apparent is that the Petitioners are concerned with *inter-alia*, procuring and obtaining copies of the memorandum of association and the article of association of the 7th Respondent.
54. Furthermore, the Petitioners are also interested in the preparation and verification of the Register of Shareholders, summoning and holding of the requisite annual general meeting of the 7th Respondent, declaration pertaining to the legitimacy of the current directors; and ultimately, the election of (sic)the Directors of the 7th Respondent.
55. Having taken cognizance of the pertinent issues that are contained at the foot of the Petition as well as the attendant application, the question that does arise is whether the impugned issues fall within the Mandate and Jurisdiction of the Environment and Land Court.
56. To this end, it is appropriate to state and underscore that the Environment and Land court is a specialized court with a defined mandate and jurisdiction, whose scope and limits are delineated vide the provisions of Article 162(2) (b) of the Constitution 2010, which provides as hereunder;

162. System of courts

- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
 - (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.
57. Additionally, the scope and tenor of the jurisdiction of the Environment and Land court is also delineated vide the provisions of Section 13(2) of the Environment and Land Court Act, 2011.
58. For ease of reference, the said provisions are reproduced as hereunder;

13. Jurisdiction of the Court

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;



- b. relating to compulsory acquisition of land;
- c. relating to land administration and management;
- d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- e. any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No 12 of 2012, Sch.

(6) Deleted by Act No 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

- a. interim or permanent preservation orders including injunctions;
- b. prerogative orders; 2
- (c) award of damages;
- (d) compensation;
- (e) specific performance;
- (g) restitution;
- (h) declaration; or
- i. costs.

59. Having taken into account the foregoing provisions, it is clear and evident that the issues which are alluded to and contained at the foot of the impugned Petition do not fall within the purview and competence of the Environment and land court.

60. Furthermore, it is imperative to state and underscore that Jurisdiction of a court is provided for by the Constitution or Parent statute or both. However, where the Constitution or the enabling statute does not confer requisite jurisdiction upon a particular court, then the court is divested and deprived of the requisite jurisdiction.

61. To amplify the foregoing statement of the law, it is appropriate to restate and reiterate the succinct holding of the Supreme Court of Kenya in the case of Samuel K Macharia versus Kenya Commercial Bank Ltd & Another (2012)eKLR, where the Supreme Court observed at paragraph 68 as hereunder;

(68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We



agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution.

Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

62. In addition, there is also no gainsaying that jurisdiction is everything. Consequently, where a court is divested and devoid of the requisite jurisdiction, then the court cannot purport to entertain and adjudicate upon the dispute beforehand, for which same lacks the requisite jurisdiction.
63. On the other hand, once it becomes clear and explicit that the court is divested of jurisdiction, then there is no need of postponing or better still, adjourning the determination of the question of jurisdiction, to await adduction/production of additional evidence or otherwise.
64. For coherence, it suffices to state that once a court is convicted that same is divested of the requisite jurisdiction, then it behooves the court to strike out the impugned proceedings and thereafter to down his/her tools in the matter.
65. To my mind, this critical pronouncement was succinctly elaborated and underscored vide the holding in the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd 1989 KLR 1, held as hereunder;

‘Jurisdiction is everything. Without it, a court has no power to take one more step. In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution, Constitutional Application No 2 of 2011; the Supreme Court noted that The Lillian ‘S’ case [1989] KLR 1] establishes that “jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity...”

66. In addition and for good measure, the significance and centrality of the question of Jurisdiction was reiterated by the Court of Appeal in the case of Phoenix of EA Assurance Company Limited versus SM Thiga t/a Newspaper Service [2019] eKLR.
67. For coherence, the court of appeal at paragraph 2 held as hereunder;
 2. In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.



68. Before departing from the question of jurisdiction, it is also appropriate to state that access to the articles of association and memorandum of the 7th Respondent, which constitutes Right to Information, are issues that are statutorily provided for pursuant to and by dint of the provisions of the [Access to Information Act](#), 2016.
69. Without belaboring the point, where any citizen, the Petitioners not excepted, are keen to procure and obtain copies of documents or information held by the Government, Government Department, Parastatal or any other body thereof, then it is incumbent upon the applicant/citizen to write to the concerned body, authority or person to provide and supply the impugned documents.
70. Once the citizen, the Petitioners herein not excepted, have applied for the provision of the named documents/ Information, then same must give the concerned body/authority reasonable time to provide and supply the impugned documents or information.
71. Be that as it may, the process towards procuring and obtain such documents and information, was well explained and delineated by the Court of Appeal in the case of [Okuya Omtata Okoiti versus The Attorney General](#) (2020)eKLR, where the court stated as hereunder;
80. The interpretation given by the Court in that case that Article 50(4) of the [Constitution](#) applies only to criminal law and not civil law is, with respect, doubtful. Article 50 of the [Constitution](#) deals generally with “fair hearing”. In Article 50(1) for instance, reference is made to “every person” as having the right to a fair hearing. This is in contrast to Article 50(2) which is specific “every accused person”. In our view, under Article 50(4) if a court determines that admission of evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights would be detrimental to the administration of justice, the court may reject it irrespective of whether it is in connection with a civil or criminal trial. This view accords, we believe, with the Supreme Court decision in *Njonjo Mue & Another vs Chairperson of Independent Electoral and Boundaries Commission & 3 Others* [2017] eKLR.
81. In the last-mentioned case, the Supreme Court of Kenya was invited to expunge certain documents in a presidential election petition. In its ruling, from which it is necessary to quote in extenso, the apex Court had this to say:
- “Having found that there are procedures provided for under the law through which any person who seeks to access information should follow, the question that follows is; what happens where a person ‘unlawfully’ or ‘improperly’ obtains any information held by an entity” Can a court of law admit such evidence...We also recognize that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information... Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the [Constitution](#) and the constituting provisions of the law. It is a two way channel where the right has to be balanced with the obligation to follow due process...”



