



REPUBLIC OF KENYA  
THIRTEENTH PARLIAMENT (THIRD SESSION)  
THE NATIONAL ASSEMBLY

SELECT COMMITTEE INVESTIGATING THE PROPOSED  
REMOVAL FROM OFFICE OF HON. FRANKLIN MITHIKA  
LINTURI, AS THE CABINET SECRETARY FOR  
AGRICULTURE AND LIVESTOCK DEVELOPMENT

HON. LINTURI'S DOCUMENTS

**APPENDIX 3**

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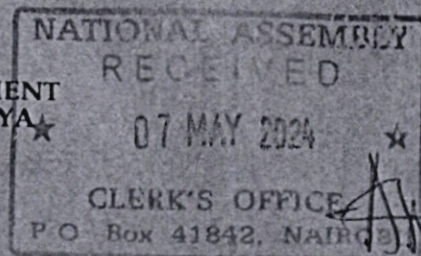
**DATED at NAIROBI this...13<sup>th</sup> ... day of .....May..... 2024**

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**CHAIRPERSON OF THE SELECT COMMITTEE INVESTIGATING THE PROPOSED REMOVAL FROM OFFICE OF HON. FRANKLIN MITHIKA LINTURI, AS THE CABINET SECRETARY FOR AGRICULTURE AND LIVESTOCK DEVELOPMENT**

VOL 3



PARLIAMENT  
OF KENYA



**THIRTEENTH PARLIAMENT (THIRD SESSION)  
THE NATIONAL ASSEMBLY**

**REPLYING AFFIDAVIT IN RESPONSE AND OPPOSITION TO THE SPECIAL MOTION FOR  
THE DISMISSAL FROM OFFICE OF HON. FRANKLIN MITHIKA LINTURI, EGH, CABINET  
SECRETARY FOR AGRICULTURE AND LIVESTOCK DEVELOPMENT**

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I, **FRANKLIN MITHIKA LINTURI**, a male adult of sound mind residing and working for gain in the Meru and Nairobi City Counties of the Republic of Kenya, whose address for purposes of the matters deposed in this Affidavit is *Muthomi & Karanja Advocates, 1209 Applewood Adams, Adams Arcade, Tel. +254 20 246 7437, Email info@muthomikaranja.com, P. O. Box 19893-00100* **MAKE OATH AND SOLEMNLY STATE AS FOLLOWS:**

**PART A: INTRODUCTION**

**Brief Profile**

- 1 I am the Cabinet Secretary ("**CS**") for Agriculture and Livestock Development. I have held the position since **27<sup>th</sup> October 2022**. A copy of the Gazette Notice on my appointment is annexed hereto and marked "**FML-1.**"
- 2 I had previously held the following State Offices, ***in which I served with honour and distinction***, prior to my appointment as a CS—

(a) a duly elected **Member of Parliament** for Igembe South Constituency in Meru County for **ten years**, during which tenure I also served in the National Assembly of the Republic of Kenya as—

- (i) the Chairperson, Public Investments Committee;
- (ii) a member of the Energy, Communication and Information Committee;
- (iii) a member of the House Business Committee;
- (iv) a member of the Public Investments Committee; and
- (v) a member of the Liaison Committee.

(b) a duly elected **Senator** for Meru County for **five years**, during which tenure I also served in the Senate of the Republic of Kenya as—

- (i) the Vice-Chairperson of the County Public Accounts Committee;
- (ii) the Vice-Chairperson of the Justice, Legal Affairs and Human Rights Committee;
- (iii) a member of the Roads, Transport and Public Works Committee; and
- (iv) a member of the Energy Committee.

### **The Subject Matter of the Special Motion**

3 I have read and understood the *contents, tenor and purport* of the Special Motion ("**the Special Motion**") for my dismissal from office before

this Honourable Select Committee, which was presented to the Speaker of the National Assembly by HON. JACK WANAMI WAMBOKA ("**the Mover**") on **24<sup>th</sup> April 2024**.

4 The Special Motion revolves around **consignments of substandard fertiliser that comprised barely 0.05% of the total supply** (specifically, **3,000 bags out of a total of more than 5,349,829 bags**). Regrettably, the **3,000 bags** of substandard fertiliser from **Batch Number 03/2024** were distributed to farmers across the country.

5 *I wish to point out from the outset that **although the Mover wants me dismissed from office for the acts and omissions of third parties, his spouse was charged with fraud** on the very day he was prosecuting the Special Motion before the House. Since *this raises a question of principle*, I humbly urge this Honourable Select Committee to request the Mover to reflect on **how he would feel if someone sought to have him removed from office as an MP on account of his spouse's alleged crimes**. Copies of a Charge Sheet that the ODPP has preferred against the Mover's spouse, a newspaper article and a Charge Sheet preferred against the perpetrators of the substandard fertiliser scandal are annexed hereto and marked "**FML-2**."*

#### **My Duties as the CS for Agriculture and Livestock Development**

6 My duties as a CS are to—

- (a) **provide policy and strategic direction** to the Ministry, the State Department for Agriculture and the State Department for Livestock Development;
- (b) **formulate, present and articulate Cabinet Memoranda, Sessional Papers and other policy issues** emanating from the Ministry to Cabinet, Parliament or any other fora;
- (c) strengthen public entities, state agencies, state corporations and any institutions under the Ministerial portfolio to operationalise their mandates effectively;
- (d) **respond to questions** touching on the Ministry to the relevant National Assembly and Senate Committees;
- (e) **appoint board members of public institutions** falling under the Ministry and the state departments in consultation with the Executive Office of the President in accordance with their respective enabling statutes;
- (f) **promote, embody and define the shared core values** that institutionalise a culture of efficiency, productivity and discipline within the Ministry; and
- (g) **perform any other function** prescribed in law or assigned by the President.

7 As elaborated in the ensuing paragraphs of this Affidavit, *my powers and duties as a CS do not extend to "approving"* the public procurement

processes and decisions of the National Cereals and Produce Board ("**the NCPB**"). Copies of the Approved NCPB Organisational Structure, the Tender Advert and a relevant decision from the Public Procurement Administrative Review Board are annexed hereto and marked "**FML-3.**"

8 As elaborated in the ensuing paragraphs of this Affidavit, *the Kenya Kwanza Government has never had a policy for the procurement and distribution of "fake fertiliser."* The **Tender Advert** alluded to in the preceding paragraph of this Affidavit required bidders to—

...provide your specifications as per your formulation in line with KEBS standards upon which evaluation shall be based for both planting and top-dressing fertilisers...

#### **My Key Achievements as a CS**

9 Contrary to the widespread negative propaganda and misconceptions created by the Special Motion, **my tenure as a CS has been characterised by many impressive achievements**, all of which are incompatible with the false narrative of a rogue CS painted in the Special Motion. The achievements include—

(a) **the reduction of the price** of a 50-kilogram bag of fertiliser from **KShs.6,500/- to KShs.2,500/-**, due mainly to the Kenya Kwanza Administration's policy to subsidise production as opposed to consumption. I earnestly believe that the Special Motion **is part of the backlash and reprisals from cartels** that previously made *supranormal* profits from the sale and distribution of fertiliser; and

(b) **the increase in maize production from 34 million bags to 67 million bags**, against a projected annual requirement of 52 million bags. As a result, **the country has significantly reined in the hunger, starvation and high food prices** that bogged down the country before I assumed office. Annexed hereto and marked "**FML-4**" is a copy of a Central Bank of Kenya Agriculture Sector Survey for **March 2024**. Also annexed hereto and marked "**FML-5**" is a copy of a Cabinet Memo dated **22<sup>nd</sup> April 2024**. Further, I humbly urge this Honourable Select Committee to view the recordings saved as "**Video 1**" and "**Video 2**" in the flash disk filed herewith.

## **Background and Context of the Special Motion**

### ***Personal Vendetta and Family Disputes***

10 As is manifest from the face of **Allegation 2** and the Background Information set out on **pages 15 to 17** of the Special Motion, **the allegations against me are inexorably linked to frivolous and vexatious civil, commercial and family suits**, nearing fifty in number as of the date of this Affidavit, that HON. MARYANNE JEBET KITANY ("**Hon. Kitany**"), the MP for Aldai Constituency, maliciously instituted against me following the irretrievable breakdown of our relationship in **2018**. Indeed, and as will shortly become clear, **the Mover is a proxy of Hon Kitany**. Further, and as will shortly become clear, **the Special Motion is nothing more than a clever calumny for personal vendetta** cloaked in a pretended concern for the plight of farmers who, regrettably, received substandard fertiliser.

### ***Persecution, Vilification and Negative Media Propaganda***

11 ***The previous administration and Hon Kitany waged a five-year negative media publicity and vilification campaign against me*** between 2018 and 2022. Hon. Kitany's motivation for the five-year negative media publicity and vilification campaign against me was, as explained, a personal vendetta following the irretrievable breakdown of our relationship in 2018. The previous administration's motivation for the five-year negative media publicity and vilification campaign against me, on the other hand, was to ***punish me for my unwavering and unflinching loyalty and support for the candidature of H. E. William Samoei Ruto*** in the 2022 presidential election.

12 It is in the public domain that the five-year negative media publicity and vilification campaign by Hon Kitany and the previous administration ***falsely and persistently portrayed me, in both print and electronic media, as (among other things) an incorrigible womaniser, criminal, fraudster, thug, crook and scoundrel.***

13 I was not, of course, the sole victim of the previous administration's five-year persecution, negative media publicity and vilification campaign against the supporters of H. E. William Samoei Ruto. However, anyone with a good memory will readily agree that ***the previous administration succeeded in making me the poster child*** of its persecution, negative media publicity and vilification campaign against the supporters of H. E. William Samoei Ruto. As a result, ***more than any other person, I was subjected to multiple malicious criminal complaints, investigations,***

*Friday afternoon arrests, the freezing of bank accounts and a sustained smear campaign on both print and electronic media between 2018 and 2022.*

14 Due to the previous administration's and Hon. Kitany's five-year persecution, negative media publicity and vilification campaign against me, *my reputation has been unfairly mischaracterised and irreversibly scandalised in the eyes of most citizens.* Specifically, ***I was made the dog with a bad name*** in the eyes and minds of Kenyans with access to a print or electronic newspaper, a television broadcast or an FM radio broadcast. This has ***made me an extremely easy target*** for people who wish to unfairly frame, blame and scapegoat me for crimes committed by others.

15 Seen from the prism of the five-year persecution, negative media publicity and vilification campaign outlined above, ***the Special Motion is no more than a clever witch-hunt*** for furthering the personal vendetta of an estranged ex-lover (i.e., Hon. Kitany) and sympathisers of the previous administration. Specifically, I earnestly believe that ***the motive underlying the Special Motion is to weaponise the frustrations of farmers*** who were duped into purchasing substandard fertiliser as a tool for hounding me out of office. In other words, the Mover, Hon Kitany and sympathisers of the previous administration have opportunistically converted the substandard fertiliser scandal into ***a handy tool for whipping emotions*** against "*the notorious Linturi*" while pretending to assuage farmers' *bona fide* cries for justice.

16 My advocates have advised me that **our system of justice is loath to lynching** and the "**he is a bad guy**" and Pontius Pilate's "**crucify him**" approaches to adjudicating disputes. That is why **Article 152 (7)** of the *Constitution of Kenya, 2010* ("**the Constitution**") provides for the establishment of a Select Committee to "**investigate**" the veracity of allegations against a CS. I also earnestly believe that the **immutable rules** against the admission of *character evidence, disposition evidence, and similar fact evidence* confirm that our system of justice is loath to lynching and the "**he is a bad guy**" and Pontius Pilate's "**crucify him**" approaches to adjudicating judicial and quasi-judicial disputes.

17 I have been subjected to public lynching through negative media propaganda, **even during the pendency of the Special Motion**, to prejudice me in the **instant inquiry**. Annexed hereto and marked "**FML-6**" is a copy of an online publication by **the Star Newspaper** on **2<sup>nd</sup> May 2024** claiming, **falsely and maliciously**, that officers from the DCI had arrested, interrogated and processed me for formal arraignment in court in relation to the substandard fertiliser scandal. I also urge this Honourable Select Committee to view the fake news **television broadcast on Citizen TV** on **2<sup>nd</sup> May 2024**, which is saved as "**Video 3**" in the flash disk filed herewith.

#### **Constitutional Threshold for Dismissal of a CS Under Article 152 (6)**

18 As the Communication from the Chair dated **30<sup>th</sup> April 2024** (No. 021 of 2024) amply indicates, the threshold for the dismissal of a CS under

**Article 152 (6)** of the Constitution is **high**. The threshold is "**gross violation**" of the Constitution, "**serious reasons**" for believing a CS has committed a crime under national or international law and "**gross**" misconduct.

19 My advocates have advised me that **the prevailing case law from the Supreme Court of Kenya** requires the following as part of the threshold for the dismissal or removal from office of State Officers—

(a) **a specific act or omission by the State Officer**, which means a Special Motion for the dismissal of a CS cannot be founded on vague or overbroad allegations that are not supported by material and cogent evidence;

(b) **a nexus** between the State Officer and the alleged act or omission, which means a Special Motion for the dismissal of a CS cannot be based on the acts or omissions of a third party or third parties;

(c) "**seriousness**" or "**grossness**" of the act or omission *by the State Officer*, which means that a Special Motion for the dismissal of a CS cannot be founded on ordinary infractions that fall in the realm of normal human frailty and imperfection. A copy of the Supreme Court's decision in *Hon. Mike Mbuvi Sonko v The Clerk, County Assembly of Nairobi City & 11 Others* is annexed hereto and marked "**FML-7.**"

#### **Role and Mandate of this Honourable Select Committee**

20 As the Communication from the Chair dated **2<sup>nd</sup> May 2024** (No. 024 of 2024) amply indicates, the proceedings before this Honourable Select Committee are "**quasi-judicial**" and a vital component of the

accountability and oversight frameworks provided in the Constitution. As pointed out by the Chair, the proceedings require "**not only diligence and conscientiousness**" but also greater thresholds of impartiality, fairness, integrity and independence. My advocates have advised me that **the practical import of Communication from the Chair is that**—

(a) the Members of this Honourable Select Committee **sit and act as judges** rather than as Members of the National Assembly or political parties; and

(b) while sitting and acting as judges, the Members of this Honourable Select Committee are obliged to administer justice "**without any fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence**" (see the Third Schedule to the Constitution).

#### **Justice as a Two-Sided Coin**

21 My advocates have advised me that **justice has always been a two-sided coin** and hence the constitutional imperative of administering it "**without any fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence**" (see the Third Schedule to the Constitution).

22 **I unreservedly acknowledge and sympathise with the plight of Kenyan farmers** who were duped into buying substandard fertiliser. Further, I unreservedly acknowledge that **the duped farmers deserve justice. It would be an unfortunate day for our constitutional democracy,** however, **if we were to conflate justice with emotional lynching,**

*bloodletting, guillotining, "head rolling" or scapegoating.* Accordingly, **the farmer's bona fide cries for justice cannot justify injustice to me or any other person.** Specifically, the farmers' *bona fide* cries for justice cannot form the basis for upholding a Special Motion that—

- (a) **falsely accuses** me or any other person of "**gross violation**" of the Constitution, "**serious reasons**" for believing that I have committed a crime under national law and "**gross**" misconduct;
- (b) is **driven by ulterior motives** and **personal vendetta** on the part of the Mover and my ex-lover (i.e. Hon. Kitany);
- (c) seeks to reopen matters that the National Assembly extensively considered when it approved my nomination as a CS; or
- (d) revolves around acts and omissions of third parties.

**PART B: INCURABLE LEGAL INFIRMITIES OF THE SPECIAL MOTION**

23 My advocates have advised me that **the Special Motion is incompetent** to the extent that it has **incurable legal infirmities**, which are outlined in the ensuing paragraphs of Part B of this Affidavit.

**Defective Affidavit**

24 The Special Motion is **incompetent and incurably defective** to the extent that it is supported by an Affidavit that violates the express provisions of **section 4** of the *Oaths and Statutory Declarations Act*. The incurability of this defect can be confirmed by countless judicial decisions, including—

- (a) the decision in *Stephen M Mogaka v IEBC & 2 Others*, Election Petition No. 2 of 2017 (see, among others, **paras 49 to 54** of the decision); and
- (b) the decision in *Maureen Nyambura Ngigi Warui v Board of Directors Kenya Power & Lighting Company Ltd & 2 Others*, Petition No. 226 of 2019 (see, among others, **pages 6 to 8** of the decision). Copies of the two judicial decisions are annexed hereto and marked "**FML-8.**"

### **The Role of Cabinet Secretaries in Public Procurement**

- 25 The Special Motion is **incompetent** to the extent that it seeks to have me dismissed for **public procurement acts and omissions of a semi-autonomous government agency** that enjoys statutory, administrative and operational protection from ministerial micro-management, interference and meddling.
- 26 **The lynchpin** or **substratum** of the Special Motion, in my understanding, is the allegation of "**approving procurement and distribution of fake fertiliser**" (which is *repeated at least ten times*). However, as stated, my powers and duties as a CS do not extend to "**approving**" the NCPB's public procurement processes and administrative decisions. I urge this Honourable Select Committee to peruse the NCPB's Organisational Structure and the Tender Advert alluded to in the preceding paragraphs of this Affidavit.
- 27 Even if it were accepted for argument's sake that I had the power of "*approving procurement and distribution of fake fertiliser,*" **the scope and impact of the power would be too limited to justify the draconian**

**sanction of dismissal** from office given the provisions of **section 5 (2)** of the *Public Procurement and Asset Disposal Act, 2015* ("**the Procurement Act**"). **Section 5 (2)** of the Procurement Act states as follows—

A provision of an Act that provides for a person or body to approve any work or expenditure shall not be construed as giving that person or body any power with respect to the entire procurement proceedings.

28 To the best of my knowledge, **CSs have little to no role in matters relating to public procurement decisions and processes.** This can be confirmed by *the framework for the segregation of responsibilities and systematic and structured corporate decision-making* established under **Part V** of the Procurement Act (especially in **sections 44 (1), 44 (2), 45 (1), 45 (4), 45 (5), 46** and **47**). Under that framework, responsibility for public procurement decisions and processes lies with specified actors *with clearly demarcated levels of authority*. Specifically, **Part V of the Procurement Act only recognises the following actors** in public procurement processes and decisions—

- (a) accounting officers;
- (b) tender opening committees;
- (c) tender evaluation committees;
- (d) procurement professionals;
- (e) inspection and acceptance committees;
- (f) procurement agents; and

(g) storekeepers.

### **Blaming a Single CS for Official Government Policy**

29 The Special Motion seeks to have me dismissed from office **for a government policy** that formed part of the Kenya Kwanza Election Manifesto, which **voters ratified** in the **2022** general election. I urge this Honourable Select Committee to note that **the Mover has admitted that the fertiliser subsidy program was part of the Kenya Kwanza Manifesto** and was even put to the electorate during the **2022** general election (see **page 12, para (i)** of the Special Motion). It **smacks of bad faith and ulterior motives**, therefore, for the Mover to unfairly target me for dismissal on account of an official government policy ratified by voters in a general election.

### **Acts that Pre-date My Appointment as a CS**

30 The Mover has **deliberately misrepresented the Judgment** delivered in High Court (Milimani) Constitutional Petition No. E068 of 2021 on **30<sup>th</sup> November 2021** (notably, before my appointment as a CS). As can be confirmed from the text of the Judgment, a copy of which is annexed hereto and marked "**FML-9,**" **the Judgment vindicated me** as follows—

87. What emerges from the Petitioners' documents in support is that first, the parties' relationship was contractual based on their commercial relations with each other, which was well noted by Okwany J in her determination in *Barons Estate Limited v Atticon Limited & 5 others* [2019] eKLR and *Barons Estate Limited v Atticon Limited & 5 others* [2020] eKLR...Okwany J notes in both rulings under

paragraphs 10 and 39 of the rulings that the supposed titles were given voluntarily...

92. From the above analysis, it is clear that the Petitioner...raised complaints with the 2<sup>nd</sup> Respondent. The same needed to be investigated by the 2<sup>nd</sup> Respondent...the 2<sup>nd</sup> Respondent has a duty to properly investigate the complaints raised by the Petitioners...Thereafter they can decide on the way forward on the advice of the 1<sup>st</sup> Respondent.

93. I base this opinion on the fact that there are already numerous cases of a civil nature between the parties, stemming from family and contractual relationships...

119. Having found that the 2<sup>nd</sup> Respondent did not fully act or investigate the Petitioners' complaint lodged with him, I direct him to act on the same and forward his findings to the 1<sup>st</sup> Respondent within 90 days. During the 90 days, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall not charge or arrest the Petitioners....

31 After the delivery of the Judgment as excerpted above, **the Police fully investigated** the criminal acts alleged in the Special Motion. The Police thereafter **forwarded the file to the Office of the Director of Public Prosecutions** ("the ODPP") for review and advice. *The ODPP thoroughly reviewed the investigation file* and recommended that it **be closed with no further police action**. A copy of a letter from the Directorate of Criminal Investigations ("the DCI") dated **31<sup>st</sup> May 2023** is annexed hereto and marked "**FML-10.**"

32 My advocates have advised me that **the letter from the DCI should put to rest all the allegations in the Special Motion relating to—**

(a) "**serious reasons for believing**" that I have committed a crime under national law;

(b) current, pending or ongoing criminal investigations; and

(c) imminent arrests, arraignment, charging, prosecution etc. In any event, the Special Motion is speculative to the extent that it seeks my dismissal on account of **anticipated future contingencies** which may not occur.

33 As is evident from the preceding narration, the Special Motion seeks to have me dismissed from office for **alleged criminal acts that pre-date my appointment** as a CS, which **the National Assembly considered** in approving my nomination as a CS. **I disclosed the cases to the National Assembly** when I attended the vetting/approval proceedings before I was appointed a CS, which goes to show my candour and integrity.

34 **I am not even a party to some of the alleged pending civil, commercial and family suits** listed in the Special Motion (which Hon. Kitany filed against my family members and my businesses). Specifically, I am not a party to—

(a) the High Court Civil Suit No. E086 of 2019: *Gulf African Bank Limited v Atticon Limited & 4 Others* listed on **page 15** of the Special Motion. Nonetheless, I am aware that the High Court decided this suit **against Hon. Kitany's privies** vide a Judgment delivered on **26<sup>th</sup> May 2023**. A copy of the Judgment is annexed hereto and marked "**FML-11**"; and

(b) the High Court Civil Suit No. E1316 of 2020: *Linkit Limited & Another v Brenda Mithika* listed on **page 16** of the Special Motion (the parties to

this suit are Linkit Ltd, Arnold Kipkurui (who is a son to Hon Kitany) and Brenda Mithika (who is my daughter).

35 To repeat, all the allegations relating to the Mover's fanciful "*serious reasons for believing*" that I have committed a crime under national law **are inexorably linked to frivolous and vexatious civil, commercial and family suits**, nearing fifty in number as of the date of this Affidavit, that Hon. Kitany deliberately and maliciously instituted against me following the irretrievable breakdown of our relationship in **2018**.

***Countless Judicial Decisions in My Favour***

36 *Several judges and magistrates have made countless decisions that have vindicated me* in relation to the alleged criminal acts and the vexatious civil, commercial and family suits, nearing fifty in number as of the date of this Affidavit, that Hon. Kitany maliciously instituted against me. The decisions include—

(a) the Ruling delivered by the Environment and Land Court on **17<sup>th</sup> January 2022** in Nairobi ELC Case No. E393 of 2021, which **struck out as an abuse of the court process, Hon. Kitany's suit** seeking exclusive user and possession of my Runda home. A copy of the Ruling is annexed hereto and marked "**FML-12**";

(b) the Ruling delivered by the Court of Appeal on **19<sup>th</sup> August 2022** in Nairobi Civil Application No. E068 of 2022, **which dismissed as an abuse of judicial process, Hon. Kitany's application** for exclusive user

and occupation of my Runda home. A copy of the Ruling is annexed hereto and marked "**FML-13**";

(c) the Judgment delivered by the Milimani Chief Magistrate's Court in Divorce Cause No. 272 of 2019 on **27<sup>th</sup> September 2022**, which **dismissed Hon. Kitany's anchor claim of the existence of a marriage and matrimonial rights** between her and me. A copy of the Judgment is annexed hereto and marked "**FML-14**";

(d) the Ruling delivered by the Milimani High Court on **20<sup>th</sup> June 2019** in Commercial Case No. 138 of 2018, **which dismissed Hon. Kitany's allegations of forgery and wrongful charging** of title documents. A copy of the Ruling is annexed hereto and marked "**FML-15**";

(e) the Ruling delivered by the Milimani High Court on **17<sup>th</sup> December 2020** in Commercial Case No. 138 of 2018, **which dismissed, yet again, Hon. Kitany's allegations of forgery and wrongful charging** of title documents. A copy of the Ruling is annexed hereto and marked "**FML-16**";

(f) the Eviction Order issued by the Milimani Chief Magistrate's Court on **7<sup>th</sup> February 2023** in Divorce Cause No. 272 of 2019, **which lifted ex-parte orders previously granted to Hon. Kitany** in Miscellaneous Application No. 1044 of 2018 on account of her alleged but non-existent marriage to me. A copy of the Eviction Order is annexed hereto and marked "**FML-17**";

(g) the Ruling delivered by the Milimani High Court on **24<sup>th</sup> April 2023** in Family Division Appeal No. E022 of 2023, **which dismissed Hon. Kitany's Application for a stay of the orders** issued in the Divorce Cause. A copy of the Ruling is annexed hereto and marked "**FML-18**"; and

(h) the Ruling delivered by the Milimani High Court on **3<sup>rd</sup> November 2023** in Family Division Appeal No. E022 of 2023, **which dismissed Hon. Kitany's Application to cite me for contempt of court**. A copy of the Ruling is annexed hereto and marked "**FML-19**."

#### **The Sub Judice Rule**

37 The alleged pending personal, family, property and company court cases against me, which are all filed by Hon. Kitany, **predate my appointment** as a CS. The **National Assembly considered all those cases** when it approved my nomination as a CS. More importantly, the Mover's admission that some of the cases are still pending is the most unmistakable evidence that **the Special Motion is sub judice** contrary to **Standing Order 89**.

#### **Inapplicable Constitutional Provisions**

38 The Special Motion seeks to have me dismissed for an alleged breach of constitutional provisions that **have no bearing on my powers and responsibilities** as a CS. To illustrate—

(a) the **Allegation 1 (e)** of the Special Motion accuses me of gross violation of "**Article 152 (5 (a) to (10))**" of the Constitution, yet these provisions are incapable of violation by a CS; and

(b) the **Allegation 1 (a)** of the Special Motion accuses me of gross violation of "**Article 2**" of the Constitution, yet there is no allegation of treason or any attempt on my part to exercise any extra-constitutional powers.

39 The Special Motion seeks to have me dismissed for **acts and omissions of the previous administration**, which also predate my appointment as a CS. To illustrate, **page 14** of the Special Motion falsely accuses me of misrepresenting the nature of the Agency Agreement signed between the NCPB and 51 Capital on **31<sup>st</sup> March 2022**, **seven months** before I was appointed a CS. As can be confirmed from the Agency Agreement, a copy of which is annexed hereto and marked "**FML-20**," *there is nothing in the text to suggest that GPC Diatomaceous is a fertiliser and not a soil conditioner*. Indeed, and as can be confirmed from the text, **the Agency Agreement does not mention the word "fertilizer."** I urge this Honourable Select Committee to take judicial notice of the fact that unlike the item described in the Agency Agreement between NCPB and 51 Capital, fertiliser fertilisers **are usually described using symbols and ratios** that depict their chemical elements composition.

### **Inadmissible Hearsay**

40 My advocates have advised me that **the Special Motion** is based on **inadmissible hearsay**. I am specifically advised that—

(a) the **letter by Mr Ahmednasir Abdullahi SC**, which is produced on **pages 32 to 43** of the Special Motion, is **inadmissible hearsay** to the extent that Mr Ahmednasir Abdullahi SC did not receive or otherwise participate in any of the alleged telephone calls or witness the alleged factory visit;

(b) **the screengrabs** attached to the letter by Mr Ahmednasir Abdullahi SC **have not been authenticated** by the police, the mobile telecommunication services provider or any other credible source or authority; and

(c) **the alleged public spats with journalists** are attributed to an alleged press statement by Ms Faith Odhiambo, **who is not a journalist** and thus cannot claim to be a witness to the alleged spats.

### **PART C: RESPONSES TO THE SPECIFIC ALLEGATIONS IN THE SPECIAL MOTION**

41 I have endeavoured to condense and summarise, in the ensuing paragraphs of Part C of this Affidavit, for clarity and to demonstrate frivolity the specific allegations that the Special Motion makes against me.

## Gross Violations of the Constitution

### **Allegation 1 (a): Gross Violation of Articles 2 and 10 (1) (c)**

42 Allegation 1 (a) states that the CS "**appears**" to have grossly violated **Articles 2 and 10 (1) (c)** of the Constitution. The use of the word "**appears**" demonstrates the Mover's doubt in the veracity of the allegation. *Prima facie*, **the allegation falls far short of the applicable constitutional, legal, nexus and evidential thresholds** established by the Supreme Court in *the Sonko case (supra)*. Nonetheless, the Mover of the Special Motion accuses me of—

- (a) "**not undertaking public participation**" in the implementation of a far-reaching policy decision on the procurement and distribution of fertiliser [see **allegation 1 (a) (i)**]; and
- (b) **making and implementing the public policy** of "*approving the procurement and distribution of fake fertiliser*" [see **allegation 1 (a) (ii)**].

43 My response to **allegation 1 (a)** is that—

- (a) **the allegation as to public participation is frivolous** to the extent that it relates to **a government policy** that formed part of the Kenya Kwanza Election Manifesto, which *voters ratified* in the **2022** general election. No mode of public participation can conceivably rank higher than putting an issue to the electorate in a general election, being the true *locus* for the free exercise of their will. I urge this

Honourable Select Committee to note that **the Mover has admitted that the fertiliser subsidy program was part of the Kenya Kwanza Election Manifesto** and was even put to the electorate during the 2022 general election (see **page 12, para (i)** of the Special Motion). It **smacks of bad faith and ulterior motive**, therefore, for the Mover to unfairly target me for dismissal on account of an official government policy ratified by voters in a general election. Moreover, and in any event, **the fertiliser subsidy program was not really a new policy** that required public participation, as the previous administration had already adopted and implemented the policy *long before my appointment* as a CS;

- (b) **the Kenya Kwanza Government has never adopted a policy to procure and distribute "fake fertiliser."** The Mover has not presented any tender document, Cabinet Memo or other evidence of the existence of a policy to procure and distribute "fake fertiliser." How can I approve a non-existent policy? The accusation of "**approving the procurement and distribution of fake fertiliser,**" which is **repeated seven times** in the Special Motion, is just a sensational claim devoid of any factual basis. A spurious allegation cannot stick or hold merely because it is repeated seven times or any other number of times; and
- (c) contrary to the Mover's allegation, I formally warned the NCPB, purely acting in an abundance of caution, of the dangers of

substandard fertiliser. A copy of my letter dated **20<sup>th</sup> December 2023** is annexed hereto and marked "**FML-21.**"

**Allegation 1 (b): Gross Violation of Article 46**

44 Allegation 1 (b) states that the CS "**appears**" to have grossly violated **Article 46** of the Constitution. The use of the word "**appears**" *demonstrates the Mover's doubt in the veracity of the allegation. Prima facie, the allegation falls far short of the applicable constitutional, legal, nexus and evidential thresholds* established by the Supreme Court in *the Sonko case (supra)*. Nonetheless, the Mover of the Special Motion accuses me of—

- (a) **infringing consumers' right** to goods and services of reasonable quality and to the protection of their health, safety and economic interests by "*approving the procurement and distribution of fake fertiliser*" [see **allegation 1 (b) (i)**]; and
- (b) "**approving budgets**" for the "*procurement and distribution of fake fertiliser*" by the NCPB [see **allegation 1 (b) (iii)**].

45 My response to allegation 1 (b) is as follows—

- (a) **the allegation is frivolous** to the extent that it is founded on a non-existent government policy of procuring and distributing "*fake fertiliser*";
- (b) my duties and powers as a CS do not extend to "**approving budgets**" for the NCPB's procurements. I reiterate the depositions in the

preceding paragraphs of this Affidavit on the Organisational Structure of the NCPB and **the framework for the segregation of responsibilities and systematic and structured corporate decision-making** established under Part V of the Procurement Act;

(c) **I am not a manufacturer or distributor of any goods or services that could conceivably infringe on consumer rights**, nor am I omniscient in my official capacity as a CS. Specifically, I **wholly rely on independent technical agencies of the State** to ensure that consumers enjoy goods and services of reasonable quality and to protect their health, safety and economic interests;

(d) though highly regrettable, the failure of independent technical agencies to detect consignments of substandard fertiliser that comprised barely 0.05% of the total supply (specifically, 3,000 bags out of a total of more than 5,349,829 bags) **cannot warrant the knee-jerk, disproportionate and draconian sanction of dismissing a CS from office**. Indeed, no CS would survive dismissal under such an unreasonable and impracticable standard of ministerial responsibility;

(e) in the manufacturing industry, **it is not inconceivable or improbable for products from a specific batch to fall below the prescribed standards** (as happened with the 3,000 bags of fertiliser from Batch Number 03/2024 that triggered the Special Motion. Indeed, **manufactured products are assigned batch and serial numbers to**

**facilitate tracing and recall** if problems are subsequently discovered, as happened in the matter under investigation. Such recalls are not unheard of in the manufacturing world. The fact that the NCPB was able to track, trace and recall the bags from the affected batch is inconsistent with the narrative of a scheme to procure and distribute "fake fertiliser."

**Allegation 1 (c): Gross Violation of Article 73**

46 Allegation 1 (c) states that the CS "**appears**" to have grossly violated **Article 73** of the Constitution. The use of the word "**appears**" demonstrates the Mover's doubt in the veracity of the allegation. *Prima facie*, **the allegation falls far short of the applicable constitutional, legal, nexus and evidential thresholds** established by the Supreme Court in *the Sonko case (supra)*. Nonetheless, the Mover of the Special Motion accuses me of—

- (a) "*approving procurement and distribution of fake fertiliser,*" to which I have already responded sufficiently [see **allegation 1 (c) (iii)**];
- (b) exercising a public trust in a manner that is inconsistent with the objects of the Constitution [see **allegation 1 (c) (i)**]; and
- (c) failing to bring honour and dignity to the nation and the office of the CS for Agriculture and Livestock Development [see **allegation 1 (c) (i)**].

47 My response to Allegation 1 (c) is that **the Special Motion does not disclose any wrongful act or omission** on my part that substantiates the claims of "gross" violation of Article 73, breach of public trust and failure to bring honour and dignity to the office of the CS.

**Allegation 1 (d): Gross Violation of Article 201**

48 Allegation 1 (d) states that the CS "**appears**" to have grossly violated **Article 201** of the Constitution. The use of the word "**appears**" demonstrates the Mover's doubt in the veracity of the allegation. *Prima facie*, **the allegation falls far short of the applicable constitutional, legal, nexus and evidential thresholds** established by the Supreme Court in *the Sonko case (supra)*. Nonetheless, the Mover of the Special Motion accuses me of—

(a) "*approving procurement and distribution of fake fertiliser,*" to which I have already responded sufficiently [see **allegation 1 (d) (i)**]; and

(b) failure to apply public money in a product and responsible way, which is also linked to "*approving procurement and distribution of fake fertiliser,*" to which I have already responded sufficiently [see **allegation 1 (d) (i)**].

**Allegation 1 (e): Gross Violation of Article 152 (5) et seq**

49 Allegation 1 (e) states that the CS "**appears**" to have grossly violated **Articles 152 (5) (a), (c), (6), (7), (8), (9) and (10)** of the Constitution. The use of the word "**appears**" demonstrates the Mover's doubt in the

veracity of the allegation. *Prima facie*, **the allegation falls far short of the applicable constitutional, legal, nexus and evidential thresholds** established by the Supreme Court in *the Sonko case* (*supra*). Nonetheless, the Mover of the Special Motion accuses me of—

(c) **overseeing the implementation of the budgets of the NCPB** for the “*procurement and distribution of fake fertiliser*,” to which I have already responded sufficiently;

(d) **lying to the Departmental Committee**, whose work is still ongoing, that the Agreement signed between the NCPB and 51 Capital Africa Diatomite Industries on **31<sup>st</sup> March 2022** (long before I was appointed a CS) was for the sale of **a soil conditioner** rather than a chemical fertiliser [see **allegation 1 (e) (i)**]; and

(e) violating the principles of public service duty to use resources efficiently, effectively and economically [see **allegation 1 (e) (ii)**].

50 My response to allegation 1 (e) of the Special Motion is as follows—

(a) **the allegation is frivolous** to the extent that Articles 152 (5) (a), (c), (6), (7), (8), (9) and (10) of the Constitution **are inapplicable and incapable of violation by a CS**; and

(b) as already explained, the text of the Agency Agreement signed between the NCPB and 51 Capital Africa Diatomite Industries on **31<sup>st</sup> March 2022** (long before my appointment as a CS) **does not state that GPC Diatomaceous is a fertiliser**. Further, and in any event, the

Mover of the Special Motion **has not adduced any evidence** to substantiate the accusation that I misled the Departmental Committee that GPC Diatomaceous is a soil conditioner.

**Allegation 2: Crimes Under National Law**

51 Allegation 2 states that the CS "**there are serious reasons**" for believing that I have committed crimes under national law (specifically, under **sections 100, 101, 353 and 355** of the *Penal Code*. The "**serious reasons**" given for the belief are—

(a) **a letter** that **Ahmednasir Abdullahi SC** wrote to the DCI on **19<sup>th</sup> April 2024** on behalf of his client, a copy of which is produced on **pages 32-34** of the Special Motion [see **allegation 2 (a)**]; and

the Judgment delivered in High Court (Milimani) Constitutional Petition No. E068 of 2021 on **30<sup>th</sup> November 2021** (notably, before my appointment as a CS), which is part of the countless court cases between Hon. Kitany and me [see **allegations 2 (a) (i) and 2 (b)**].

52 My response to allegation 2, which is already set out in Parts A and B of this Affidavit, is that—

(a) the **letter** that **Ahmednasir Abdullahi SC** wrote to the DCI on **19<sup>th</sup> April 2024** on behalf of his client **is inadmissible hearsay**. Accordingly, the letter is not evidence of anything;

(b) the Mover of the Special Motion **has misrepresented the contents, tenor and purport of the Judgment** delivered in High Court (Milimani) Constitutional Petition No. E068 of 2021 on **30<sup>th</sup> November 2021**;

(c) the invocation and misrepresentation of the contents, tenor and purport of the Judgment delivered in High Court (Milimani) Constitutional Petition No. E068 of 2021 on **30<sup>th</sup> November 2021 unwittingly discloses the hidden hand and motive behind the Special Motion**. Specifically, it discloses, **especially when read together with the multiple civil, commercial and family suits mentioned on pages 15 and 16** of the Special Motion, that *Hon. Kitany is using the Mover as a proxy* in her now seven-year campaign of personal vendetta and persecution against me. A newspaper printout that points to Hon. Kitany as the actual Mover of the Special Motion is annexed hereto and marked "**FML-22**." Further, a K-24 television broadcast of Hon. Kitany agitating for my dismissal from office a few weeks before the filing of the Special Motion is saved as "**Video 4**" in the flash disk filed herewith; and

(d) in any event, the alleged criminal acts **pre-date my appointment** as a CS and were (i) **thoroughly investigated** by the police, (ii) **reviewed by the ODPP** and (iii) **closed** with a recommendation for **no further police action**.

### **Allegation 3: Gross misconduct Under Cap 185C**

53 Allegation 3 states that I have engaged in "**gross misconduct**" by breaching **sections 8, 10 (a) and (b), 11 (a) and 29** of the *Leadership and Integrity Act* (Cap 185C). Other than "**approving procurement and distribution of fake fertiliser**" and "**submitting false information**" to the Departmental Committee, to which I have already replied sufficiently, the only other basis for Allegation 3 lies in **a press statement** that **Ms Faith Odhiambo**, the President of the Law Society of Kenya, issued on **22<sup>nd</sup> April 2024**. A copy of the press statement is produced on **pages 30 and 31** of the Special Motion. The press statement accused me of having a "**public spat with journalists**" and "**purporting to revoke licenses**" without conducting proper investigations [see **allegations 3 (a) and 3 (b)**].

54 Just like the **letter** that **Ahmednasir Abdullahi SC** wrote to the DCI on **19<sup>th</sup> April 2024** on behalf of his client, the **press statement** that **Ms Faith Odhiambo** issued on **22<sup>nd</sup> April 2024** constitutes **inadmissible hearsay** and thus is not evidence of anything. Further, and in any event, the Special Motion **does not contain any evidence** of the alleged public spat and revocation of licenses. Copies of section 63 of the Evidence Act and the classical decision in *Teper v R [1952] A. C. 480* on hearsay evidence are annexed hereto and marked "**FML-23**."

### **PART D: CONCLUSION**

55 As can be confirmed from the preceding paragraphs of this Affidavit and the annexures to it—

- (a) the Special Motion is **incompetent and incurably defective** to the extent that it is supported by an Affidavit that violates the express provisions of the Oaths and Statutory Declarations Act (Cap 15);
- (b) **the Special Motion is incompetent** to the extent that it seeks to have me removed from office—
- (i) for the public procurement **acts and omissions of a semi-autonomous government agency**, with which I am statutorily barred from meddling;
  - (ii) **for a government policy** that formed part of the Kenya Kwanza Election Manifesto, which also existed prior to my appointment as a CS and which **voters ratified** in the **2022** general election;
  - (iii) for alleged criminal acts that pre-date my appointment as a CS, which have been thoroughly investigated by the Police, reviewed by the ODPP and closed with a recommendation for no further police action;
  - (iv) for **personal, family, property and company court cases** filed by Hon. Kitany against me, which (i) **predate my appointment** as a CS, (ii) **the National Assembly considered** in approving my nomination as a CS and (iii) in respect of which many judges and magistrates have so far **determined in my favour**;
  - (v) for personal, family, property and corporate court cases filed by Hon. Kitany against me, which predate my appointment as

a CS, the House considered in approving my nomination as a CS and some of which are sub judice within the meaning of Standing Order 89;

- (vi) for an alleged breach of constitutional provisions that **have no bearing on my powers and responsibilities** as a CS;
- (vii) for **acts and omissions of the previous administration**, which also predate my appointment as a CS; and

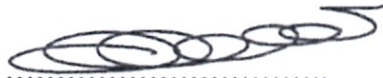
(c) the Special Motion is incompetent to the extent that it is based on inadmissible hearsay.

56 I swear this Affidavit in response to and opposition to the Special Motion and humbly urge this Honourable Select Committee to find and hold that the allegations against me have not been substantiated.

57 The depositions in this Affidavit are accurate to the best of my knowledge and belief, save where I have relied on advice or information whose sources are disclosed.

Sworn at **Nairobi** by the said  
**Franklin Mithika Linturi**  
On the **6<sup>th</sup>** day of **May** 2024  
**BEFORE ME**

**GITONGA J. M'LIMBIINE**  
ADVOCATE AND COMMISSIONER FOR OATHS AND CPS  
P. O. Box 12618 - 00100, NAIROBI  
MOB 0722 240091  
DATE: 06/05/2024 SIGN: 



(Deponent)

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Nairobi

**ADMISSION No. P.105/6588/07**

**PRACTICE No. LSK/2024/00446**

**FILE REF.: M024/001/GEN/2018M**

**TO BE SERVED UPON:**

The Clerk of the National Assembly

1<sup>st</sup> Floor Main Parliament Buildings

Email: [cna@parliament.go.ke](mailto:cna@parliament.go.ke)

P. O. Box 41842-00200

Nairobi

Hon Wanami Wamboka, MP

Main Parliament Buildings

Tel.: +254 722 403 082

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P. O. Box 41842-00200

Nairobi

**SPECIAL ISSUE**



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GAZETTE NOTICE NO. 13033

## THE CONSTITUTION OF KENYA

### APPOINTMENT OF CABINET SECRETARIES

IN EXERCISE of the powers conferred by Article 152 (2) of the Constitution, I, William Samoei Ruto, President and Commander-in-Chief of the Kenya Defence Forces, appoint—

Wycliffe Musalia Mudavadi,  
Kithure Kindiki (Prof.),  
Simon Kiprono Chelugui,  
Aden Bare Duale,  
Njuguna Sospeter Ndung'u (Prof.),  
Davis Kimutai Chirchir,  
Alfred Mutua,  
Alice Muthoni Wahome,  
Ababu Namwamba,  
Salim Mvurya,  
Onesimus Kipchumba Murkomen,  
Soipan Tuyu,  
Moses Kiarie Kuria,  
Ezekiel Machogu Ombaki,  
Aisha Jumwa Karisa Katana,  
Eliud Okech Owalo,  
Rebecca Miano,  
Susan Nakhumicha Wafula,  
Peninah Malonza,  
Zacharia Mwangi Njeru,  
Franklin Mithika Linturi,  
Florence Koske Bore.

to be Cabinet Secretaries, with effect from the 27th October, 2022.

Dated the 26th October, 2022.

WILLIAM SAMOEI RUTO,  
*President.*

GAZETTE NOTICE NO. 13034

## THE CONSTITUTION OF KENYA

### APPOINTMENT

IN EXERCISE of the powers conferred by Article 156 (2) of the Constitution, I, William Samoei Ruto, President and Commander-in-Chief of the Kenya Defence Forces, appoint —

JUSTIN BEDAN NJOKA MUTURI

to be the Attorney-General, with effect from the 27th October, 2022.

Dated the 26th October, 2022.

WILLIAM SAMOEI RUTO,  
*President.*

GAZETTE NOTICE NO. 13035

## THE CONSTITUTION OF KENYA

### APPOINTMENT

IN EXERCISE of the powers conferred by Article 154 (2) (a) of the Constitution, I, William Samoei Ruto, President and Commander-in-Chief of the Kenya Defence Forces, appoint —

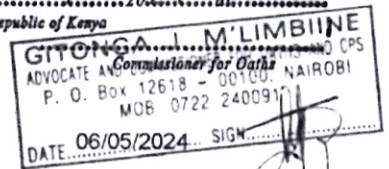
MERCY KIIRU WANJAU

to be the Secretary to the Cabinet, with effect from the 27th October, 2022.

Dated the 26th October, 2022.

WILLIAM SAMOEI RUTO,  
*President.*

This is the Exhibit marked "FML-1" referred to in the annexed affidavit of declaration of Franklin Mithika Linturi Sworn before me this 6th day of May 2024 at Nairobi in the Republic of Kenya



This is the Exhibit marked "FML-2" referred to in the annexed affidavit of declaration of Franklin Mithika Linturi

Sworn before me this 6th day of May 2024 at Nairobi

In the Republic of Kenya  
 GYONGA J. M. LINTURI  
 Commissioner for Oaths  
 DATE 06/05/2024 SIGN



REPUBLIC OF KENYA  
 CHARGE SHEET

COURT FILE NO: .....  
 ODPD MSN NO: .....  
 ODPD STATION: .....