72. In the premises, if the Petitioners herein were keen to procure and obtain the impugned memorandum of association and article of association of the 7th Respondent, then it behooved same to comply with the procedure stipulated vide Section 6 of the [Access to Information Act](#), 2016.
73. Finally, it is also appropriate to state that the issue pertaining to the preparation and verification of a register of a company together with the convention of (sic) the annual general meeting of a company are well provided for and captured in the Article of association of each and every company.
74. Consequently, where a dispute pertaining to the internal affairs and management of a company do arise, it behooves the members thereof, (including the Petitioners herein, if at all same are such Members/ Shareholders) to invoke and apply the articulated internal dispute resolution mechanism, before ultimately approaching the honourable court.
75. To this end, it is appropriate to reiterate the decision of the Court of Appeal in the case of [Geoffrey Mutbinja Kabiro versus Samuel Muguna Henry](#) (2015) eKLR, where the honourable court held as hereunder;

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the [Constitution](#) which commands Courts to encourage alternative means of dispute resolution”.

76. Nourished and guided by the various decisions that have been alluded to hereinbefore, it is my humble view that this Honourable court is divested and devoid of the requisite jurisdiction to entertain and adjudicate upon the Issues enumerated at the Foot of the Subject Petition.

Issue number 3 whether the instant petition constitutes and amounts to an abuse of the due process of the court.

77. From the contents of the Petition beforehand as well as the averments contained in the supporting affidavit, there is nowhere wherein the Petitioners have contended that same are (sic) members/ shareholders of the 7th Respondent.
78. In this respect, it is therefore not lost on the court that the Petitioners herein, cannot front or agitate any personal claim/cause of action as against the Respondents, whatsoever and howsoever.
79. Secondly, there is no gainsaying that though the Petitioners have purported that same are acting for and on behalf of Wilson Njuguna Kinuthia, same have however, neither tendered nor availed any Evidence or basis upon which same draw (sic) the purported authority.
80. Nevertheless and in any event, this Honourable court has since found and held, whilst addressing issue number one, elsewhere hereinbefore, that the Petitioners herein have no basis to purport to act in the manner alleged. Simply put, the Court found and held that the Petitioners are Busybodies.
81. Thirdly, the Petitioners have themselves contended and expressly stated that there have been a multiplicity/ plethora of suits addressing and canvassing the same subject of the suit beforehand. In this regard, paragraph 34 of the Petition is pertinent.



82. For ease of reference, the said paragraph 34 of the Petition is reproduced as hereunder;
34. That there has been a multiplicity of suits with the common agenda of having credible board of director elections from an authentic shareholder/member register.
83. Despite the foregoing admissions and acknowledgement, the petitioners have still found it appropriate and expedient to mount the current Petition before this honourable court whilst knowing that issues have hitherto been addressed and ventilated elsewhere.
84. From the foregoing, it is clear that the origination, commencement and filing of the current Petition was/is driven by some ulterior or sinister motive, which has neither been disclosed nor expressly, stated by the Petitioners.
85. Nevertheless and having examined the entire Petition and the issues therein, there is no gainsaying that the petition herein has not been filed with a view to pursuing a genuine and legitimate cause of action.
86. To the contrary, it is discernable that the petition is meant to accrue and attract some ulterior or collateral benefit, only known to the Petitioners. In a nutshell, what becomes evident is that the court process is being misused or better still, abused.
87. To this end, I derive inspiration from the sentiments expressed by the honourable court in the case of *Satya Bharna Gandhi versus The Director of Public prosecution & Others* (2019)eKLR, where the court stated as hereunder;
22. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation.
- However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[12]
23. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-
- (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
 - (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.
 - (c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
 - (d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
 - (e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[13]



- (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- (g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
- (h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[14]

88. Consequently and in my humble view, the current Petition fits within the four corners of what constitutes and amounts to an abuse of the due process of the court. See also the holding of the Court of Appeal in the case of *Muchanga Investment Limited versus Safaris Unlimited (Africa) Limited* (2009) eklr.

Final Disposition:

- 89. Having addressed and analyzed the various perspectives, arising from and attendant to the Petition beforehand, it is evident and apparent that the instant Petition has been placed before a court without the requisite Jurisdiction to entertain and adjudicate upon the same.
- 90. Furthermore, it is also evident that the Petition itself is also premature, misconceived and otherwise constitutes an abuse of the due process of the court. Clearly, the instant Petition has been mounted in pursuit of (sic) ulterior or sinister purpose.
- 91. Consequently and in the premises, the Petition dated the January 23, 2023, together with the attendant Notice of Motion Application of even date, be and are hereby ordered struck out with costs to the 1st, 3rd, 5th and 7th Respondents.
- 92. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2023.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson - Court Assistant

Mr. Francis Awino – 1st Petitioner.

Mr. Ngugi Mbugua – 2nd Petitioner.

Mr. Gakunju for the 2nd Respondent.

Mr. Njenga for 1st, 3rd, 5th and 7th Respondent

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