POLICE CASE NO: ... 121/  
 OB NUMBER: 55/30/04/2024.  
 DATE DRAFTED: ...02/05/2024.

First Name	Surname or Father's Name	Identity Card or Passport No.	Gender	Tribe / Nationality	Appar ent Age	Address (include District and Location where applicable)
CHRISTINE NYAMBURA	MUTURI	23810744	FEMALE	KENYAN	40 YRS	

CHARGE

CHEATING CONTRARY SECTION 315 OF THE PENAL CODE

PARTICULARS OF OFFENCE (See Second Schedule C.P.C)

of **CHRISTINE NYAMBURA MUTURI**: On diverse dates between 24<sup>th</sup> March 2023 and 30<sup>th</sup> April 2023 in Gigiri area within Nairobi County jointly with others not before court by means of fraudulent tricks induced Gina Nduta to pay a sum of Kenyan Shillings two hundred and fifty thousand (250000/=) to account no 1308935765 domiciled at Kenya Commercial Bank pretending that you were in a position to train and issue her with a certificate in Certified Nurse Assistance from westwick institute limited which is not accredited by Technical and Vocational Education and Training Authority.  
 (COUNT II SEE OVERLEAF)

OTHER COUNTS SEE OVERLEAF

Date of arrest	Without or with warrant	Date Apprehension to court	Bond or Bail and amount	Is Application made for summons to issue
30/04/24	without	02/05/2024	In Custody	//////////

Remanded adjourned to

Complainant and Address

REPUPLIC OF KENYA THROUGH ODPD

Police Station

Witnesses

- GINA NDUTA CHEGE
- CYNTHIA CHERUTO
- OTHERS TO BE STATED

Sentence Court and Date

If fine is paid.....

NAME & RANK OF PROSECUTOR



ODPD STAMP/DATE/SIGNATURE



COUNT II:

CHARGE

CHEATING CONTRARY SECTION 315 OF THE PENAL CODE

PARTICULARS OF OFFENCE

CHRISTINE NYAMBURA MUTURI: On diverse dates between 5<sup>th</sup> June 2023 and 7<sup>th</sup> August 2023 in Gigiri area within Nairobi County jointly with others not before court by means of fraudulent tricks induced Gina Nduta to pay a sum of USD two thousand five hundred (2500) to USD account no 1312821159 domiciled at Kenya Commercial Bank, pretending that you were in a position to train and issue her with a certificate in Certified Nurse Assistance from westwick institute limited which is not accredited by Technical and Vocational Education and Training Authority.

COUNT III

CHARGE

CHEATING CONTRARY SECTION 315 OF THE PENAL CODE

PARTICULARS OF OFFENCE

CHRISTINE NYAMBURA MUTURI: On 24<sup>th</sup> April 2023 in Gigiri area within Nairobi County jointly with others not before court by means of fraudulent tricks induced Cynthia Cheruto to pay a sum of Kenyan Shillings two hundred thousand (200000/=) to account no 1308935765 domiciled at Kenya Commercial Bank, pretending that you were in a position to train and issue her with a certificate in Certified Nurse Assistance from westwick institute limited which is not accredited by Technical and Vocational Education and Training Authority.

COUNT IV

CHARGE

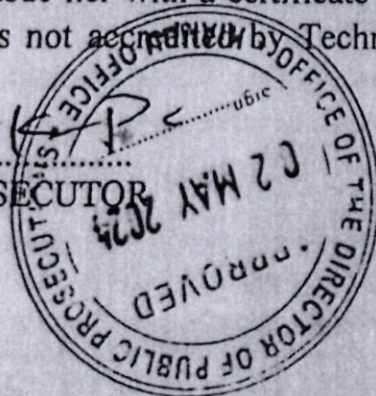
CHEATING CONTRARY SECTION 315 OF THE PENAL CODE

PARTICULARS OF OFFENCE

CHRISTINE NYAMBURA MUTURI: On diverse dates between 24<sup>th</sup> April 2023 and 15<sup>th</sup> September 2023 in Gigiri area within Nairobi County jointly with others not before court by means of fraudulent tricks induced Cynthia Cheruto to pay a sum of USD four thousand (4000) to USD account no 1312821159 domiciled at Kenya Commercial Bank, pretending that you were in a position to train and issue her with a certificate in Certified Nurse Assistance from westwick institute limited which is not accredited by Technical and Vocational Education and Training Authority.

.....  
NAME & RANK OF PROSECUTOR

.....  
ODPP STAMP/DATE/SIGNATURE



Home Central

# Bumula MP's wife Nyambura charged with fraud

By Fidelis Kabunyi | 2d ago



**Bumula Mp Jack Wamboka Wanami during an interview with the Standard at his rural home in Bumula constituency on September 10, 2023. [Benjamin Sakwa, Standard]**

Bumula MP Jack Wamboka's wife was on Thursday charged before a Kiambu court over fraud.

She denied obtaining over Sh1.9 million in an alleged nurse's training scam.

Christine Nyambura Muturi appeared before Kiambu Senior Principal Magistrate Meresia Opondo.

Nyambura was directed to remain in custody after she denied eight counts of falsely obtaining the money and offering nursing certificate courses in an unaccredited institution.

"The court hereby directs the suspect to remain in custody until tomorrow when the court will rule on the bail application," Opondo ruled.

According to the charge sheet, Nyambura was accused of obtaining Sh1,959,000 from seven individuals by inducing them to pay college fees for a certified nursing assistant course at Westwick Institute Limited.

## Keep Reading



**Maai Mahiu's neglected tunnel that exploded, killing over 50**



**Two Italians deny Sh32 million fraud charges**



**MP wants Linturi to quit over fake fertiliser scam**



**Bumula MP Wamboka in a drive to tackle menstrual poverty and teenage pregnancy**

"On diverse dates between January 20, 2023, and February 27, 2024, in Gigiri area within Nairobi County, jointly with others not before court being the director of Westwick Institute Limited, offered training in Certified Nurse Assistant without accreditation, licensing and registration by Technical and Vocational Education and Training Authority," read part of the charge sheet.

Nyambura denied that she obtained Sh428,500 from Sally Wanjiru between January 20, 2023, and July 28, 2023, by inducing her that she could be trained and issued with a certificate in certified nursing assistant course from Westwick Institute Limited that is not accredited by TVET.

She was further accused of obtaining various amounts of money from six other unsuspecting Kenyans.

She will appear in court on Tuesday, May 7 for a hearing on bail.

She is currently hospitalized at a Nairobi hospital under police watch.



REPUBLIC OF KENYA

CHARGE SHEET

COURT FILE NO: ..... POLICE CASE NO: CR. No. 211/262/2024

ODPP MSN NO: ..... OB NUMBER: .....

ODPP STATION: ..... DATE DRAFTED: 02/05/2024

First name	Surname or Father's Name	Identity Card/Passport No.
1. JOSEPH MUNA	KIMOTE	10860904
2. DAVESHKUMAR BHUPENDRABHAI	PATEL	21407294
3. CHANDRABHAN	CHIMURKAR	
4. COLLINS KIPCHUMBA	NG'ETICH	23152723
5. KEL CHEMICALS	LIMITED	24284320
6. MEMS DISTRIBUTORS	LIMITED	C.170645

CHARGE	CONSPIRACY TO COMMIT AN OFFENCE OF ECONOMIC CRIME CONTRARY TO SECTION 47A (3) AS READ WITH SECTION 48 (1) OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT No. 3 OF 2003				
COUNT I					
PARTICULARS OF OFFENCE (see second Scheduled of C.P.C)	1. JOSEPH MUNA KIMOTE, 2. CHANDRABHAN CHIMURKAR 3. DAVESHKUMAR BHUPENDRABHAI PATEL, 3. COLLINS KIPCHUMBA NG'ETICH: Between 21 <sup>st</sup> December, 2023 and 21 <sup>st</sup> March, 2024 at unknown place within the Republic of Kenya, jointly with others not before court, conspired to commit an offence of economic crime during the tendering, manufacture, distribution and supply of one hundred and fourteen thousand, seven hundred and seven (114,707) bags of 50Kgs substandard fertilizer worth three hundred and fifty three million, four hundred and fifty two thousands and five hundred shillings (kshs.353,452,500/=) under government fertilizer subsidy programme through National Cereals and Produce Board purporting it to be standard fertilizer.(See Count II to XV overleaf)				
If accused arrested	Date of arrest	Without or with warrant	Date apprehension to court	Bond or Bail and amount	Is application made for summons to issue
	Yes	03/05/24	W/A	06/05/24	KSHS. 100,000
Remanded adjourned to					
Complainant and address	REPUBLIC THROUGH DIRECTORATE OF CRIMINAL INVESTIGATIONS				
Police Station	FIU - IB DCI HQRS				
Witness	1. CAROLYN CHEPWOGEN 2. KENNETH WAINAINA 3. OTHERS TO BE STATED 0928 792567.				
Sentence Court and Date	If fine is paid .....				

.....  
ODPP STAMP/DATE/SIGNATURE

.....  
OFFICER IN CHARGE MUTHAIGA POLICE STATION  
KIAMBU OFFICE



COUNT II – FOR 1<sup>ST</sup> ACCUSED PERSON

WILLFUL FAILURE TO COMPLY WITH LAW RELATING TO PROCUREMENT CONTRARY TO SECTION 45(2)(b) AS READ WITH SECTION 48(1)(a) OF THE OF THE ANTICORRUPTION AND ECONOMIC CRIMES ACT NO.3 OF 2003.

**PARTICULARS**

JOSEPH MUNA KIMOTE: Between 21<sup>st</sup> December, 2023 and 21<sup>st</sup> March, 2024 at National Cereals and Produce Board headquarters in Nairobi City within Nairobi County, being a person employed by public body as the Managing Director of National Cereals and Produce Board knowingly and unlawfully failed to ensure quality fertilizer of sixty-nine thousand and seventy (69,070) bags of 50Kgs NPK fertilizer valued at Two ninety-seven million and one thousand shillings (Kshs. 297,001,000/-) supplied by Mems Distributors Limited was within the required Kenyan standards.

COUNT III – FOR 3<sup>RD</sup> ACCUSED PERSON

WILLFUL FAILURE TO COMPLY WITH LAW RELATING TO PROCUREMENT CONTRARY TO SECTION 45(2)(b) AS READ WITH SECTION 48(1)(a) OF THE OF THE ANTICORRUPTION AND ECONOMIC CRIMES ACT NO.3 OF 2003.

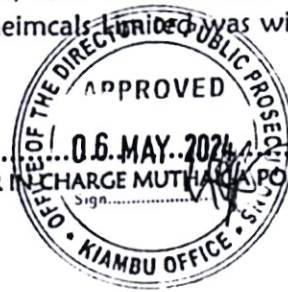
**PARTICULARS**

JOSEPH MUNA KIMOTE: Between 21<sup>st</sup> December, 2023 and 21<sup>st</sup> March, 2024 at National Cereals and Produce Board headquarters in Nairobi City within Nairobi County, being a person employed by public body as the Managing Director of National Cereals and Produce Board knowingly and unlawfully failed to ensure quality fertilizer of forty five thousand, six hundred and thirty seven (45,637) bags of 50Kgs NPK fertilizer valued at one hundred and seventy six million, four hundred and sixteen thousand shillings (Kshs. 176,416,000/-) supplied by Kel Chemicals Limited was within the required Kenyan standards.

WKM

.....  
ODPP STAMP/DATE/SIGNATURE

.....  
OFFICER IN CHARGE MUTHAI POLICE STATION



**COUNT IV- FOR 2<sup>ND</sup> 3<sup>RD</sup> AND 5<sup>TH</sup> ACCUSED PERSON**

**MANUFACTURING SUBSTANDARD GOODS CONTRARY TO SECTION 9(4) AS READ WITH SECTION 15 OF THE STANDARDS ACT CAP 496 LAWS OF KENYA**

**PARTICULARS:**

**1. DAVESHKUMAR BHUPENDRABHAI PATEL, 2. CHANDRABHAN CHIMURKAR, 3. KEL CHEMICALS LIMITED:** Between 31<sup>st</sup> January, 2024 and 21<sup>st</sup> March, 2024, at KEL Chemicals Limited Factory in Thika township within Kiambu County, having been issued with Standardization Permit Number 72446 for manufacture of NPK fertilizer (10:26:10) branded as KEL GREEN, knowingly manufactured sixty-nine thousand and seventy (69,070) bags/50kgs of substandard NPK 10:26:10 fertilizer valued at two hundred and seventy-six million shillings (Kshs. 276,000,000/-).

**COUNT V- FOR 2<sup>ND</sup> ,3<sup>RD</sup> AND 5<sup>TH</sup> ACCUSED PERSON**

**MANUFACTURING SUBSTANDARD GOODS CONTRARY TO SECTION 9(4) AS READ WITH SECTION 15 OF THE STANDARDS ACT CAP 496 LAWS OF KENYA**

**PARTICULARS:**

**1. DAVESHKUMAR BHUPENDRABHAI PATEL, 2. CHANDRABHAN CHIMURKAR, 3. KEL CHEMICALS LIMITED:** Between 31<sup>st</sup> January, 2024 and 21<sup>st</sup> March, 2024, at KEL Chemicals Limited Factory in Thika township within Kiambu County, having been issued with Standardization Permit Number 44463 for manufacture of NPK fertilizer (9:16:6) branded as KEL GOLD, knowingly manufactured thirty five thousand, four hundred and seventeen (35,417) bags/50kgs of substandard NPK 9:16:6 fertilizer valued at one hundred and fourteen million, six hundred and sixty eight thousand shillings (Kshs. 141,668,000/-).

**COUNT VI- FOR 2<sup>ND</sup>, 3<sup>RD</sup> AND 5<sup>TH</sup> ACCUSED PERSON**

**MANUFACTURING SUBSTANDARD GOODS CONTRARY TO SECTION 9(4) AS READ WITH SECTION 15 OF THE STANDARDS ACT CAP 496 LAWS OF KENYA**

**PARTICULARS:**

**1. DAVESHKUMAR BHUPENDRABHAI PATEL, 2. CHANDRABHAN CHIMURKAR, 3. KEL CHEMICALS LIMITED:** Between 31<sup>st</sup> January, 2024 and 21<sup>st</sup> March, 2024, at KEL Chemicals Limited Factory in Thika township within Kiambu County, having been issued with Standardization Permit Number 44789 for manufacture of NPK fertilizer (10:17:0) branded as KELPHOS PLUS, knowingly manufactured ten thousand, two hundred and twenty (10,220) bags/50kgs of substandard NPK 10:17:0 fertilizer valued at thirty four million, seven hundred and forty eight thousand shillings (Kshs. 34,748,000/-).

**COUNT VII - FOR 2<sup>ND</sup>, 3<sup>RD</sup> AND 5<sup>TH</sup> ACCUSED PERSON**

**APPLYING STANDARDIZATION MARK TO A COMMODITY THAT DOES NOT COMPLY WITH RELEVANT KENYA STANDARDS CONTRARY TO SECTION 10(6) AND 10(8) OF THE STANDARDS ACT CAP 496 LAWS OF KENYA**

**PARTICULARS:**

**1. DAVESHKUMAR BHUPENDRABHAI PATEL, 2. CHANDRABHAN CHIMURKAR, 3. KEL CHEMICALS LIMITED:** Between 31<sup>st</sup> January, 2024 and 21<sup>st</sup> March, 2024, at KEL Chemicals Limited in Thika township within Klambu County, knowingly and with intent to deceive, you applied the Standardization Mark 72446 on 69,070 bags of 50kgs KEL GREEN NPK 10:26:10 of substandard fertilizer.

**COUNT VIII - FOR 2<sup>ND</sup>, 3<sup>RD</sup> AND 5<sup>TH</sup> ACCUSED PERSON**

**APPLYING STANDARDIZATION MARK TO A COMMODITY THAT DOES NOT COMPLY WITH RELEVANT KENYA STANDARDS CONTRARY TO SECTION 10(6) AND 10(8) OF THE STANDARDS ACT CAP 496 LAWS OF KENYA**

**PARTICULARS:**

**1. DAVESHKUMAR BHUPENDRABHAI PATEL, 2. CHANDRABHAN CHIMURKAR, 3. KEL CHEMICALS LIMITED:** Between 31<sup>st</sup> January, 2024 and 21<sup>st</sup> March, 2024, at KEL Chemicals Limited in Thika township within Kiambu County, knowingly and with intent to deceive, you applied the Standardization Mark 44463 on 35,417 bags of 50kgs KEL GOLD NPK 10:26:10 of substandard fertilizer.

**COUNT IX - FOR 2<sup>ND</sup>, 3<sup>RD</sup> AND 5<sup>TH</sup> ACCUSED PERSON**

**APPLYING STANDARDIZATION MARK TO A COMMODITY THAT DOES NOT COMPLY WITH RELEVANT KENYA STANDARDS CONTRARY TO SECTION 10(6) AND 10(8) OF THE STANDARDS ACT CAP 496 LAWS OF KENYA**

**PARTICULARS:**

**1. DAVESHKUMAR BHUPENDRABHAI PATEL, 2. CHANDRABHAN CHIMURKAR, 3. KEL CHEMICALS LIMITED:** Between 31<sup>st</sup> January, 2024 and 21<sup>st</sup> March, 2024, at KEL Chemicals Limited in Thika Township within Kiambu County, knowingly and with intent to deceive, you applied the Standardization Mark 44789 on 10,220 bags of 50kgs KEL GREEN NPK 10:26:10 of substandard fertilizer.

.....  
ODPP STAMP/DATE/SIGNATURE

MUTHAIGA POLICE STATION  
OFFICER IN CHARGE MUTHAIGA POLICE STATION  
03 MAY 2024

4

.....  
MUTHAIGA POLICE STATION  
MUTHAIGA  
MUTHAIGA POLICE STATION

**COUNT X- FOR 4<sup>TH</sup> AND 6<sup>TH</sup> ACCUSED PERSON**

**OFFERING FOR SALE SUBSTANDARD GOODS CONTRARY TO SECTION 10(4) AS READ WITH SECTION 15 OF THE STANDARDS ACT CAP 496 LAWS OF KENYA**

**PARTICULARS:**

**1. COLLINS KIPCHUMBA NGETICH, AND 2. MEMS DISTRIBUTORS LIMITED:** Between 31<sup>st</sup> January, 2024 and 21<sup>st</sup> March, 2024, at National Cereals and Produce Board Depots within the Republic of Kenya, offered for sale sixty-nine thousand and seventy (69,070) bags/50kgs of substandard NPK 10:26:10 fertilizer valued at two hundred and seventy-six million shillings (Kshs. 276,000,000/-) to Kenyan farmers through National Cereals and Produce Board.

**COUNT XI- FOR 2<sup>ND</sup>, 3<sup>RD</sup> AND 5<sup>TH</sup> ACCUSED PERSON**

**OFFERING FOR SALE SUBSTANDARD GOODS CONTRARY TO SECTION 10(4) AS READ WITH SECTION 15 OF THE STANDARDS ACT CAP 496 LAWS OF KENYA**

**PARTICULARS:**

**1. DAVESHKUMAR BHUPENDRABHAI PATEL, 2. CHANDRABHAN CHIMURKAR, 3. KEL CHEMICALS LIMITED:** Between 31<sup>st</sup> January, 2024 and 21<sup>st</sup> March, 2024, at National Cereals and Produce Board Depots within the Republic of Kenya, offered for sale thirty-five thousand, four hundred and seventeen (35,417) bags/50kgs of substandard NPK 9:16:6 fertilizer valued at one hundred and fourteen million, six hundred and sixty-eight thousand shillings (Kshs. 141,668,000/-) to Kenyan farmers through National Cereals and Produce Board.

**COUNT XII- FOR 2<sup>ND</sup>, 3<sup>RD</sup> AND 5<sup>TH</sup> ACCUSED PERSON**

**OFFERING FOR SALE SUBSTANDARD GOODS CONTRARY TO SECTION 10(4) AS READ WITH SECTION 15 OF THE STANDARDS ACT CAP 496 LAWS OF KENYA**

**PARTICULARS:**

**1. DAVESHKUMAR BHUPENDRABHAI PATEL, 2. CHANDRABHAN CHIMURKAR, 3. KEL CHEMICALS LIMITED:** Between 31<sup>st</sup> January, 2024 and 21<sup>st</sup> March, 2024, at National Cereals and Produce Board Depots within the Republic of Kenya, offered for sale two hundred and twenty (10,220) bags/50kgs of substandard NPK 10:17:0 fertilizer valued at thirty-four million, seven hundred and forty-eight thousand shillings (Kshs. 34,748,000/-) to Kenyan farmers through National Cereals and Produce Board.

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ODPP STAMP/DATE/SIGNATURE

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OFFICER IN CHARGE MUTHAIGA POLICE STATION

P. O. Box 605070 - 00604, N

NAIROBI

TELEPHONE: (011) 254 200 0000

5

COUNT XIII – FOR 2<sup>ND</sup>, 3<sup>RD</sup> AND 5<sup>TH</sup> ACCUSED PERSON

FRAUDULENT ACQUISITION OF PUBLIC PROPERTY CONTRARY TO SECTION 45 (1)  
(a) AS READ WITH SECTION 48 (1) OF THE ANTI-CORRUPTION AND ECONOMIC  
CRIMES ACT No. 3 OF 2003

**PARTICULARS:**

1. DAVESHKUMAR BHUPENDRABHAI PATEL, 2. CHANDRABHAN CHIMURKAR, 3. KEL CHEMICALS LIMITED: Between 5<sup>th</sup> February, 2024 and 13<sup>th</sup> March, 2024, in Nairobi City within Nairobi County, fraudulently acquired public money worth one hundred and thirty-three million, four hundred and ninety thousand shillings (Kshs. 133,490,000/=) through bank account number 2025277018 under the name Kel Chemicals Limited for supply and delivery of forty four thousand, two hundred and thirty-three (44,233) bags of 50kgs substandard fertilizer.

COUNT XIV – FOR 4<sup>TH</sup> & 6<sup>TH</sup> ACCUSED PERSON

FRAUDULENT ACQUISITION OF PUBLIC PROPERTY CONTRARY TO SECTION 45 (1)  
(a) AS READ WITH SECTION 48 (1) OF THE ANTI-CORRUPTION AND ECONOMIC  
CRIMES ACT No. 3 OF 2003

**PARTICULARS:**

1. COLLINS KIPCHUMBA NG'ETICH, 2. MEMS DISTRIBUTORS LIMITED: Between 5<sup>th</sup> February, 2024 and 13<sup>th</sup> March, 2024, in Nairobi City within Nairobi County, fraudulently acquired public money worth two hundred and nineteen million, nine hundred and sixty thousand, five hundred (Kshs. 219,962,500/=) through bank account number 01603667876350 under the name Mem's Distributors Limited for supply and delivery of sixty three thousand, nine hundred and eighty five (63,985) bags of 50kgs substandard fertilizer to wit, KEL GREEN NPK 10:26:10 fertilizer.

APPROVED  
06 MAY 2024  
OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION  
ODPP STAMP/DATE AND SIGNATURE

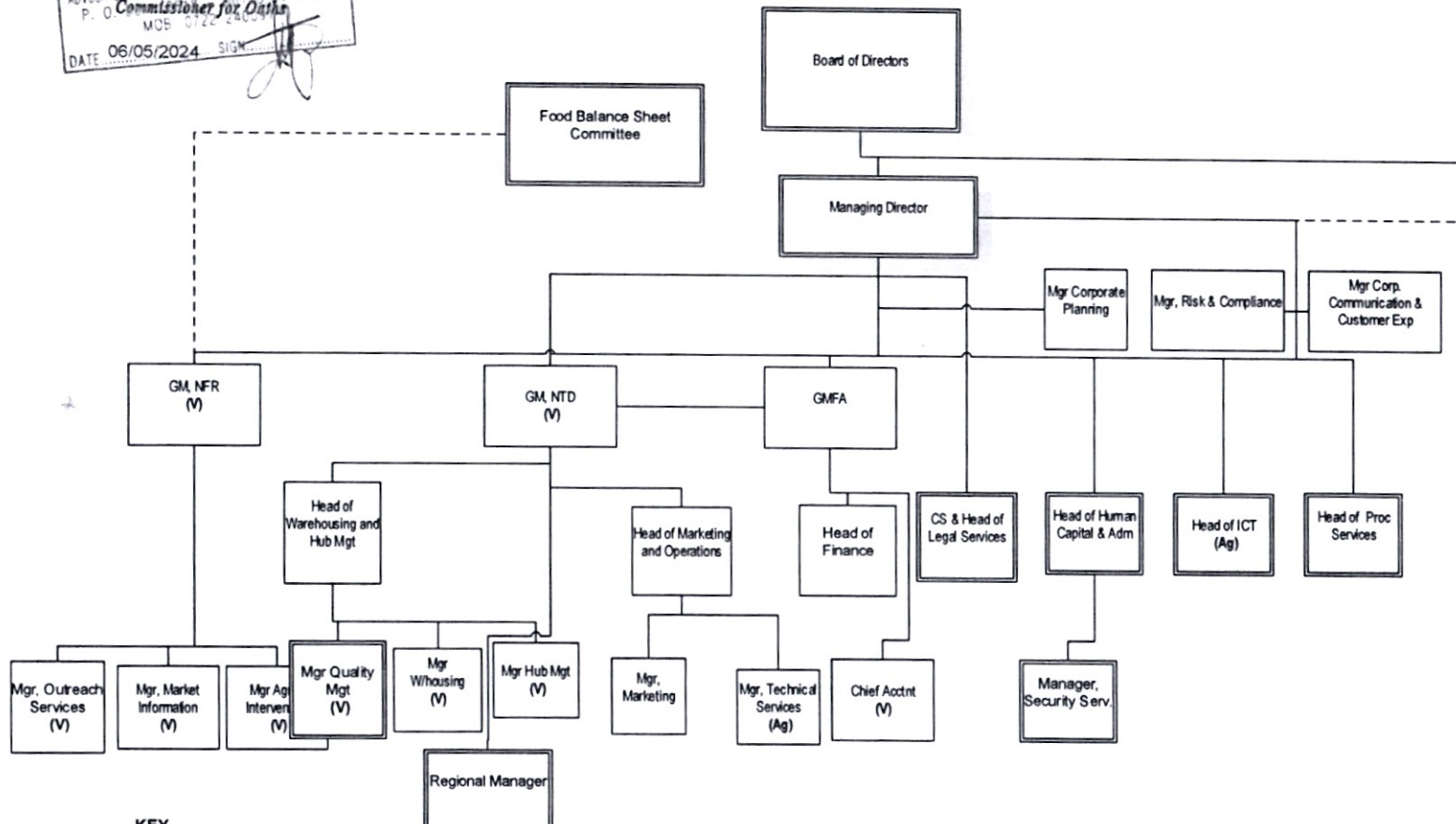
MUTHAIGA POLICE STATION  
06 MAY 2024  
OFFICER IN CHARGE MUTHAIGA POLICE STATION

This is the Exhibit marked "FML-3" referred to in the annexed affidavit of Franklin Mithika Linturi

Sworn before me this 6th day of May 2024 at Nairobi in the Republic of Kenya

GITONGA J. M'LIMBIINE  
 ADVOCATE FOR RIGHTS AND CPD  
 P. O. BOX 8722  
 MOB 0722 840000  
 Commissioner for Oaths  
 DATE 06/05/2024 SIGN

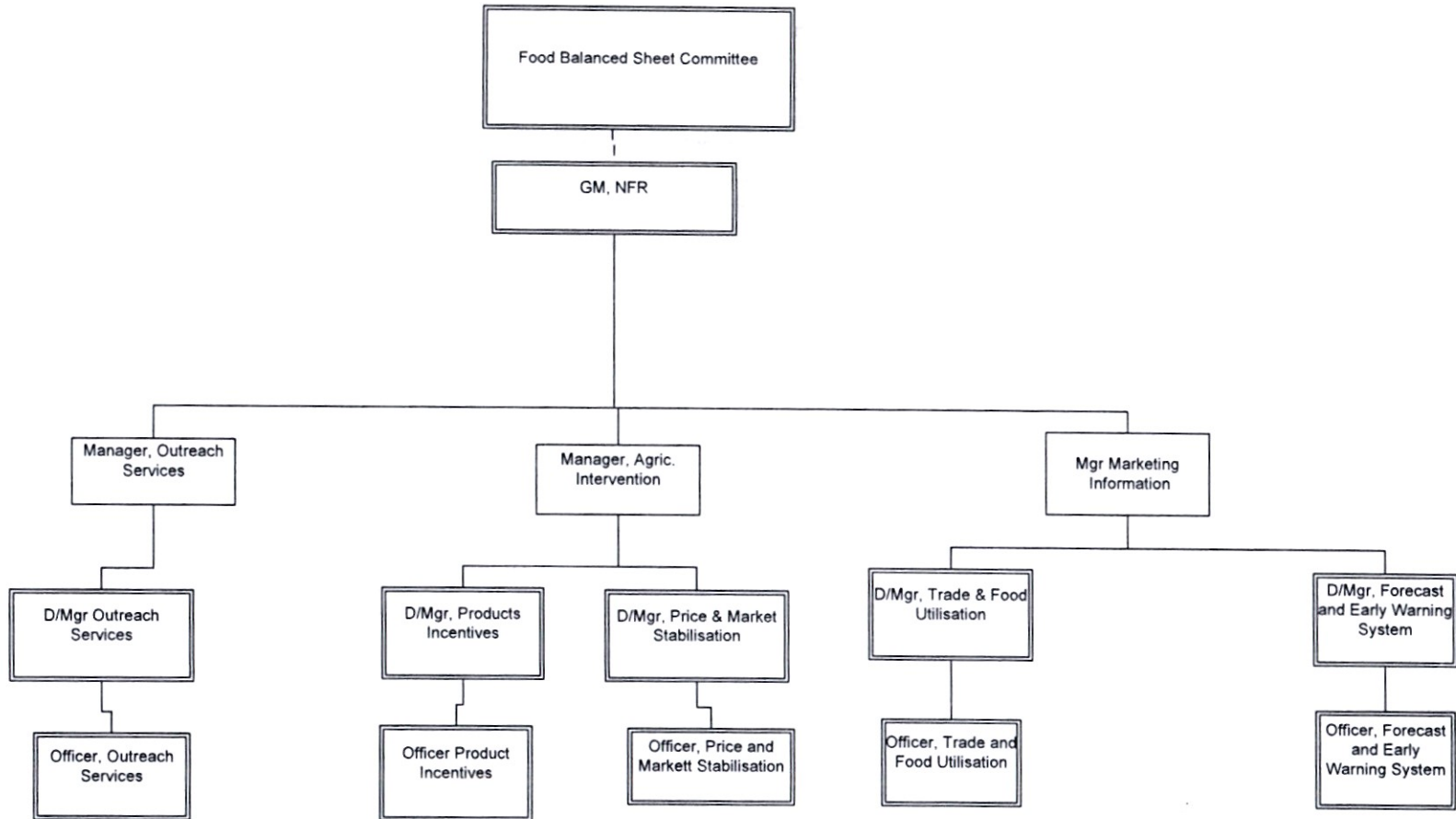
## National Cereals and Produce Board Organisation Structure for Top Management



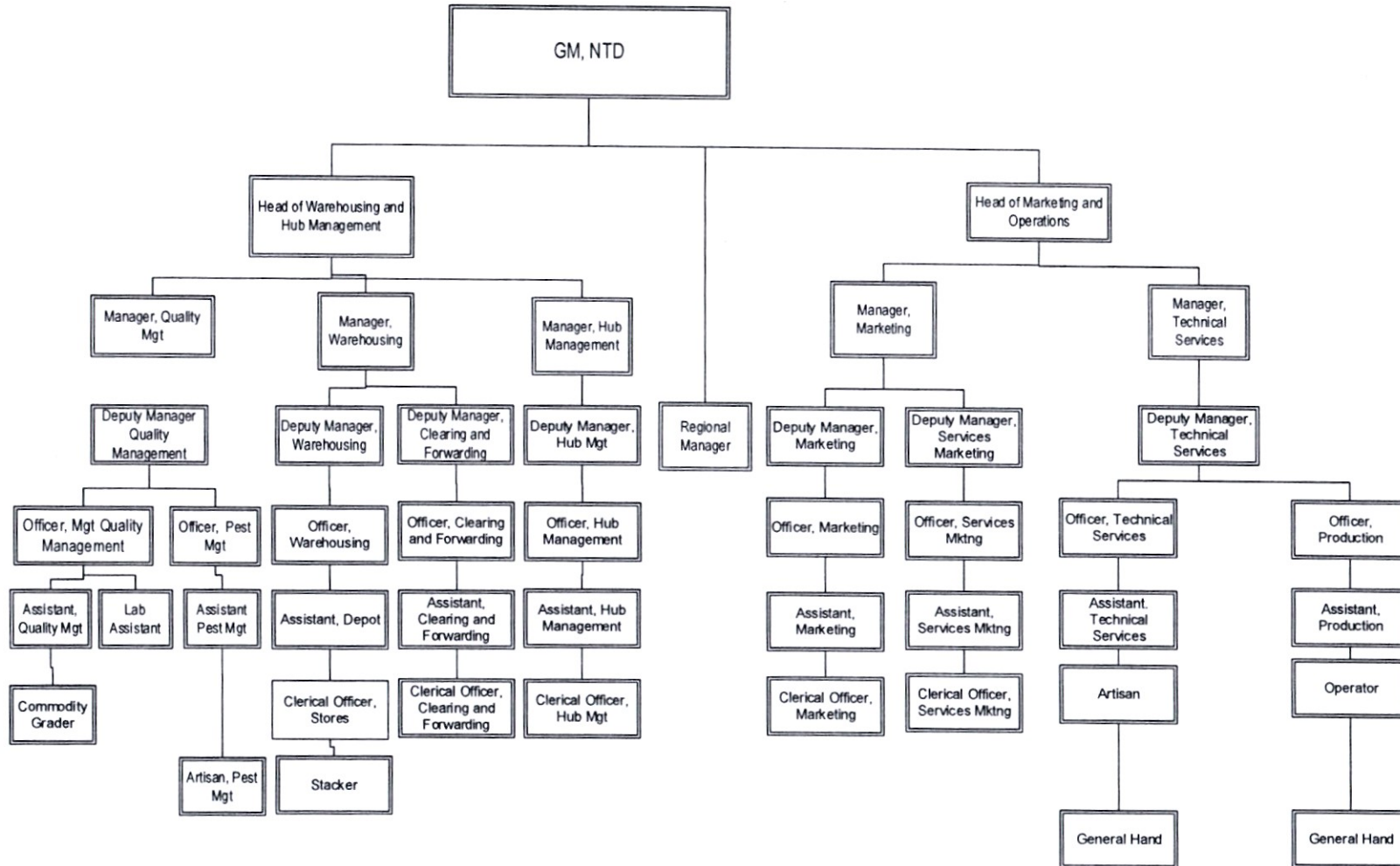
**KEY**  
 V - Vacant  
 Ag.-Acting

# National Cereals and Produce Board

Organisation Structure for National Food Reserve Division

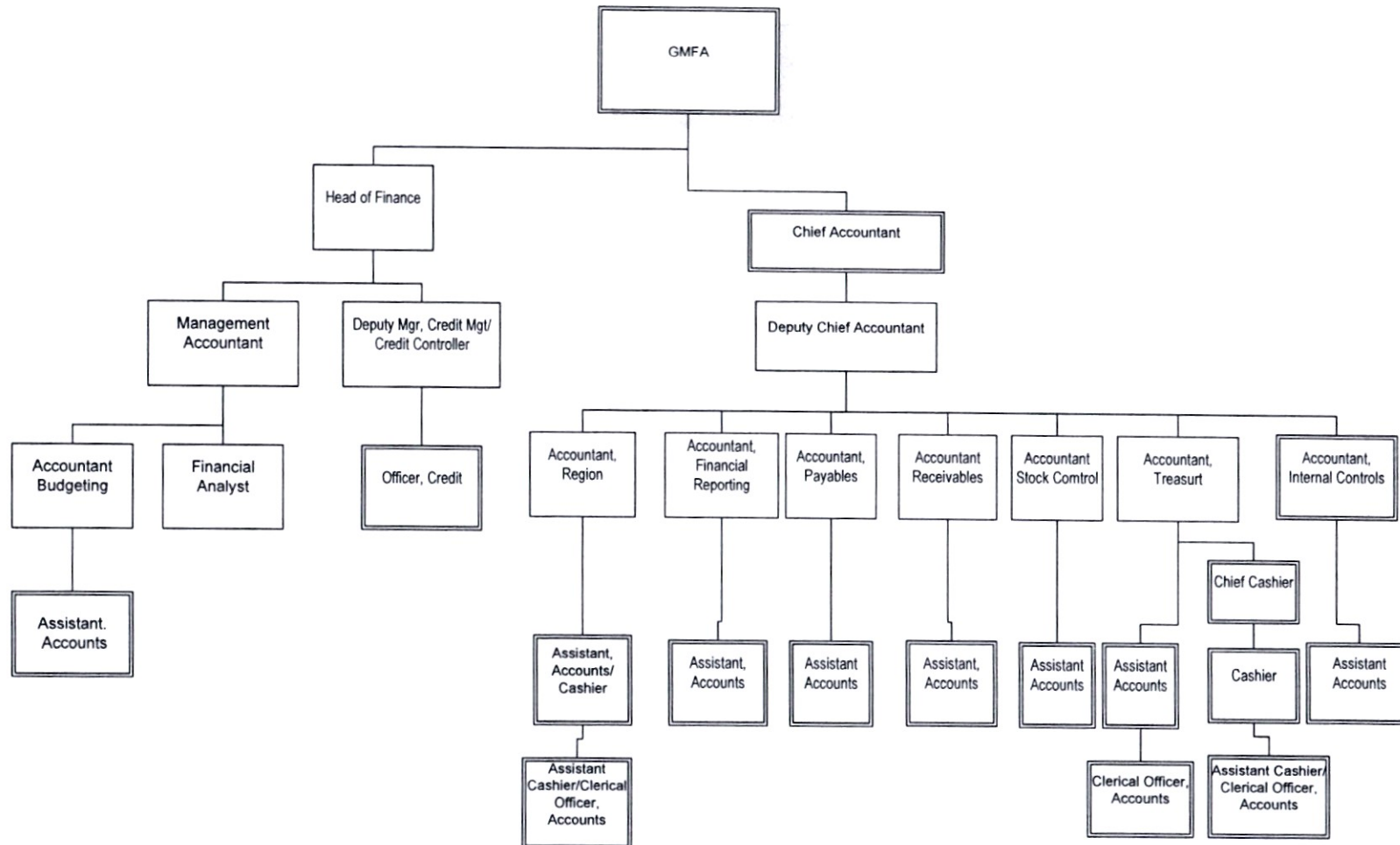


NCPB Trading Division (NTD)



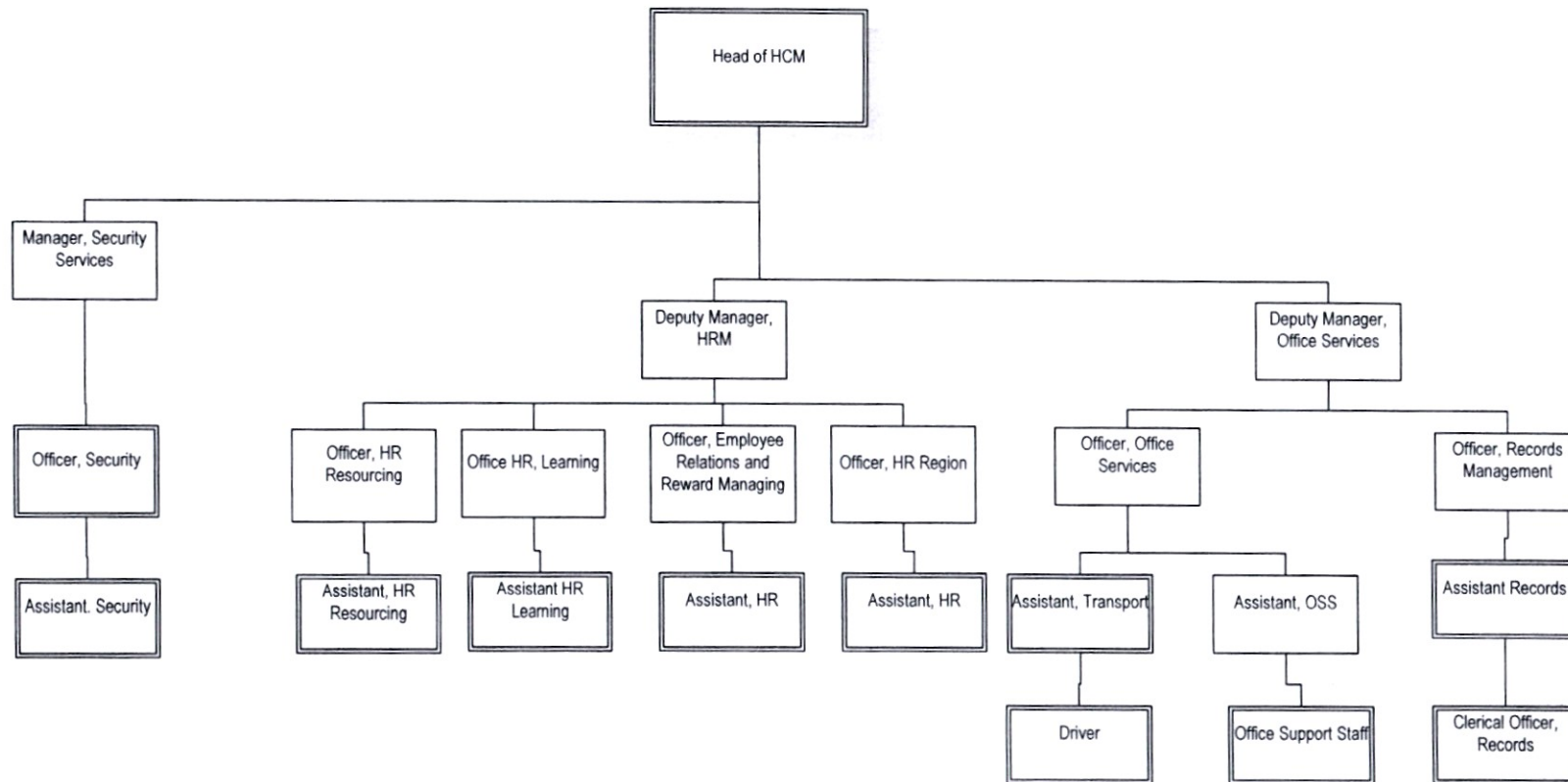
# National Cereals and Produce Board

## Organisation Structure for Finance and Accounting Division



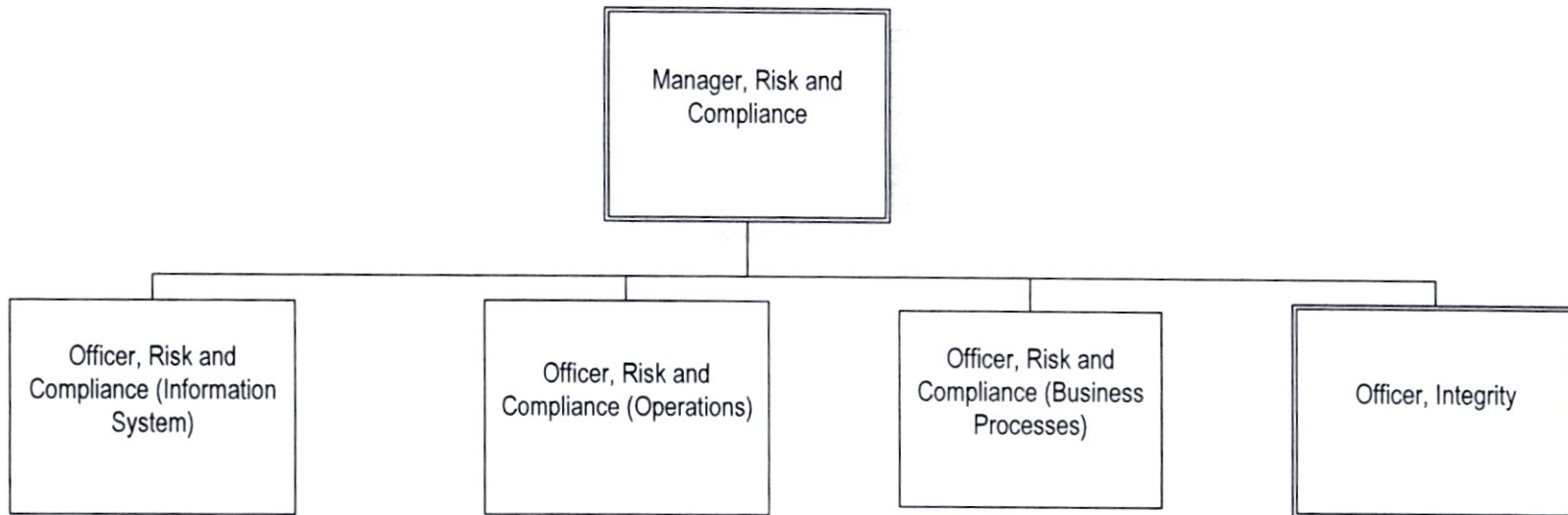
# National Cereals and Produce Board

## Organisation Structure for Human Capital Department



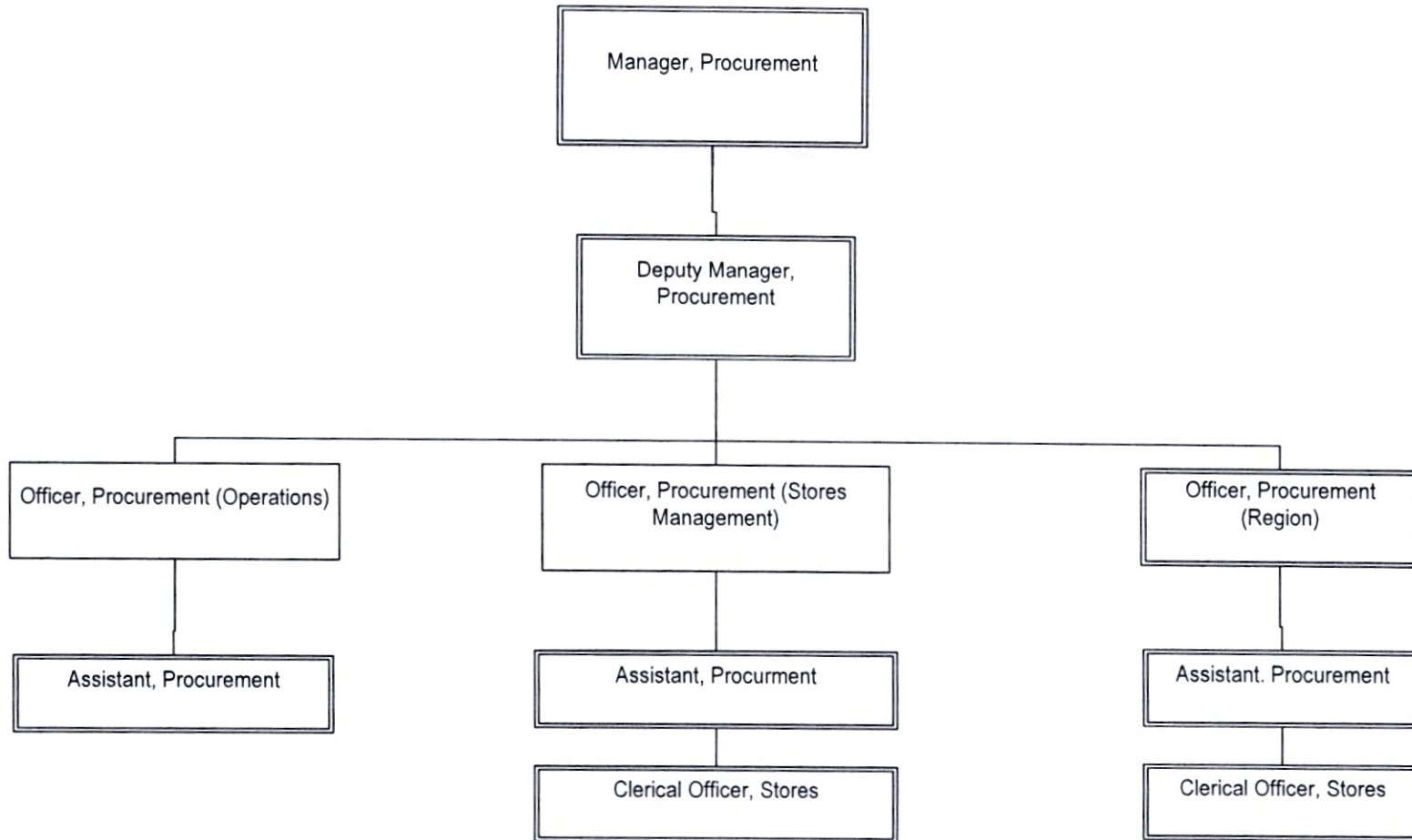
# National Cereals and Produce Board

## Organisation Structure for Risk and Compliance Department



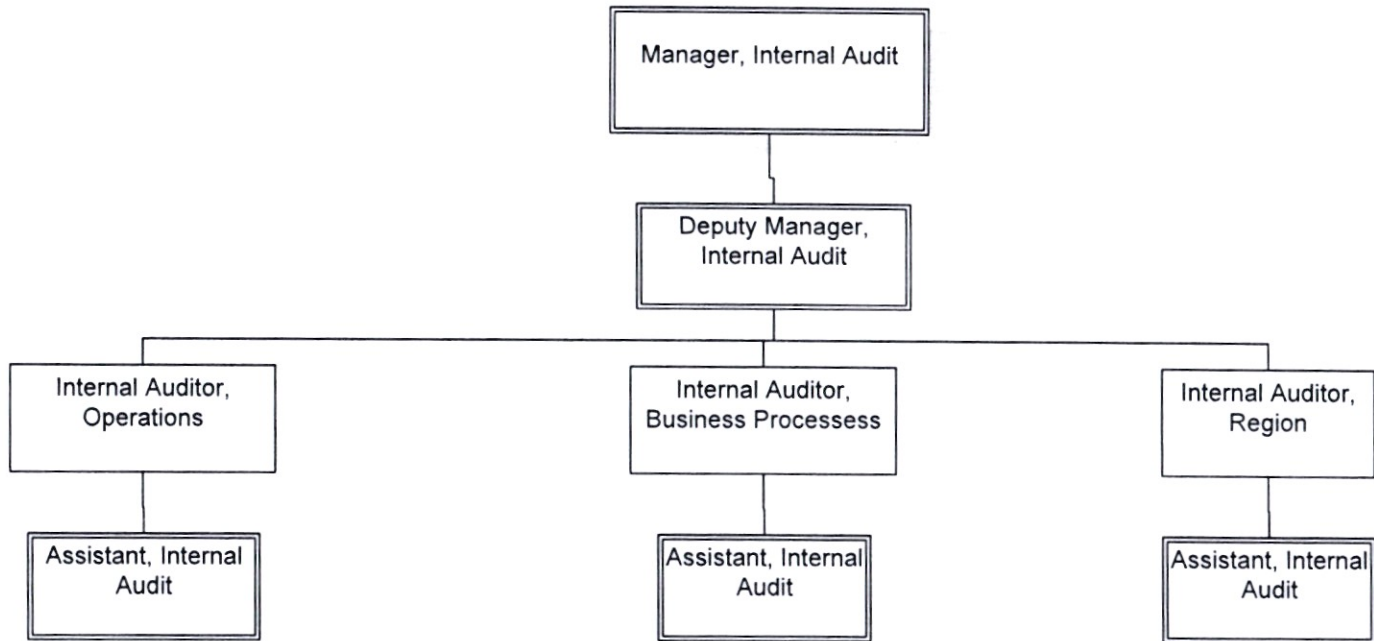
# National Cereals and Produce Board

## Organisation Structure for Procurement Department



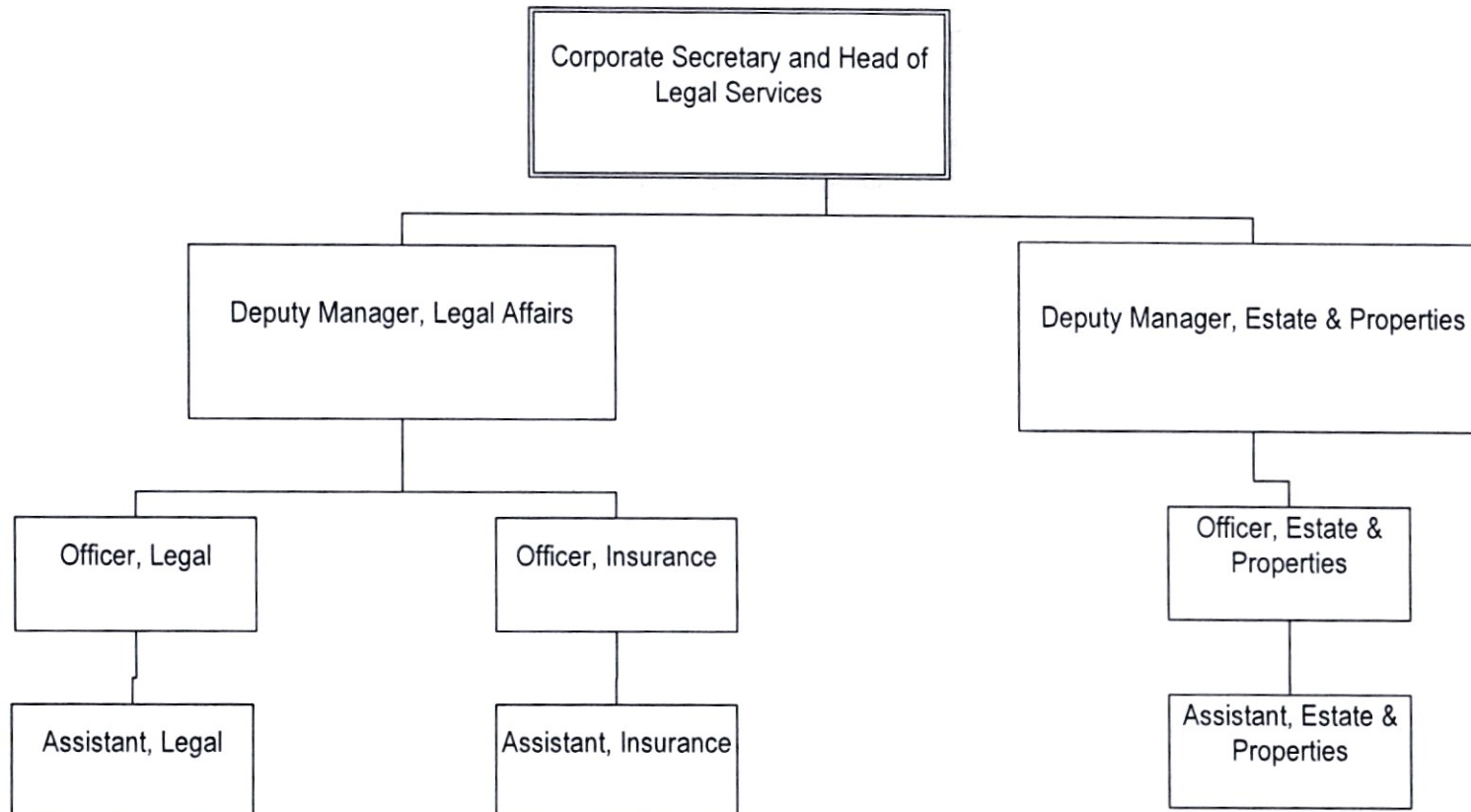
# National Cereals and Produce Board

## Organisation Structure for Internal Audit Department



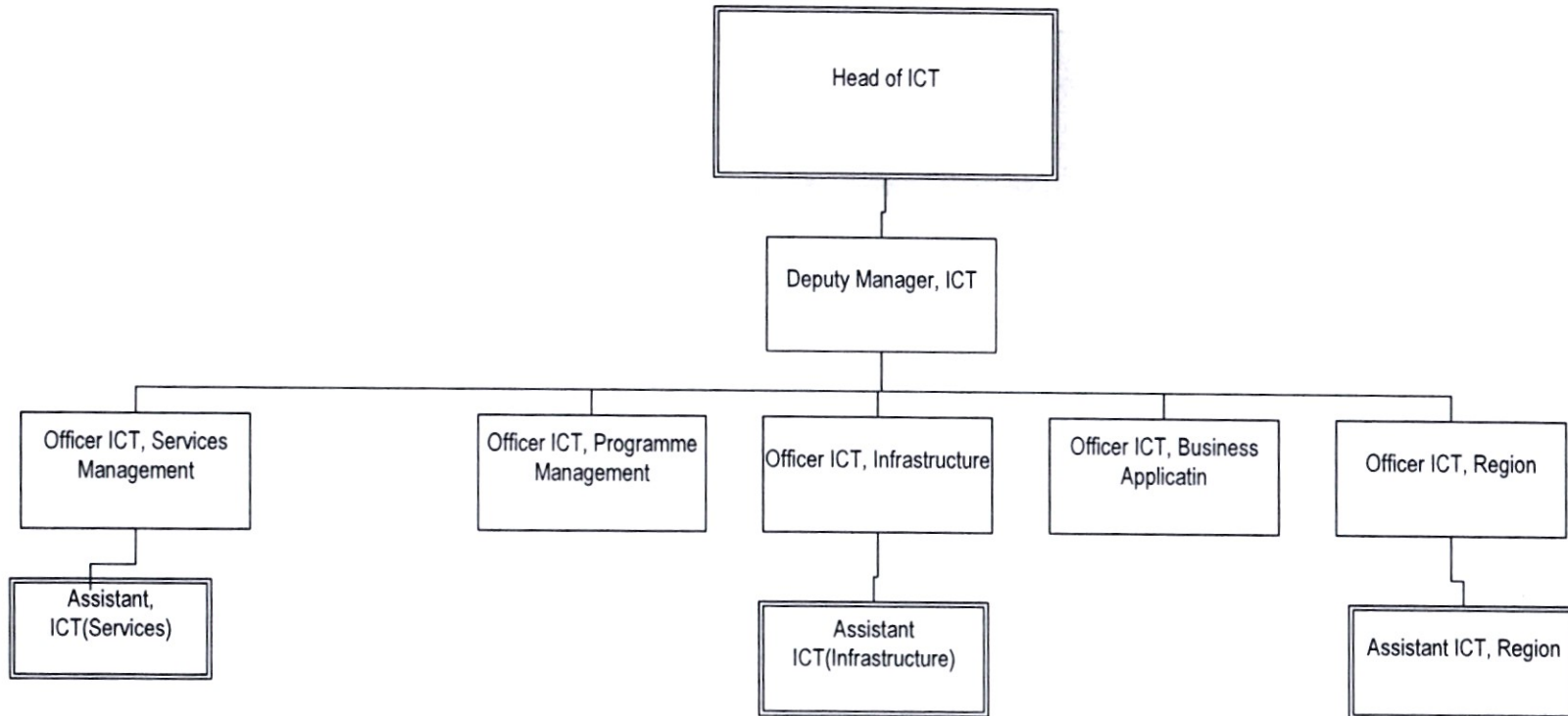
# National Cereals and Produce Board

Organisation Structure For Corporation Secretariat and Legal Services Department



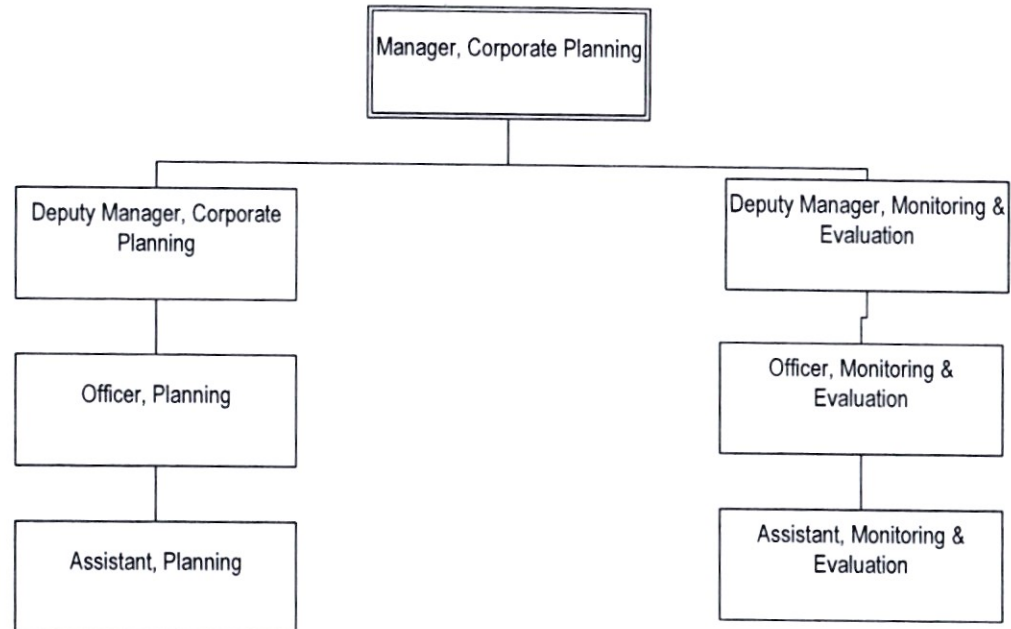
# National Cereals and Produce Board

## Organisation Structure For ICT Department



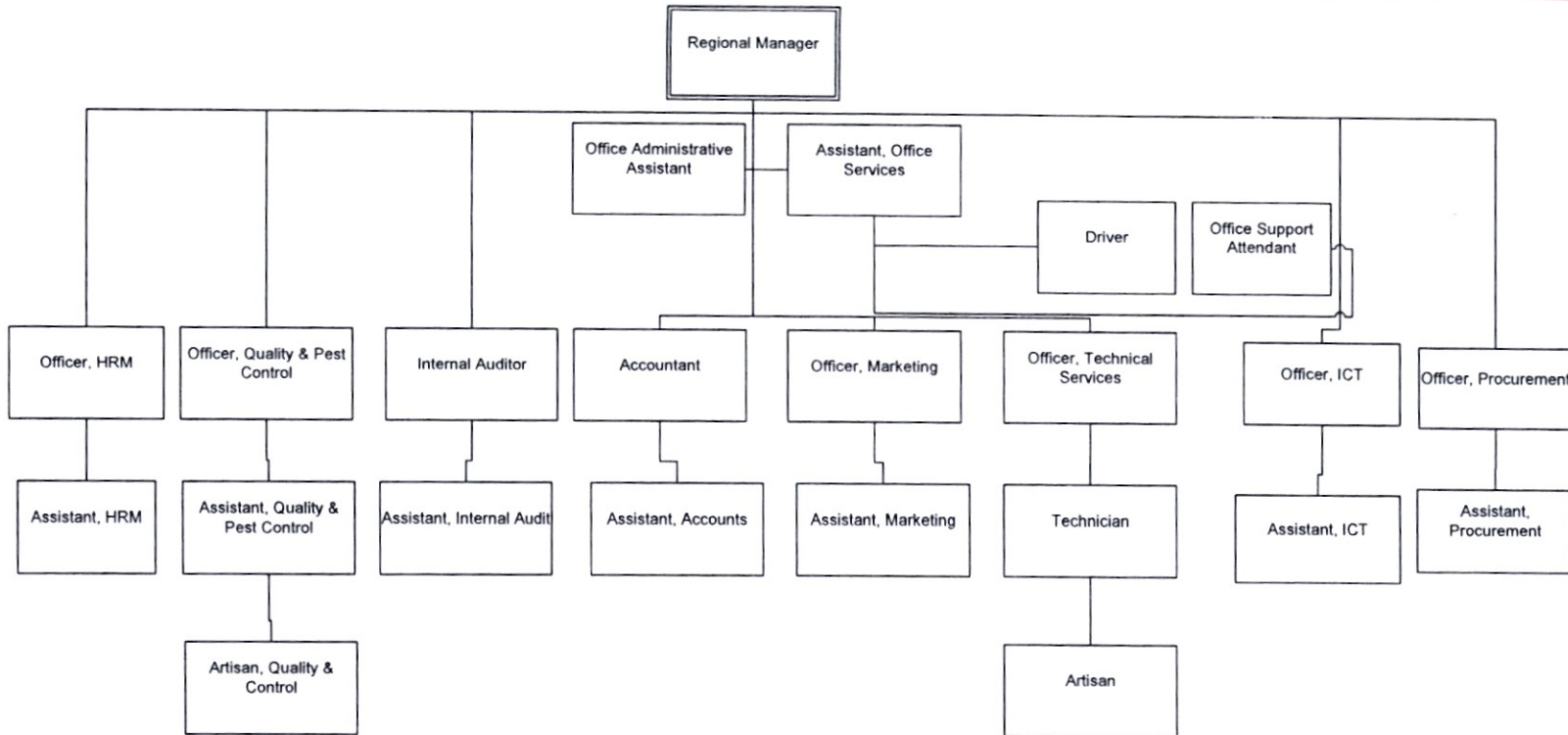
# National Cereals and Produce Board

## Organisation Structure For Corporate Planning Department



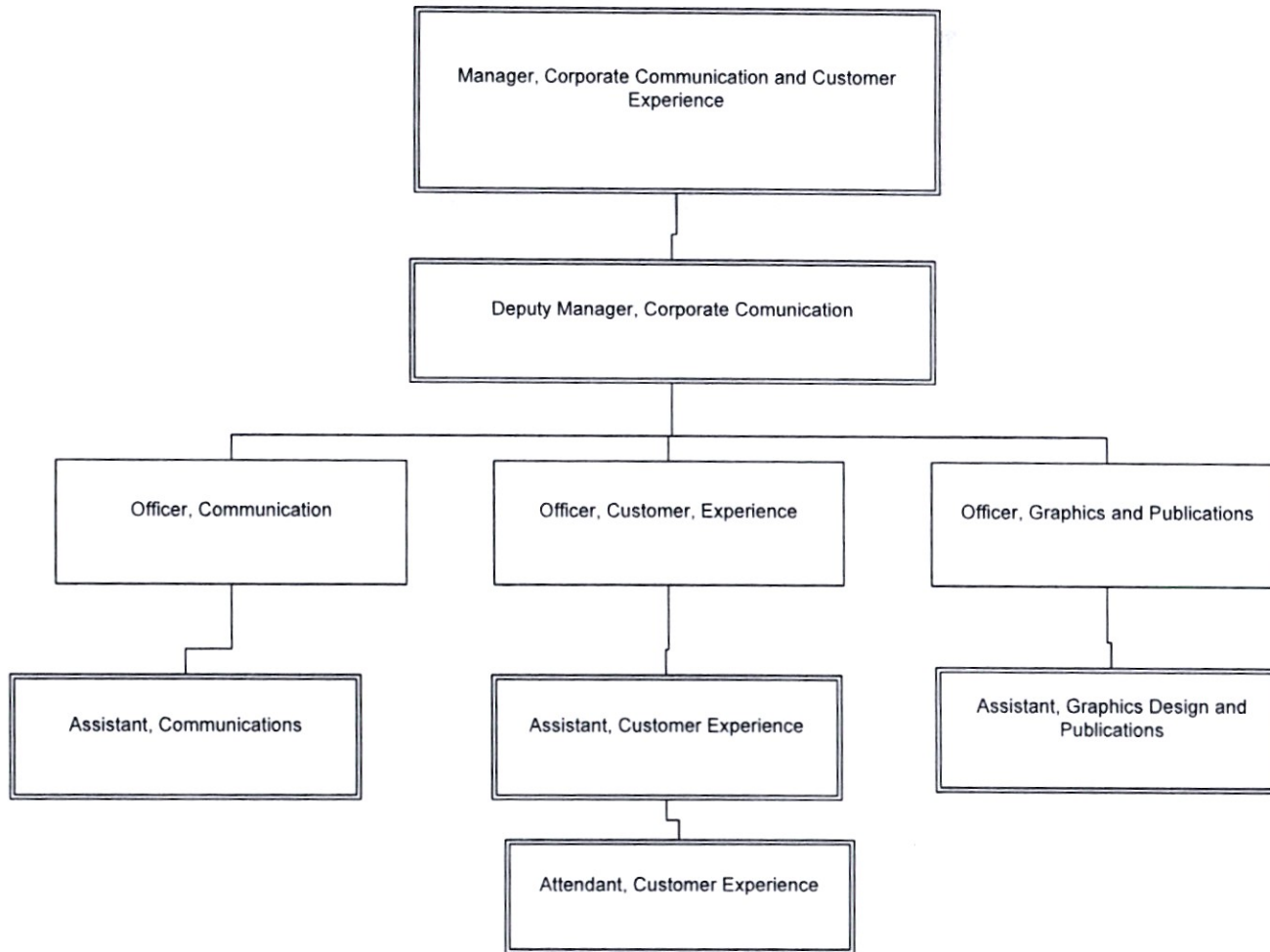
# National Cereals and Produce Board

## Organisation Structure For Regional Office



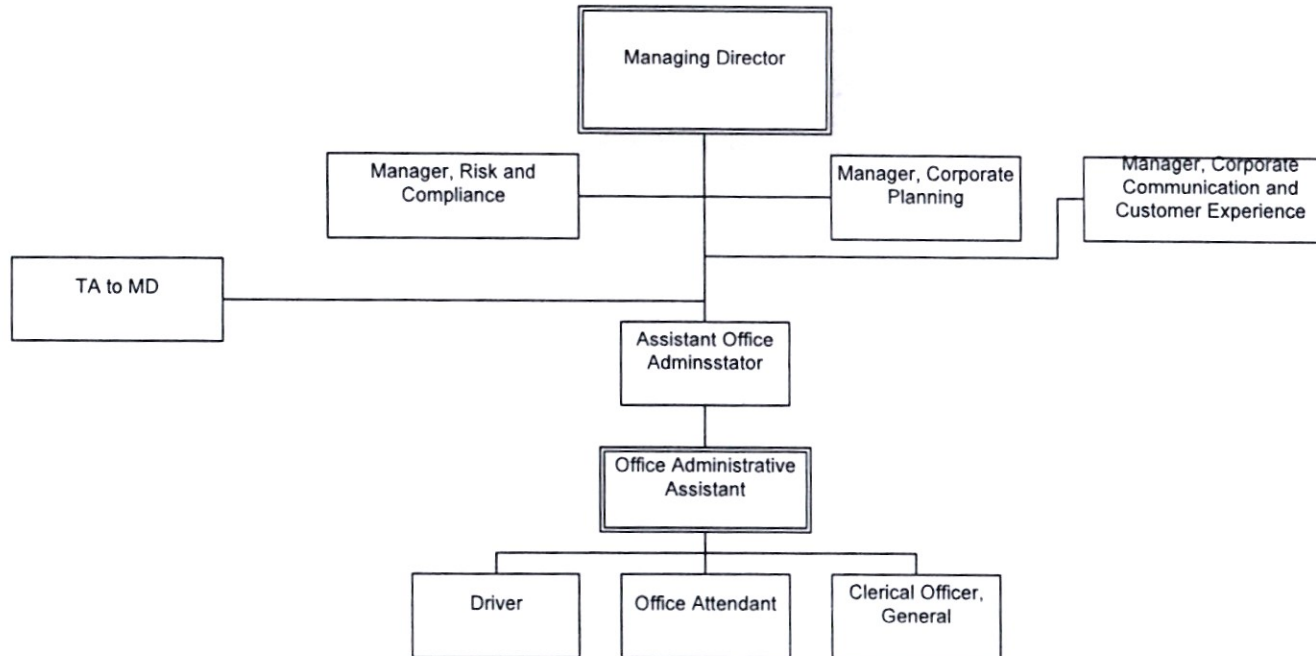
# National Cereals and Produce Board

## Organisation Structure For Corporate Communication and Customer Experience Department



# National Cereals and Produce Board

## Organisation Structure For MD's Office





REPUBLIC OF KENYA  
 MINISTRY OF AGRICULTURE  
 & LIVESTOCK DEVELOPMENT



NATIONAL CEREALS &  
 PRODUCE BOARD

## TENDER FOR SUPPLY OF FERTILIZER ON CONSIGNMENT BASIS

National Cereals and Produce Board (NCPB) is a State Corporation established under Cap 338 of the Laws of Kenya. It is a Statutory Board under the Ministry of Agriculture and Livestock Development. The Board implements Government policies and interventions on National Food security initiatives and trades commercially in grain, farm inputs and offers Grain-Post Harvest Solutions.

The Government is implementing the Fertilizer Subsidy Programme (FSP) to increase crop productivity and enhance National Food Security and thus intends to procure planting and top-dressing fertilizers for the 2024 Long Rains (LR) planting season.

The Board is therefore inviting fertilizer manufacturers, distributors and sellers to enter into **consignment-based contractual agreement** to supply fertilizer to all **NCPB depots, County Last-mile selling Centres and Government approved agro-dealers** for distribution to registered farmers.

Interested and eligible suppliers may download tender document(s) free of charge from NCPB's website: [www.ncpb.co.ke](http://www.ncpb.co.ke) or PPRA's portal [www.tenders.go.ke](http://www.tenders.go.ke).

Bidders' completed tender document(s) shall be sealed and marked as stated in the tender document(s) and addressed to;

**Managing Director  
 National Cereals and Produce Board  
 Nyumba ya Nafaka  
 Machakos/Enterprise Roads  
 Industrial Area  
 P.O BOX 30586-00100  
 NAIROBI**

And physically deposited in the Tender box situated in Nafaka House Ground Floor by the Main Entrance so as to be received on or **before 5th December, 2023 at 1200 NOON (EAT)**. Bulky tenders shall be received at the Head of Procurement Services' office, ground, floor door G54.

Bids will be closed and opened in the presence of bidders or their representatives who choose to attend the ceremony at NCPB's Gilfillan hall. Please note that bids sent late or electronically shall NOT be accepted

Canvassing in any form shall lead to automatic disqualification.

**LEADERS IN TRADE & MANAGEMENT OF AGRICULTURAL COMMODITIES**



NCPB IS ISO 9001:2015 CERTIFIED



NCPB IS ISO 17025:2017 CERTIFIED



# NATIONAL CEREALS AND PRODUCE BOARD

Leaders in Trade & Management of Agricultural Commodities

Telephone: +254 (20) 6536028/6555288

Website: [www.ncpb.co.ke](http://www.ncpb.co.ke)

E-mail: [info@ncpb.co.ke](mailto:info@ncpb.co.ke)

P.O. Box 30586-00100

NAIROBI

KENYA

OUR REF: TENDER NO: NCPB/FERT/23/2023-2024

28 NOVEMBER, 2023

## ADDENDUM

### CLARIFICATION ON ADVERT PUBLISHED IN THE STANDARD AND STAR NEWSPAPER(S) ON 21<sup>ST</sup> NOVEMBER, 2023.

National Cereals and Produce Board (NCPB) issues an addendum on tender advert for supply of fertilizer on consignment basis that was published in the standard and star newspaper(s) as well as in NCPB website ([www.ncpb.co.ke](http://www.ncpb.co.ke)) and PPIP portal [www.tenders.go.ke](http://www.tenders.go.ke) on Tuesday 21<sup>th</sup> November, 2023.

In line with the pronouncements contained under amendments clause of the tender document of the above-mentioned tender, National Cereals and Produce Board hereby issues the below clarifications: -

1. Under Invitation to tender on section 3 page 2 on types of fertilizer, page 48 on price schedule forms, page 49-51 on distribution plan and page 55-60 on supply requirements,

Kindly note that the specifications published in the tender document was indicative, you are required to provide your specifications as per your formulation in line with KEBS standards upon which evaluation shall be based for both planting and top-dressing fertilizers.

Further indicate available quantity and time frames for delivery under the price schedule on page 48 of the tender document

2. Under section I: Instruction to tender part 6.2 In the TDS, there shall be a pre-tender conference meeting which shall be held at Ministry of Agriculture HQ main conference room at Kilimo house 7<sup>th</sup> floor on Monday 4<sup>th</sup> December 2023 from 10. 30am. The purpose of the meeting will be to clarify issues and to answer questions on any matter that may be raised at that stage. Querles and any concern can be channeled to email: [supplies@ncpb.co.ke](mailto:supplies@ncpb.co.ke) and telephone: +254-020-656028 or +254-723030399 for clarification as provided in the tender document.



NCPB IS ISO 9001:2015 CERTIFIED

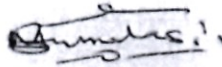
**3. Under section II-Tender data sheet (TDS) ITT21.1.**

The deadline for tender submission has been extended from 5 December 2023 to **11 December 2023 at 12.00 noon.**

The board is therefore inviting fertilizer manufacturers, distributors and sellers to enter into consignment base contractual agreement to supply fertilizer to All NCPB depots, country last mile selling centers and government approved agro dealers.

Interested and eligible suppliers may download the original tender document(s) plus the addendum free of charge from NCPB's website: [www.ncpb.co.ke](http://www.ncpb.co.ke) or PPIP portal [www.tenders.go.ke](http://www.tenders.go.ke)

Except for the amendments contained in this addendum, all other terms, conditions and instructions remain as indicated in the tender document.



**FOR MANAGING DIRECTOR**



**NCPB IS ISO 9001:2015 CERTIFIED**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 8/2015 OF 23<sup>RD</sup> JANUARY, 2015**

**BETWEEN**

**AON KENYA INSURANCE BROKERS LIMITED ..... (APPLICANT)**

**AND**

**TEACHERS SERVICE COMMISSION ..... (PROCURING ENTITY)**

Review against the decision of the Teachers Service Commission in the matter of Tender No. ISC/T/45/2014-2015 for Provision of Medical Healthcare Cover and Group Life Insurance (Including Last Expense) Cover for All Teachers in the Employment of ISC and Their Dependants.

**BOARD MEMBERS PRESENT**

1. Paul Gicheru - Chairman
2. Josephine W. Mong'are - Member
3. Paul Ngotho - Member
4. Rosemary Gituma - Member
5. Peter Ondieki - Member

### IN ATTENDANCE

1. Philip Okumu - Secretariat
2. Shelmith Miano - Secretariat

### PRESENT BY INVITATION

#### **Applicant -AON Kenya Insurance Brokers Ltd**

1. Muthomi Thiankolu - Advocate
2. Maruti Khamala - Advocate
3. Caroline Muchiri - Advocate
4. Joan J. Korir - Advocate
5. Irene Chesire - Insurance Broker
6. Edwin Kegode - Insurance Broker

#### **Procuring Entity - Teachers Service Commission**

1. Allan M. Sitima - Advocate
2. Stella Ruto - Advocate
3. Cavin Anyuor - Advocate
4. Simwa F. Atema - Legal Clerk
5. Calleb O. Ogot - Procurement Officer
6. Kenneth Marangu - PA/CC

#### **Interested Parties**

1. Steve Kimathi - Advocate, Smart Applications
2. Rachael Nderu - Lawyer, Smart Applications
3. Esther Macharia - Technical Analyst, Smart Applications

4. Ali Abbas - Staff, Pioneer Insurance
5. Nelly Muthiani - Insurer, Jubilee Insurance

## BACKGROUND OF AWARD

On 2<sup>nd</sup> July, 2014 the Procuring Entity (the Teachers Service Commission) placed an advert in the print media (the Daily Nation) inviting eligible firms to express interest for provision of an innovative and cost effective financial model and solution for healthcare for all teachers in the employment of the Commission and their dependants countrywide.

The closing date for the Expression of Interest (EOI) was on 9<sup>th</sup> July 2014. Nine (9) firms submitted bids as follows:

- i) Alexander Forbes;
- ii) Smart Application International;
- iii) CIC Insurance;
- iv) AAR;
- v) AON Kenya Insurance Brokers;
- vi) Jubilee Insurance;
- vii) UAP Life;
- viii) Pioneer Insurance; and
- ix) UAP Insurance.

The Tender Processing Committee treated the bids from UAP Life and UAP Insurance as one company since their statutory documentation were similar.

The Evaluation Committee recommended three firms, viz, UAP, CIC Insurance and AON Kenya Ltd, to participate in the bidding through the Request for Proposal, having met the technical criteria. However, the Tender Committee, in their meeting of 28<sup>th</sup> July, 2014 considered the Evaluation Report and recommended that eight (8) firms be invited for presentation on their Expressions of Interest. The eight firms made their presentations between 5<sup>th</sup> and 11<sup>th</sup> August, 2014, after which a report was compiled and later discussed by the Tender Committee on 26<sup>th</sup> August, 2014 whereupon it was resolved that all the eight bidders be invited to participate in the tender process and be given the tender documents.

The tender submission closed on 6<sup>th</sup> October, 2014 with seven firms submitting their bids, as follows: Pioneer Assurance, UAP Insurance, AON Kenya Insurance Brokers, Smart Applications, CIC General Insurance, AAR Insurance Kenya, and Jubilee Insurance. The evaluation of the seven bids was conducted between 8<sup>th</sup> and 21<sup>st</sup> October, 2014.

Tender documents received by the tender processing committee from various firms were as follows:-

### List of bidding firms

S/NO	FIRM'S NAME	ORIGINAL & A COPY	BID BOND FROM;	AMOUNT KSH.
1.	Pioneer Assurance	2 Copies	Chase Bank	24,941,358.20
2.	UAP Insurance	2 Copies	Bank of Africa	360,585,517.00
3.	AON Kenya Insurance Brokers	2 Copies	CBA	120,000,000.00
4.	Smart Applications	2 Copies	UAP Insurance	16,245,148.13
5.	CIC General Insurance	2 Copies	Co-op Bank	529,742,557.00
6.	AAR Insurance Kenya	2 Copies	Madison Insurance	150,000,000.00
7.	Jubilee Insurance	2 Copies	DTB	383,484,979.00

### PRELIMINARY EVALUATION

This stage of evaluation assessed compliance with the Mandatory requirements which included:-

- i) Registration status of the firm
- ii) Valid Tax Compliance
- iii) License by the Regulator (IRA)
- iv) Bid Security
- v) Valid Business permit/Trade License

The table below shows a summary of the Preliminary Evaluation results for the seven (7) bidders:-

Table: Preliminary Evaluation Results

CRITERIA	SUB-CRITERIA	BIDDERS						
		1	2	3	4	5	6	7
STATUTORY REQUIREMENTS (MANDATORY)	a) Copy of registration/ incorporation Certificate (2009 or earlier)	√	√	√	√	√	√	√
	b) Current tax compliance certificate	√	√	√	√	√	x	√
	c) Evidence of Physical Address/Administration Office	√	√	√	√	√	√	√
	d) Copy of IRA registration certificate.	√	√	√	x	√	√	√
	e) Correct bid security and validity period (150 days)	√	√	√	√	√	√	√
	f) Valid Business Permit/ Current Trading License)	√	√	√	√	√	√	√
RESPONSIVENESS		√	√	√	x	√	x	√

Key  
 √ - Responsive  
 X - Non Responsive

## TECHNICAL EVALUATION

Technical evaluation of the qualified bidders considered various aspects on the suitability of the firms. These included:-

- Firms' Experience
- Management structure
- Qualification of the key personnel
- Adequacy of ICT infrastructure and support systems.
- Geographical distribution and support systems.

The committee also considered the methodology and work plan presented by each firm which entailed:-

- Scope of Benefits
- Claims administration
- Responsiveness on customer requirements among other aspects.

The four (4) bidders were categorized into 2 namely;-

- i) Insurance Brokers/MIPs and
- ii) Insurance Underwriters/Life Assurance Companies.

This was as per the evaluation criteria outlined in the tender documents

#### TECHNICAL EVALUATION ON OPTION 1- HYBRID MODEL

The table below is a summary of the Technical Evaluation results for Insurance Brokers and Medical Insurance Providers under the Hybrid model - Option 1

Table: Technical Evaluation Results for Broker under Option 1- (Administrator)

S/NO	CRITERIA	SUB-CRITERIA	Max Score	Bidder
A	Firms Financial Capability	i. Audited Accounts (2011, 2012 2013) 3mks	10	3
		ii. Gross Profits Margin (positive Trends) 2mks		2
		iii. Current Ratio (2:1) 3mks		2
		iv. Premium Turnover of Ksh.1Billion (2012&2013) 2mks		2
B	Firms Experience/References	i. Evidence of ability and experience to handle medical claims of Ksh.1Billion 1mk	12	1
		ii. List of at least five (5) reputable clients for both medical and group life insurance policies for the last three (3) years. 5mks		5

S/ N O	CRITERIA	SUB-CRITERIA	Max Score	Bidde r 03
		iii. Reference letters from at least ten (10) large medical service providers showing willingness to offer outpatient services under the capitation model. 5mk		5
		iv. Evidence of at least 100,000 lives managed under medical scheme. 1mk		1
C	Firm's/ Management Profile	i. Firms profile 1mk	2	1
		ii. Organizational Structure 1mk		1
D	Qualifications of Professional personnel	Copies of academic Certificates submitted		
		i. Executive Managers 1mk	3	1
		ii. Business Development Managers 1mk		1
		iii. Underwriters/ Actuaries 1mk		1
F	Adequacy of ICT Infrastructure & Support Systems	i. Letter/installation certificate from Biometric Solution provider 2mks	6	2
		ii. Narrative on capability and functionality of the Biometric solution 2mks		2
		iii. Evidence of other ICT integrated Medical information and support systems (software) 2mks		2
F	Geographical Distribution of Firms Services	Network and spread of service providers		
		i. Health care providers/ facilities country wide. 6mks	10	5
		ii. Regional Presence (East Africa) 2mks		2
		iii. Established panels for overseas referrals 2mks		2
G	Methodology and Work Plan	1. Implementation Plan and Timelines. 2mks		2
		2. Benefits structure for option one (1)		
		i. Scope of healthcare benefits per family 8mks	25	7
		ii. Exclusions 2mks		1
		3. Group Life Cover 2mks		2
		4. Last expense cover 2mks		2

S/ N O	CRITERIA	SUB-CRITERIA	Max Score	Bidde r 03
		5. Any additional benefits offered 2mks		2
		6. Linkages with stakeholders		-
		i. Scheme Governance structure 1mk		1
		ii. Claims administration 1mk		1
		iii. M&E and reporting 1mk		1
		iv. Key Performance indicators 1mk		1
		7 Responsiveness on customer Service		-
		i. Existence of call Centres for enquiries, emergencies and other support services 1mk		1
		ii. Existence of staff customer and other support services. 1mk		1
		iii. Other customer service facilities. 1mk		0
H	Guarantees	i. Professional indemnity (ksh.100million) 1mk	2	1
		ii. Bank Guarantee (Ksh.3million) 1mk		1
<b>TOTAL SCORE</b>			<b>70</b>	<b>65</b>

Pass mark was set at 40 out of 70.

Observations on the bidder No. 03

i) The bidder demonstrated willingness to work with five underwriters and provided documentation on the same. Four of these underwriters were subjected to technical and financial evaluation.

- ii) The bidder proposed provision of smart card @ Kshs. 200 and Kshs. 40 transaction cost per month.
- iii) The bidder provided the smart card to principal member and the spouse.
- iv) The bidder has provided negotiated tariff with the medical service providers for the various fees costs and packages.
- v) The bidder suggested alternative biometric solutions for consideration.

Therefore bidder 03 - AON Kenya qualified for financial evaluation under the category of insurance brokers/medical insurance provider.

The table below shows a summary of the Technical Evaluation results for *Insurance Underwriters- option 1(Administrator)*.

Table: Technical Evaluation Results for **Insurance Underwriters** under **Option 1**

S/ NO	CRITERIA	SUB-CRITERIA	Max Score	BIDDERS		
				2	5	7
A	Firms Financial Capability	i) Audited Accounts (2011, 2012,2013) <b>3 mks</b>	10	3	3	3
		ii) Gross Profits Margin (positive Trends) <b>2mks</b>		2	2	2
		iii) Current Ratio (2:1) <b>2mks</b>		2	1	2
		iv) Premium Turnover of Ksh.1Billion (2012&2013) <b>2mks</b>		1	1	2
		v) Group life minimum Ksh.500million life insurance premiums for the last two (2) years <b>1mk</b>		0	1	1
B	Firms Experience/ References	i) Evidence of ability and experience to handle medical claims of Ksh.1Billion <b>1mk</b>	12	1	1	1
		ii) List of at least five (5) reputable clients for both medical and group life insurance policies for the		5	5	5

S/ NO	CRITERIA	SUB-CRITERIA	BIDDERS			
			Max Score	2	5	7
		last three (3) years. <b>5mks</b>				
		iii) Reference letters from at least ten (10) large medical service providers showing willingness to offer outpatient services under the capitation model. <b>5mk</b>		1	0	1
		iv) Evidence of at least 100,000 lives managed under medical scheme. <b>1mk</b>		0	1	1
C	Firm's/ Management Profile	i) Firm's profile <b>1mk</b>	2	1	1	1
		ii) Organizational Structure <b>1mk</b>		1	1	1
D	Qualifications of Professional personnel	<b>Copies of academic Certificates submitted</b>				
		i) Executive Managers <b>1mk</b>	3	1	1	1
		ii) Business Development Managers <b>1mk</b>		1	1	1
		iii) Underwriters/Actuaries <b>1mk</b>		1	0	1
E	Adequacy of ICT Infrastructure & Support Systems	i) Letter/installation certificate from Biometric Solution provider <b>2mks</b>	6	2	2	2
		ii) Narrative on capability and functionality of the Biometric solution <b>2mks</b>		2	0	2
		iii) Evidence of other ICT integrated Medical information and support systems (software) <b>2mks</b>		0	1	2
F	Geographical Distribution of Firms Services	<b>Network and spread of service providers</b>				
		i) Health care providers/ facilities country wide. <b>6mks</b>	10	5	3	6
		ii) Regional Presence (East Africa) <b>2mks</b>		2	2	2
		iii) Established panels for overseas referrals <b>2mks</b>		1	1	2
G	Methodology and Work Plan	1. Implementation Plan and Timelines. <b>2mks</b>	25	1	1	1
		2. Benefits structure for option one (1)				
		i) Scope of healthcare benefits per family. <b>8mks</b>		6	3	5
		ii) Exclusions <b>2mks</b>		0	1	2
		3. Group Life Cover <b>2mks</b>		2	1	2
		4. Last Expense Cover <b>2mks</b>		2	2	2
		5. Any additional benefits offered <b>2mks</b>		1	0	1
		6. Linkages with stakeholders				
		i) Scheme Governance structure <b>1mk</b>		2	0	2

S/ NO	CRITERIA	SUB-CRITERIA	BIDDERS			
			Max Score	2	5	7
		ii) Claims administration 1mk		0	1	1
		iii) M&E and reporting 1mk		0	1	1
		iv) Key Performance indicators 1mk		0	0	1
		<b>7 Responsiveness on customer Service</b>				
		i) Existence of call Centres for enquiries, emergencies and other support services 1mk		0	1	1
		ii) Existence of staff customer and other support services. 1mk		0	1	1
		iii) Other customer service facilities. 1mk		0	0	0
II	Re-insurance treaties	Letters/contract from a re-insurance Company 2mks	2	2	2	2
<b>TOTAL MARKS</b>			<b>70</b>	<b>46</b>	<b>46</b>	<b>57</b>

*Pass mark was set at 40 out of 70.*

**NB. Bidder No. 1 did not present bids for Option 1.**

*Observations on the 3 bidders evaluated*

**A. Bidder 02: UAP**

- i) The bidder stated that AON will be the Administrator of the scheme.
- ii) The bidder declared exclusions in critical areas such as Treatment of cancer, maternity services (cover delivery costs only and provision of photo-chromatic/antiglare lenses under the optical cover.

iii) The bidder provided alternative biometric solutions.

**B. Bidder 05 - CIC General Insurance**

- i) The firm presented a separate bid under the Group Life and Last Expense Cover.
- ii) Declared exclusions in critical areas on the outpatient benefits structure under the capitation model.

**C. Bidder 07: Jubilee Insurance**

- i) Declared exclusions in critical areas on the outpatient benefits structure under the capitation model.

Therefore bidders 02 - UAP Insurance, 05 - CIC General Insurance and 07 - Jubilee Insurance qualified for financial evaluation

*Financial Evaluation on option 1 - The HYBRID MODEL*

*Table: Summary of price/cost comparison for Insurance Brokers and Underwriters (Option 1)*

NO.	ITEM	BIDDER 02	BIDDER 03	BIDDER 05	BIDDER 07
		UAP	AON	CIC	JUBILEE
		Cost - Ksh.	Cost - Ksh.	Cost - Ksh.	Cost - Ksh.
1	Outpatient cover (Under Capitation)	3,000,000,000	2,925,000,000	4,598,372,272	4,561,243,750
2	Other Benefits (Self-funded- Fee for service )	160,000,000	225,000,000	-	1,042,731,000
	- Maternity Cover				
	Dental Cover			15,576,100	
	- Optical Cover			62,296,359	
	Sub-total			77,872,459	
3	a) Inpatient cover	1,000,000,000	1,100,000,000	9,529,260,081	6,562,228,073
	b) Excess of loss for inpatient and maternity covers	355,760,478			277,902,500
4	Group Life				
	Last Expense Cover	730,482,500	500,000,708	289,356,270	884,081,269
5	Technology				
	a) Biometric Member Identification solution	100,000,000	342,791,400	829,612,800	
	b) Mobile USSD solution	203,000,000	200,000,508	-	
7	Administration Fee	265,000,000	300,440,000		2,134,293,136
8	Training Expenses			30,000,000	
	<b>Total Price</b>	<b>5,814,242,978</b>	<b>5,593,232,616</b>	<b>15,354,473,882</b>	<b>15,462,510,728</b>

\* Bidder No. 2 - UAP insurance provided an alternative biometric solution from Siltech Systems

Table: Financial Evaluation for Insurance Brokers and Underwriters (Option 1)

BIDDER NO.	BIDDER NAME	BID PRICE	TECHNICAL SCORE	FINANCIAL SCORE	TOTAL SCORE	RANK
02	UAP Insurance	5,814,242,978	46	28	74	2
03	AON	5,593,232,616	65	30	95	1
07	CIC General Insurance	15,354,473,882	46	10	56	4
07	Jubilee	15,462,510,728	57	10	67	3

Financial Evaluation Formula; Financial Score =  $\frac{LB\ Price}{x} \times 30$

Bid price

Where L.B. = Lowest Bid price Quoted

## TECHNICAL AND FINANCIAL EVALUATION ON THE FULLY INSURED COVER - OPTION 2

### Technical Evaluation for Option 2

In undertaking Technical evaluation for this option the evaluation committee used the technical scores for Option 1 for the same bidders

Table: Price/cost comparison for various components under Option 2

B/ NO.	BIDDER NAME	GROUP LIFE & LAST EXPENSE Ksh.	IN PATIENT Ksh.	MATERNITY/ DENTAL/ OPTICAL Ksh.	OUTPATIENT Ksh.	FULLY INSURED PREMIUM COST Ksh.
02	UAP Insurance	790,182,500	8,909,216,194	1,513,623,495	7,462,399,897	18,615,722,085.58
03	AON	884,081,269	8,925,172,362	1,118,200,312	6,203,654,758	17,431,108,701
07	Jubilee Insurance	884,081,269	8,925,172,362	1,118,200,312	6,203,654,758	17,431,108,700.37

Table: Financial Evaluation for Option 2

BIDDER NO.	BIDDER NAME	TECHNICAL SCORE	FINANCIAL SCORE	TOTAL SCORE	RANK
02	UAP	46	28.09	74.09	3
03	AON KENYA	65	30	95	1
07	JUBILEE	57	30	87	2

Financial Evaluation Formula; Financial Score =  $\frac{L.B \text{ Price} \times 30}{\text{Bid price}}$

Where L.B. = Lowest Bid price Quoted

#### OBSERVATIONS (OPTION 2)

1. Bidder no. 05 namely CIC General did not present a quotation for option 2.
2. All the three (3) Bidders;- No. 02 - UAP Insurance, 03-AON and 07- Jubilee Insurance presented a quotation that combined Maternity, Dental and Optical components.

#### General Observations

A number of the major medical service providers were not willing to offer outpatient services under the capitation model. However, Bidder No. 3 provided a list of four (4) hospitals and a consortium of hospitals called Afrocentric who expressed willingness to offer services under the capitation model.

## RECOMMENDATIONS

From the analysis above, the committee recommends as follows:-

1. Bidder 03, namely AON Kenya, be considered for award on the provision of Healthcare administration under the Hybrid model (option 1) having been evaluated as the bidder with the highest combined technical and financial score, subject to the following:
  - i) The bidder be invited for clarification on the actual cost of managing maternity, dental and optical components.
  - ii) Negotiations and concurrence of the TSC on the scope of exclusions.
  - iii) For the Group Life and Last Expense Cover, the bidder awarded should work with the most responsive underwriter as provided in Appendix 1(a) and 1(b).
2. Bidder 03 namely AON Kenya be considered for award, being the bidder with the highest combined technical and financial score under this option, in the event that the Commission chooses **Option 2**.

## THE TENDER COMMITTEE'S DECISION

The Tender Committee on 5<sup>th</sup> November, 2014 awarded AON Kenya Ltd the contract as an administrator of the scheme. The firm was notified on 17<sup>th</sup> November, 2014 and their acknowledgement was received by the Procuring Entity on 18<sup>th</sup> November, 2014. The notification of award was subject to negotiations, which commenced on 24<sup>th</sup> November, 2014 but

was not concluded and there has been no formal communication to the firm in that regard.

The Procuring Entity carried out a review of the entire procurement process thus far which resulted in the termination of the award of the contract. This was communicated to the bidder in a letter dated 16<sup>th</sup> January, 2015.

#### REQUEST FOR REVIEW

This Request for Review was lodged by M/s AON Kenya Insurance Brokers Limited, whose address for the purposes of this review is c/o Simba & Simba Advocates of P.O. Box 10312 - 00100 Nairobi, on 23<sup>rd</sup> January, 2015, in the matter of Tender No. TSC/T/45/2014-2015 for the Provision of Medical Healthcare Cover and Group Life Insurance (Including Last Expense) Cover for All Teachers in the Employment of TSC and their Dependants. At the hearing of the Request for Review, the Applicant was represented by Muthomi Thiankolu Advocate and Anthony Khamala Advocates while the Procuring Entity was represented by Mr. Allan Sitima Advocate, M/s Stella Ruto and M/s Cavin Anyuor Advocates. The Interested Party M/s Smart applications Ltd was represented by Mr. Steve Kimathi Advocate.

The Applicant requested the Board for the following orders:-

1. **THAT** the Procuring Entity's decision purporting to terminate the tender, which is set out in the letter dated 16<sup>th</sup> January, 2015, be annulled;

2. THAT the Procuring Entity be ordered to enter into and execute a contract with the Applicant in accordance with the relevant provisions of the Act, including Sections 68, 84 and 85 of the Act;
3. THAT the Procuring Entity be ordered to pay the Applicant the costs of and incidental to this Request for Review;
4. Such other additional, further, incidental and /or alternative orders as the Honourable Board may deem just and expedient.

The Applicant in its oral and written submissions stated that the Procuring Entity's decision purporting to terminate the tender awarded to it vide a letter dated 17<sup>th</sup> November, 2014 under the Provisions of Section 36(1) of the Act was illegal and irregular. The Applicant further argued that the impugned decision was made and communicated to it after the award of the tender, acceptance of the award and after a draft contract was forwarded to the Applicant. It was the Applicant's contention that the Law does not permit Procuring Entities to invoke Section 36(1) of the Act after the award and the acceptance of a tender. The Applicant made reference to the High Court decision in the case of *Republic v Public Procurement Administrative Review Board & 2 Others ex-parte Selex Sistemi Integrati (2008) (eKLR)* where the issue of termination of a tender after an award was extensively addressed and stated that the Court held that a Procuring Entity cannot terminate a contract under the Provisions section 36 (1) of the Act where an award of tender had already been made. The Applicant therefore stated that the Procuring Entity's decision to terminate the subject Tender under the Provisions of Section 36(1) of the Act was legally untenable.

Counsel for the Applicant additionally argued that the termination of the tender award to the Applicant by the Procuring Entity was also unwarranted and unlawful as the tender had passed through all stages including the negotiation stage without any party bringing forth a complaint anywhere including with the Board and that the Procuring Entity's decision was ill informed and was actuated by bad faith. The Applicant further argued that the inclusion of strangers, such as KNUT, KUPPET and the TSC Commissioners was illegal and amounted to a violation of the Public Procurement and Disposal Act, 2005 which clearly outlines who or what teams are responsible for carrying out evaluation of tenders and the extent of each team's role. These strangers, the Applicant argued were invited to the procurement process by the Procuring Entity after the procurement process had passed all the necessary stages and when the parties were preparing themselves to execute the contract. The Applicant submitted that this conduct was in clear violation of the Provisions of sections 5(2) and 26(4) of the Act and Regulation 58(2) of the Regulations which clearly segregates duties and responsibilities by the evaluation and tender committees of the Procuring Entity.

It was the Applicant's case that the Procuring Entity in convening a meeting that included KNUT, KUPPET and TSC Commissioners whose role is not defined by the Act, the Procuring Entity was in clear violation of the Law. The Applicant therefore submitted that any issues raised by the above bodies could not form the basis of termination since the evaluation and the tender committees, had already done their work and approved the award of the tender to the Applicant.

The Applicant therefore urged the Board to allow the Request for Review in view of the fact that the tender award had not been challenged and since it had already commenced preparations towards the implementation of the tender and had committed itself to the tune of Kenya Shillings One Billion and risked to lose a lot if the termination of the award was allowed to stand.

In its Response, the Procuring Entity stated that it was a constitutional commission established under the Constitution of Kenya 2010 and that it was mandated to observe the national values and principles espoused under chapter 10 of the said constitution and ensure that it carried out its oversight role properly and in accordance with the Provisions of section 11 of the PSC Act, which mandated the Commissioners to give strategic direction, leadership and oversight to the Procuring Entity. The Respondent argued that in carrying out of the said functions, it identified some irregularities in this procurement process. The Procuring Entity further submitted that following the notification of the award to the Applicant on 17<sup>th</sup> November, 2014, the Procuring Entity, in performing its oversight role, became aware of an element of conflict of interest by the Applicant in that the Applicant had indeed been involved extensively with the material substance relevant to the procurement proceedings prior to the floating of the tender and that the Applicant had inside information in respect of the substance of the procurement proceedings.

The Procuring Entity additionally submitted that the Applicant had an unfair advantage over other bidders who had participated in the tendering process and that the Applicant had in conjunction with the

Kenya National Teachers Union (KNUT) initiated the registration and sensitisation of teachers and their dependants (beneficiaries of the medical scheme) countrywide and that this information was neither disclosed or made available to those participating in the process. The Procuring Entity therefore submitted that this gave the Applicant advantage over other bidders.

The Procuring Entity further submitted that it also emerged that during the preparation of the proposal, the Applicant accessed critical information relating to the levels of budgetary allocation designed for the medical scheme. The Procuring Entity submitted that one of the illustration of this alleged access to information was the fact that the Applicant's bid price was in tandem with the budget allocated to the teachers' medical scheme which was approximately Kshs. 5.6 Billion while the bid price was Kshs. 5,593,232,616/=. The Procuring Entity submitted that this information was not available to other bidders. The Procuring Entity additionally stated that this amounted to a corrupt and fraudulent practice on the Applicant's part contrary to provisions of the Act, and subsequently the Procuring Entity exercised its option under Section 40(2) and 41(2) of the Act by disqualifying the Applicant from entering into a contract with it and thus opted to terminate the award made to the Applicant.

It was the Procuring Entity's further submission that the provisions of section 36(1) of the Act allowed it to terminate the tender at any time during the procurement proceedings. The Procuring Entity referred the Board to the American decision of *Morewood Vs. Hollister* (6 NY 1852) in its attempt to define the term "proceedings" and stated that it was

therefore entitled to terminate the tender proceedings and had notified both the Applicant and the other bidders of its decision therein. The Procuring Entity submitted that it was exempted from any liability by virtue of the Provision of section 36 of the Act.

The Procuring Entity in its submissions further stated that it found that the applicant had not met some of the specifications set out in its technical conditions of the tender and these issues emerged when it sought clarification after the tender award and during negotiations. Being a responsible public body institution therefore, the Procuring Entity therefore felt compelled to terminate the tender forthwith. The Procuring Entity therefore urged the board to dismiss the Request for Review.

#### THE BOARDS FINDINGS

The Board has considered the Request for Review, the responses filed in answer thereto together with all the documents that were placed before it by the parties. The Board has also considered the written and the oral submissions made to the Board by the parties.

The Board finds on the basis of the above that this Request for Review raises only one issue for determination, namely, **whether or not the purported termination of the above tender by the Procuring Entity was lawful and proper under the Provisions of Section 36 of the Public Procurement and Disposal Act (2006)**. The Applicant and the Procuring Entity put up several arguments in support and or opposition to their respective positions and the Board will therefore address each of the

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arguments put forward by the parties in determining whether the Procuring Entity acted lawfully in the circumstances of this case.

In navigating through this process, it is useful for the Board to first consider the basis upon which the decision to terminate the subject tender was premised.

It was common ground during the hearing of this Request for Review that the Procuring Entity placed an advertisement inviting eligible firms to express interest for the Provision of an innovative and cost effective financial model and solution for healthcare for all teachers in the employment of the commission and their dependants countrywide in the Daily Nation Newspaper of 2<sup>nd</sup> July, 2014.

It was also not in dispute that the Applicant submitted its tender for the said services which was evaluated by the Procuring Entity and that the Procuring Entity's tender committee awarded the subject tender to the Applicant on 17<sup>th</sup> November, 2014. It was also generally agreed by the parties to this Request for Review that the Applicant was notified that its tender was successful via a letter dated 17<sup>th</sup> November, 2014. The Applicant acknowledged receipt of the said letter on 18<sup>th</sup> November, 2014 and unconditionally accepted the award made to it by the Procuring Entity on the same date. The Applicant stated that upon accepting the award of the tender to it, the Applicant and the successful bidder commenced negotiations on 24<sup>th</sup> November, 2014 but the negotiations were not concluded. The documents placed before the Board further show that the Applicant and the Procuring Entity

exchanged a written draft agreement which was to form the basis for the agreement which was to be entered into by the said parties.

All was then quiet until 16<sup>th</sup> January, 2015 when the Procuring Entity wrote to the Applicant informing it that it had terminated the tender which it had awarded to the Applicant. It is this turn of events that precipitated the filing of the present Request for Review.

The Board has considered all the issues raised and will first address the issue of the Board's jurisdiction which was raised by the Procuring Entity.

On the issue of jurisdiction, the Board has previously held that the power to terminate an award of a tender under the Provisions of Section 36 of the Act is not absolute and further that the Board has jurisdiction to inquire into the circumstances leading up to the termination of the an award of a tender to a successful bidder.

The position taken by the Board on the issue of jurisdiction in cases of termination follows several decisions by the High Court such as the case of **Selex Sistemi Intergetti -vs- The Public Procurement Administrative Review and the Kenya Civil Aviation Authority (NAI HC Misc. Application No. 1260 of 2007)** where the High Court (both Justices G. Nyamu and G. Dulu) held that the Board has jurisdiction to hear and determine any grievance arising from the exercise of the power conferred upon a Procuring Entity under the Provisions of Section 36 (6) of the Act. The High Court has further held that the said Section 36 (6) does not oust the jurisdiction of the Court or the Board to hear any grievance under the Provisions of Section 36 of the Act. \*

The Board has affirmed this Position in several of its past decisions as illustrated by the case of **Horsbridge Network Systems (E.A) Ltd -vs- Central Bank of Kenya (PPARB APPL. No. 65 of 2012)**.

Where the Board held that it has jurisdiction to investigate the circumstances under which a Procuring Entity has exercised the powers of termination under the Act.

For the purposes of this review, the first ground on the basis of which the Applicant challenged the Procuring Entity's decision to terminate the award of the subject tender to it was that the Procuring Entity could not lawfully terminate the award of a tender to a successful bidder once the award of the tender was made, notified and was accepted by the successful bidder. The Applicant relied on the High Court decision in the case of **Republic =vs= The Public Procurement Administrative Review Board and 2 Others Exparte Selex Sistemi Interatti (2008) eKLR** in support of the argument that such a tender cannot be terminated. The Applicant relied on the following extract from the judgment of the Honourable Justice G. Dulu in the above case.

*"In our present case the purported termination was done after award of Tenders was communicated as confirmed by both the Applicant and the Interested Party, and even the 2<sup>nd</sup> Respondent. This cannot be a situation covered by the ouster clause under Section 36(1) of the Act. It is my finding and decision that the ouster clause under Section 36(1) of the Act does not apply to the*

*present case as the tender was already awarded. There is no subsequent event from parties other than the Procuring Entity that actuated the proceedings. I therefore hold that both the 1<sup>st</sup> Respondent and this court has jurisdiction to consider and review the decision of the 2<sup>nd</sup> Respondent, the Procuring Entity to terminate the awarded Tender”.*

The Board has considered the court’s judgment and finds that what the court held was that a Procuring Entity cannot purport to terminate an award once a successful bidder is notified that it’s tender was successful. As the Board has already stated, the Applicant in the case before the Board was notified that it’s tender was successful on 17<sup>th</sup> November, 2014 and accepted the award to it on 18<sup>th</sup> November, 2014 while the letter of the purported termination was issued on 16<sup>th</sup> January, 2015. This was done long after the date of notification to the Applicant and after the Applicant had unconditionally accepted the award of the tender to it.

The Board therefore finds on the basis of the above decision which is binding on the Board that the Applicant could not lawfully terminate the award made to the successful bidder on 17<sup>th</sup> November, 2014 via the letter of termination dated 16<sup>th</sup> January, 2015. The decision of the Procuring Entity was therefore a decision made in vain since it is not allowed by law.

Turning to the next fundamental issue, Counsel for the Procuring Entity informed the Board that the decision to terminate the Applicant’s tender was made by the commissioners of the Teachers Service Commission. The Board has perused the entire bundle of the documents supplied to it

by the Procuring Entity and was unable to find any minutes of the Teachers Service Commission containing the decision by the Commissioners to terminate the award of the tender in any of the documents supplied to it. All that the Board came across was the letter informing the Applicant of the purported termination which is dated 16<sup>th</sup> January, 2015.

The Board however finds on the basis of the Provisions of the Teachers Service Commission Act that the Commission can only discharge its functions through its relevant committees and that the Commissioners cannot base their decision on verbal pronouncements which are not supported by any minutes.

The Board therefore finds that in the absence of such minutes authorising termination, the Commissioners or any other officer or employee of the Teachers Service Commission could not purport to terminate the Applicant's tender since such an action would not have foundation.

The Board further finds that the Procuring Entity had constituted a tender processing/evaluation committee and a tender committee which evaluated and awarded the subject tender to the Applicant and further that pursuant to the award of the said tender, the tender committee constituted a negotiation committee whose members were:-

- i) Mrs. Nancy Macharia,
- ii) Mr. Cheptumo Ayabet,
- iii) Mrs. Josphine Maundu,

iv) Mr. Ibrahim Mumin,

v) M/s Agnes Gatere,

vi) And the Tender Processing Committee Members.

The Board has not been able to find any document that appointed the Commissioners of the Teachers Service Commission as part of the Procuring Entity's tender evaluation committee or the negotiation team. It was therefore improper for the Commissioners or any other officer or employee of the Teachers Service Commission to interfere with the functions of the tender processing/evaluation committee, the tender committee or the tender negotiations committee. The Board therefore accepts the Applicant's submission that the Commissioners or any other Officer or employee of the Teachers Service Commission were "strangers" to the Procurement Proceedings and their decision to terminate the award of the tender made in favour of the Applicant was therefore unlawful.

Under the Provisions of Section 26 (4) of the Act, every Procuring Entity is required by law to establish a Procuring unit, a tender evaluation/processing team, the tender committee and such other bodies as are required by the Regulations for the purposes of making decisions on behalf of the Public entity as are specified in the Act and the Regulations. Once such bodies have been established, it is only the said bodies which are empowered to undertake any tender process to the exclusion of everybody else.

The Board finds that pursuant to the Provisions of Section 26 of the said Act, the Procuring Entity appointed a tender processing/evaluation

committee, a tender Committee and a negotiation team and placed the mandate to evaluate the tender and to make all the necessary recommendations and or decisions as respects the subject tender on the said committees. The three committees proceeded diligently with the said exercise leading up to the award of the tender and the negotiations with the Applicant.

As the Board has already observed, the Board has perused all the documents submitted to it by the Applicant and the Procuring Entity but did not come across any minute or document which appointed the Commissioners of the Teachers Service Commission or any other employee or body as part of the bodies that would undertake the Procurement process or terminate the award of the tender to the Applicant.

The Board further finds that Commissioners of the Teachers Service Commission stayed away from the proceedings relating to the subject tender until 15<sup>th</sup> December, 2014 when the Procuring Entity invited a total of 29 people to a meeting to ostensibly discuss certain issues relating to the award of the subject tender to the Applicant. The Board has perused the previous minutes of the tender processing/evaluation committee, the tender committee and the negotiation committee and it has established that most of the people, who attended the meeting of 15<sup>th</sup> December, 2014 were not members of either committee. The Board has further established that after the meeting held on 15<sup>th</sup> December, 2014, the Procuring Entity convened another meeting on 18<sup>th</sup> December, 2014 to discuss the same issues. A total of 28 people attended the second meeting but a majority of them were again not members of the tender

processing/evaluation committee, the tender committee or the negotiation committee.

The Applicant produced the letter of invitation to the participants in the meeting of 18<sup>th</sup> December, 2014 which is dated 17<sup>th</sup> December, 2014 together with the minutes of the said meeting as annexures "AKB - 10".

It was the Applicant's position that it is permissible under the Provisions of the Public Procurement Act and the Regulations made thereunder for strangers to participate in the evaluation process or in any other proceedings related to the award of the tender and that such a participation was unlawful.

The Board has considered the above submissions in view of the Provisions of Section 26 of the Act and Regulations 10 and 11 of the Regulations and finds that the law does not permit persons who are not members of the tender processing/evaluation committee or the tender committee to participate in a tender process unless their participation is expressly permitted under the provisions of Section 26 of the Act. Such persons cannot therefore purport to convene meetings and make decisions to terminate a tender which has already been awarded. The Board considered a similar situation in the case of **M/s Wamo Construction Co. Ltd -vs- The District Tender Committee Ijara District (PPRB Application No. 18 of 2010)** where the Board held that it was unlawful for a body which had not been lawfully constituted under the Provisions of Section 26 of the Act to participate in proceedings touching on the evaluation of a tender or any process relating to the said tender.

4 The Board stated as follows in the said decision:-

*"The Board finds that according to the requirements set out in clause 1.5 of the instruction to tenderers, the evaluation committee determined the Applicant to be the lowest evaluated bidder and recommended for award to the tender committee. Notwithstanding this recommendation, the secretariat which is a body that is not established in accordance with Section 26 of the Act and part 11 of the Regulations and therefore not empowered to play any role in the tender process recommended to the tender committee to award the tender to the successful bidder. The Board finds that the recommendation by the secretariat was a nullity and should not have been acted upon by the tender committee. The secretariat did an evaluation after the technical evaluation committee had finished its part and by extension the tender committee also did an evaluation contrary to the Provisions of Regulation 11 (2)".*

It is clear from the above decision that the law does not permit the participation of what the Board terms as "strangers" in a tender process even if they are employees of the Procuring Entity. The Board therefore holds that all the people who participated but were not members of the tender evaluation/processing committee, the tender committee and the tender negotiation committee in the meetings of 15<sup>th</sup> December, 2014 and 18<sup>th</sup> December, 2014 were in the same shoes as the secretariat in the decision that the Board has cited above.

The Board has also gone through the minutes of the meetings held on 15<sup>th</sup> December, 2014, and 18<sup>th</sup> December, 2014 and has compared the Resolutions passed in the said meetings with the contents of the letter of

termination dated 16<sup>th</sup> January, 2015 and which was produced by the Applicant as annexure "AKB -15". The Board finds that the reasons given by the Procuring Entity in the letter dated 16<sup>th</sup> January, 2015 were not part of the recommendations made by those who attended the two meetings. Minutes of the meeting held on 15<sup>th</sup> December, 2014 and minutes of the meeting held on 18<sup>th</sup> December, 2014 shows that the Procuring Entity and the respective Unions were infact in agreement that a contract should be executed with the Applicant.

The Board further wishes to observe that neither the Tender processing/evaluation committee nor the tender committee raised any complaint relating to the award of the tender the subject matter of this Request for Review to the Applicant and further that the tender evaluation committee and the tender committee seem to have been satisfied with the outcome of the Process.

During the hearing of this Request for Review, the Applicant attacked the reasons for termination as set out in the letter dated 16<sup>th</sup> January, 2015 and stated that the decision to terminate the tender awarded to it had no basis in law or fact. Inview of the Board's finding that there are no minutes evidencing the termination and inview of the Board's further finding that strangers were allowed to participate in meetings leading to the purported termination of the subject tender, the Board holds that the purported termination as contained in the letter dated 16<sup>th</sup> January 2015 together with all the reasons contained therein are a nullity *ab-initio*.

The above finding notwithstanding, the Board has examined the reasons set out by the Procuring Entity in support of the decision to terminate

The Board has examined all the above reasons and finds that on the issue of conflict of interest, the Procuring Entity did not produce any evidence to show that it had entered into a contract with the Applicant relating to the conceptualization of the alleged scheme in December, 2013. The Board further finds that if this was true, this issue was alive during evaluation and it was the duty of the tender set out in the tender document.

iii) That there was a material variation to basic components of the scheme namely maternity, optical and dental components from free fee to service to capitation allegedly contrary to specifications

ii) The Applicant did not meet the specifications set out in the tender documents as it did not demonstrate and provide a biometric infrastructure with a member identification solution that identifies members through finger capture and enables member utilization, monitoring and reporting.

i) The Applicant was guilty of conflict of interest since it had been extensively involved with the material substance relevant to the Procurement of the medical scheme for teachers as early as in December, 2013. The Procuring Entity therefore contended that the Applicant had inside information in respect of the substance of the Procurement proceedings and that it was the party that had conceived the scheme that was being implemented in the subject tender.

the tender awarded by the Procuring Entity to the Applicant. The reasons were essentially three and they are that-

processing/evaluation committee and the Tender Committee to deal with it during evaluation but not that of the commissioners or any other officer or employee of the Procuring Entity who were not members of any committee or other body established under Section 26 of the Act.

On the issue of the alleged failure to meet the specifications set out in the tender document and the alleged variation of specifications, the Procuring Entity did not provide any evidence to back up this allegation and this was at any rate not the domain of the commissioners but that of the tender evaluation committee, the tender committee and the tender negotiation committee.

The Board further finds from the minutes of the various meetings which it has set out above that the proposals for any change or variation of any specification came up at the various meetings and some of these changes were proposed by the Procuring Entity. The Procuring Entity cannot therefore be right in seeking to terminate the award of the tender to the Applicant based on suggestions which were made by it.

The Board further finds that the award of this tender was made to the Applicant on the basis of specific tender requirements and conditions. The Board however notes that no formal agreement has to date been entered into by the parties. Nothing therefore prevents the Procuring Entity from insisting on compliance with the requirements of the tender document at the point of executing the contract.

It is therefore premature for the Procuring Entity to allege that the Applicant has changed specifications or made variations in the tender

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documents when a contract pursuant to the tender award has not been executed.

The reasons given by the Procuring Entity seeking to terminate the award of the subject tender to the Applicant are therefore an afterthought and the Board therefore rejects them.

The Board has severally held and wishes to restate that every Procuring Entity exercising the powers conferred upon it by the Provisions of Article 227 of the Constitution and the Public Procurement and Disposal Act does so on behalf and in trust for the members of the public and is therefore bound to act within the law and in good faith. The Board further finds that the present Procurement process was undertaken for the sole purpose of promoting the welfare of teachers and their dependants on matters relating to health and their well being. It is therefore regrettable that what the Board finds as a noble idea was derailed by what appears to be a disagreement or a scotestation by various organs of the Procuring Entity. This state of affairs is not healthy especially where it involves the rights of third parties or the rights of a large Section of members of the Public such as teachers and their dependants.

Further, the Board has previously held that any party seeking to rely on the Provisions of Section 36 of the Public Procurement and Disposal Act must establish that it complied with all the Provisions of Section 36 of the Act in seeking to terminate the award of a tender made to a bidder who participates in a Procurement process.

One of the requirements set out in Section 36 of the Act is that a Public Entity that terminates Procurement Proceedings shall give the Director General of the Public Procurement Oversight Authority a written report of the termination. Section 36 (8) of the Act requires that such a report shall include the reasons for the termination and shall be made in accordance with any direction of the Authority with respect to the contents of the report.

The Procuring Entity did not produce any evidence during the hearing of the Request for Review to show that it had complied with the above requirements of the Act. The only explanation given by the Procuring Entity to justify the absence of the report was that it did not give it because the Board had issued an order of stay in respect of the Procurement process. The Board however finds that the Procuring Entity ought to have given such a report timeously upon giving a notice of the purported termination and further that the order of stay did not affect the giving of reasons since it was not a Procurement process capable of being stayed.

It is also noteworthy that upon the conclusion of this exercise, no bidder who had participated in the tender process lodged any complaint with the Board or with the Procuring Entity's Commissioners challenging the award of the tender to the Applicant. The purported termination and the reasons justifying it were all raised by the Procuring Entity's Commissioners. The Commissioners therefore constituted themselves as the complainants, prosecutors and judges in their own cause which is against the rules of natural justice. The Board further notes that before making the decision to terminate, the Procuring Entity's Commissioners

did not offer the Applicant an opportunity to be heard on the reasons for the termination which again was contrary to the same rules of natural justice.

The Board further wishes to state that the course taken by the Procuring Entity contravened the Provisions of Section 84 (1) and (2) of the Act which enjoined it to invite the second best evaluated bidder for negotiations in the event that it was not able to reach any agreement with the successful bidder but not to terminate the entire tender process. Such an action would have led to a waste of public funds through a fresh but entirely unnecessary tender process.

The Procuring Entity dedicated a considerable amount of time in arguing that it is a Constitutional Commission which is mandated by the Provisions of Section 11 and 46 of the Teachers Service Commission to Review any of it's decision. The Procuring Entity also submitted that it has a duty to observe National values and the principles of Public service as expoused by Provisions of Article 10, 201 and 232 of the Constitution.

The Procuring Entity further stated in the written response dated 5<sup>th</sup> February, 2015 that it is a Constitutional Commission and that in terms Article 249 (2) (b) of the Constitution, it is not subject to the direction and/or control of any other body and that it is only answerable to the law and not to any other person or body.

The Board however respectfully holds that the fact that the Procuring Entity is a Constitutional Commission does not preclude it from observing the Provisions of the Public Procurement and Disposal Act

(2005). The above status does not also entitle the Procuring Entity to trample upon the rights of other legal persons such as the Applicant. The Procuring Entity is therefore enjoined to act lawfully, its status notwithstanding.

The upshot of all the above findings is therefore that the Procuring Entity's decision purporting to terminate the Applicant's tender was unlawful and is hereby set aside.

### FINAL ORDERS

In the light of the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 98 of the Public Procurement and Disposal Act (2005) the Board makes the following orders in this Request for Review:-

1. Request for Review filed by M/S Aon Kenya Insurance Brokers Limited against the decision of the Teachers Service Commission in the matter of Tender No. TSC/T/45/2014-2015 for Provision of Medical Healthcare Cover and Group Life Insurance (Including Last Expense) Cover for All Teachers in the Employment of TSC and their Dependants is hereby allowed and the Procuring Entity's decision purporting to terminate the said tender as set out in its letter dated 16<sup>th</sup> January, 2015 is hereby annulled.
2. The Board directs the Procuring Entity to complete the Procurement process and execute a contract with the Applicant, M/s AON Kenya Insurance Brokers Limited in accordance with

the relevant provisions of the Public Procurement and Disposal Act within Fourteen (14) days from the date hereof.

3. In view of the nature of the orders which this Board has made above which will lead to the existence of a contractual relationship in future between the Applicant and the Procuring Entity the Board directs that each party shall bear it's own costs of this Request for Review.

Dated at Nairobi on this 20<sup>th</sup> day of February, 2015

.....  
CHAIRMAN  
PPARB

.....  
SECRETARY  
PPARB



**Central Bank of Kenya**

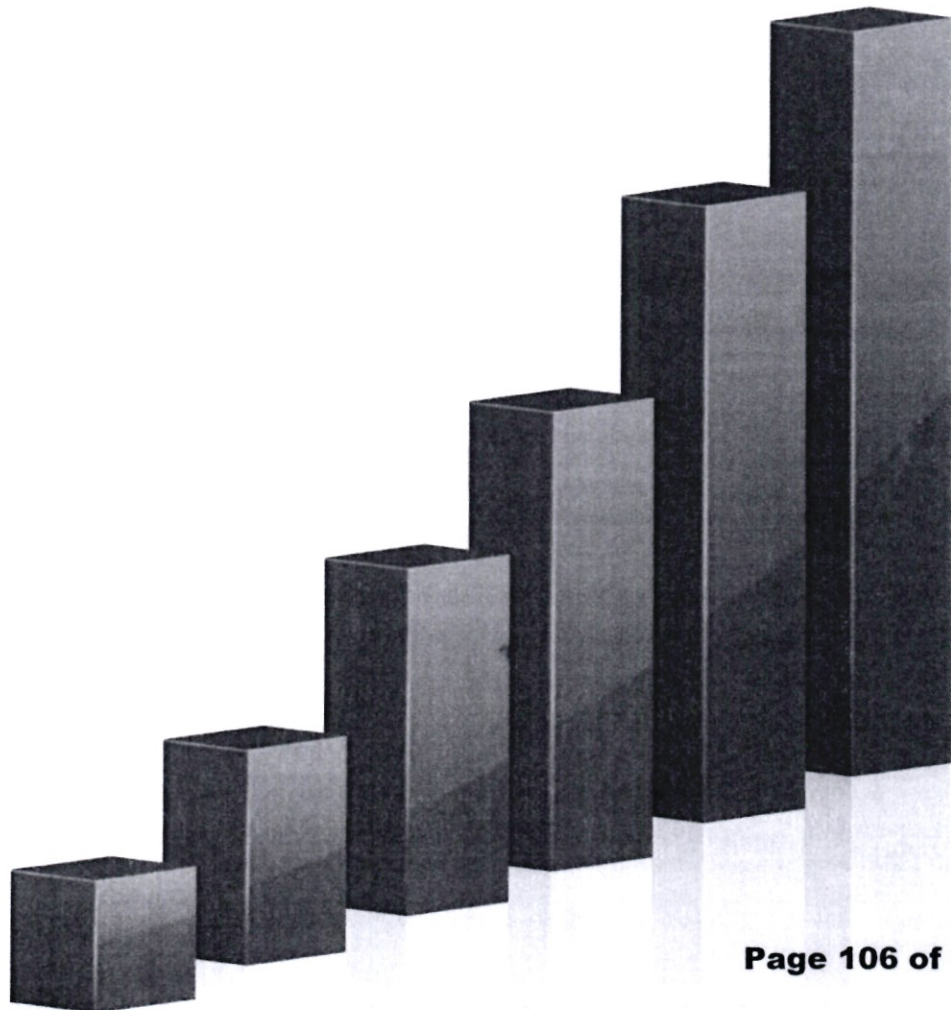
This is the Exhibit marked "FML-4" referred to in the annexed affidavit of declaration of Franklin Mithika Linturi

Sworn  
Declared before me this 6th day of May 2024 at Nairobi  
In the Republic of Kenya

**GIPONGA J. M'LIWBIINE**  
ADVOCATE AND COMMISSIONER FOR OATHS AND CPS  
P. O. BOX 42810, NAIROBI  
MOB: 0722 240091  
DATE: 06/05/2024 SIGN:

# Agriculture Sector Survey

## March 2024





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## 1. BACKGROUND

The agriculture sector recovered significantly in 2023 supported by favourable rainfall that led to increased production. The favourable weather conditions were witnessed in the better part of 2023, particularly the October – December 2023 season that recorded above average rainfall which continued into January 2024. Available data from the Kenya National Bureau of Statistics (KNBS) shows that the agriculture sector growth averaged 7.0 percent in the first three quarters of 2023 compared to a contraction of -2.0 percent in the first three quarters of 2022. Thus, the sector recovered remarkably after a contraction of -0.3 percent and -1.9 percent in 2021 and 2022, respectively, occasioned by the prolonged drought conditions.<sup>1</sup>

The rebound of agriculture sector is important not only with respect to the role it plays in enhancing Kenya's food security but also in terms of implications of agricultural commodity prices on the overall inflation. It is in this regard that the Monetary Policy Committee (MPC) of the Central Bank of Kenya (CBK) initiated the survey of the agriculture sector with the aim of gathering indicative information on current and expected developments in prices and output of select agricultural commodities to inform monetary policy decisions. Understanding the trends in the prices of basic agricultural commodities, output and challenges is vital, given the significant weight of food in the Consumer Price Index (CPI) basket, and the important role of agriculture in the economy. Moreover, given the high reliance on rain-fed farming, farmers are increasingly vulnerable to drought and unpredictable weather patterns due to climate change. These have implications not only on food security but also on price stability.

The focus areas of the survey include:

- i. Prices of key agricultural food commodities and expectations.
- ii. Assessment of output and acreage of select food items, and expectations.
- iii. Access and use of farm inputs for agricultural production.
- iv. Factors affecting agricultural production, marketing/sale of farm produce.
- v. Indicative information on access to credit facilities and how farmers use the credit; and
- vi. Suggestions on how to improve agricultural production.

<sup>1</sup> KNBS Economic Survey 2023

The current survey was conducted during the period March 11 – 15, 2024. The results show there was a general decline in prices of key food items in March relative to February 2024, particularly cereals and processed foods. The general downward trend in food prices is expected to continue in April 2024. Additionally, there was notable relief to consumers with respect to sugar, whose prices have been moderating following the re-opening of local sugar factories from October 2023. However, the survey established that retail prices of tomatoes and onions remain elevated.

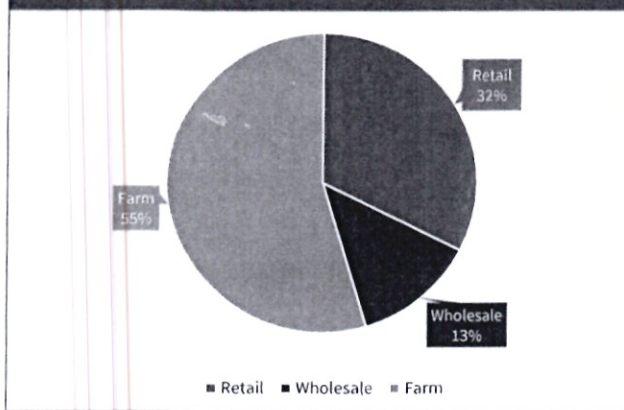
The key factors found to be exerting upward pressure on inflation remained largely unchanged from previous surveys. Transport and input costs remained the most significant factors affecting price of agricultural commodities, though there was a decline in the share of respondents who reported these factors as being significant. This could be attributable to the moderation of transport costs following four consecutive cycles of reduction in pump prices by Energy and Petroleum Regulatory Authority (EPRA), and the government's subsidised fertiliser initiative. Favourable weather conditions also continue to support a decrease in prices and an increase in output. In addition, the survey showed a marked increase in the uptake of subsidised fertilizer in March 2024, where almost 70 percent of sampled farmers benefitted.

## 2. METHODOLOGICAL FRAMEWORK

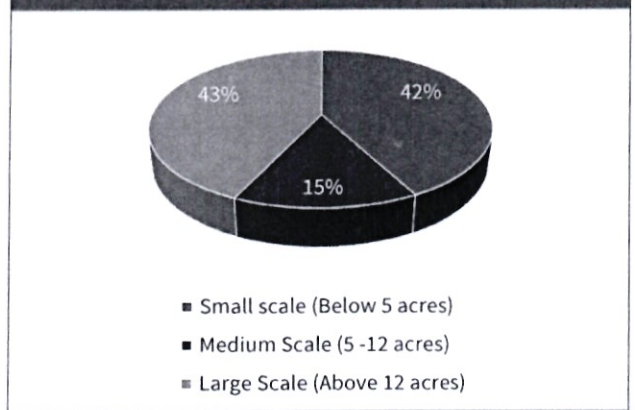
The March 2024 survey gathered information on wholesale and retail prices of select food items, expectations about changes in prices and output, and factors that affect agricultural production. The survey drew respondents from select wholesale and retail markets, and farms in major towns. These included Nairobi Metropolitan area, and neighbouring counties including Kiambu, Kajiado and Machakos; Naivasha, Gilgil, Nakuru, Narok, Bomet, Kericho Kisumu, Mombasa, Kisii, Eldoret, Kitale, Nyandarua, Nyahururu, Mwea, Isebania, Meru, Nyeri, Isiolo, Oloitoktok, Namanga, Makueni and Molo.

The coverage and scope of the survey has continued to expand over time. The data was collected using face to face interviews with retailers, wholesalers and farmers in select markets and farms. A total of 247 respondents were sampled of which farmers accounted for 55 percent while retailers and wholesalers accounted for 32 percent and 13 percent, respectively (**Figure 1a and 1b**).

**Figure 1(a): Response rate (Percent)**



**Figure 1(b): Farm categorization (Percent)**



Both quantitative and qualitative approaches were employed to analyse the cross-sectional data while findings were presented using tables and/or charts. The Balance of Opinion (BOO) approach, which is generally defined as the difference between the proportion of respondents having expressed a positive opinion and the proportion of respondents having expressed a negative opinion divided by the total number of respondents, was applied to convert

qualitative responses into quantifiable values. The survey sought respondents' views about their inflation expectations, that is, whether they expect inflation to increase, remain unchanged or decrease in the next one month and three months ahead. The BOO measure in this case is the difference between the proportion of respondents who expect inflation to increase and the proportion that expect inflation to decline, divided by the total number of respondents. This section highlights the key findings from the

### 3. MAIN HIGHLIGHTS FROM THE SURVEY

March 2024 Survey. Broadly, the following are the key highlights:

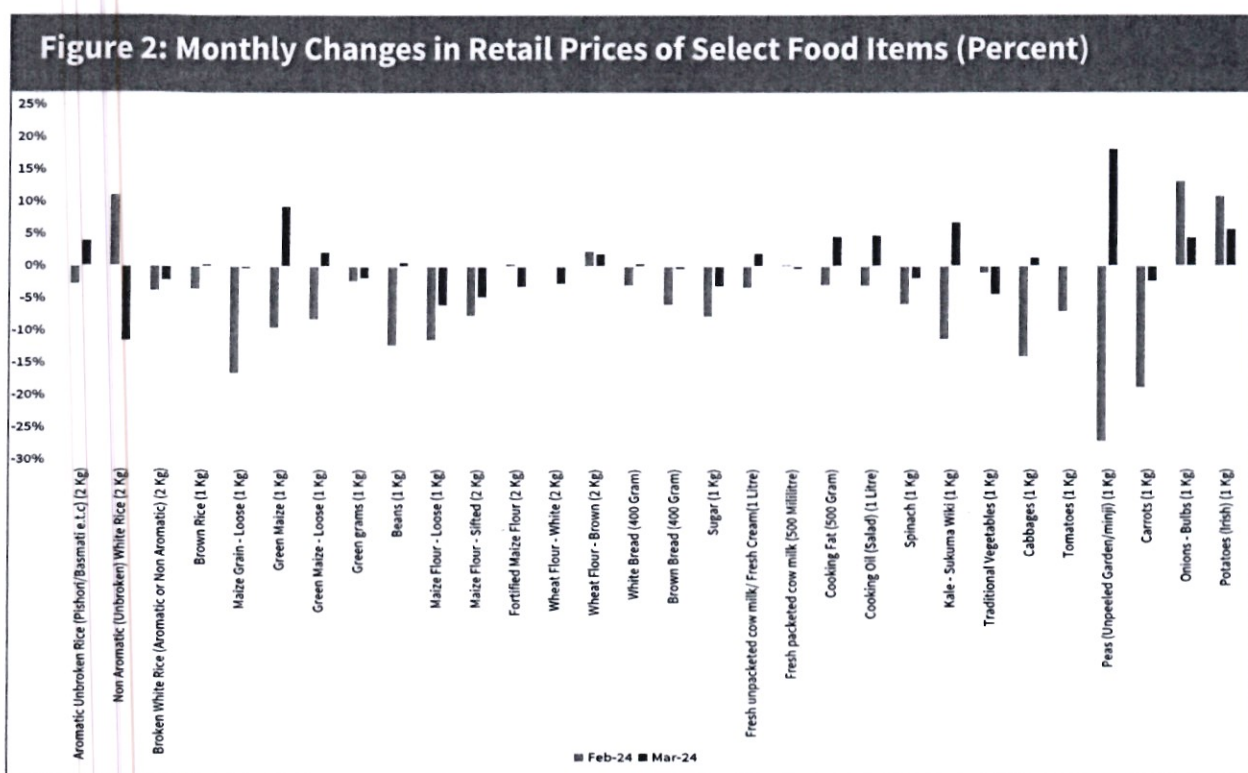
- i. Retail prices of most non-vegetable items were generally lower in March 2024 relative to February 2024, but prices of key vegetable items such as tomatoes and onions remained elevated.
- ii. The decrease in prices of cereals and cereal products was mainly supported by the bumper harvest following favourable October-December 2023 rain season, with rainfall continuing into January 2024.
- iii. A larger proportion of respondents expect a general downward trend in food prices and overall consumer price in the next one month as well as in the next three months. This view has been influenced by the continued good performance of agriculture following favourable weather; reduction in pump prices even though still elevated relative to the same period last year; and the continued strengthening of the Kenya shilling.
- iv. Expectations about both acreage and output of select crops in the next harvest remained positive in March 2024. This is partly on account of continued favourable weather conditions; availability of affordable fertilizer; and fuel price reduction which some farmers reported would moderate the cost of running farm machinery, equipment and transportation.
- v. Weather conditions, transport and input costs continue to impact both output and price of key food items. However, the proportion of respondents who reported transport and input costs to be a significant factor in driving prices declined in the March 2024 survey. In this regard, a large share of respondents cited the continued positive impact of pump price reduction by EPRA and the government subsidised fertiliser initiative.
- vi. The proportion of respondents who reported to have accessed the subsidized fertilizer increased significantly in March 2024 relative to the January 2024 survey. Most farmers rely on rain-fed agriculture and the uptick in fertilizer intake in March 2024 was a strategy to capitalise on the March-May 2024 long rain season.
- vii. Banks, Savings and Credit Cooperative Societies (SACCOs), friends/family and the Hustler Fund continue to be main sources of credit for farmers. The funds were used mainly to finance farm implements, inputs (seeds, fertiliser, pesticides), and labour.

viii. Optimism about economic performance in the next three months and one year ahead was relatively higher in March 2024. Most respondents attributed their optimism to the recent appreciation of the Kenya shilling which they expect would be sustained; expectations that the subsidised fertiliser initiative would continue and that the March-May 2024 long rain season would be favourable.

### 3.1 Prices of Key Agricultural Commodities

The survey sought to establish indicative prices of key agricultural commodities in March 2024.

Compared to the prices observed in the January and February 2024 surveys, analysis of the March survey data shows mixed outcomes. There were notable declines in prices of the various types of maize flour, reflecting the impact of continued supply of maize to the market following favourable rainfall in 2023 that led to increased production of maize. However, retail prices of tomatoes, potatoes and onions remained elevated due to higher demand relative to supply. The higher prices of green maize and peas in March 2024 reflect the influence of seasonal factors (Figure 2).



Prices of loose maize grain, green grams, and beans have been generally lower in the first quarter of 2024 compared to their respective levels in similar quarters in 2022 and 2023. The prices of various rice varieties have remained relatively stable in the first quarter of 2024, supported by local rice harvest in the period December 2023-February 2024. In March 2024, all rice varieties experienced slight price declines, except Pishori rice whose price increased slightly relative to February 2024. The prices of fresh un-packeted cow milk and packeted milk have remained stable over time, supported by favourable weather conditions, continued price offers in various outlets, and Government interventions. The latter specifically refers to the gazette notice published on March 17, 2023, which allowed animal feed

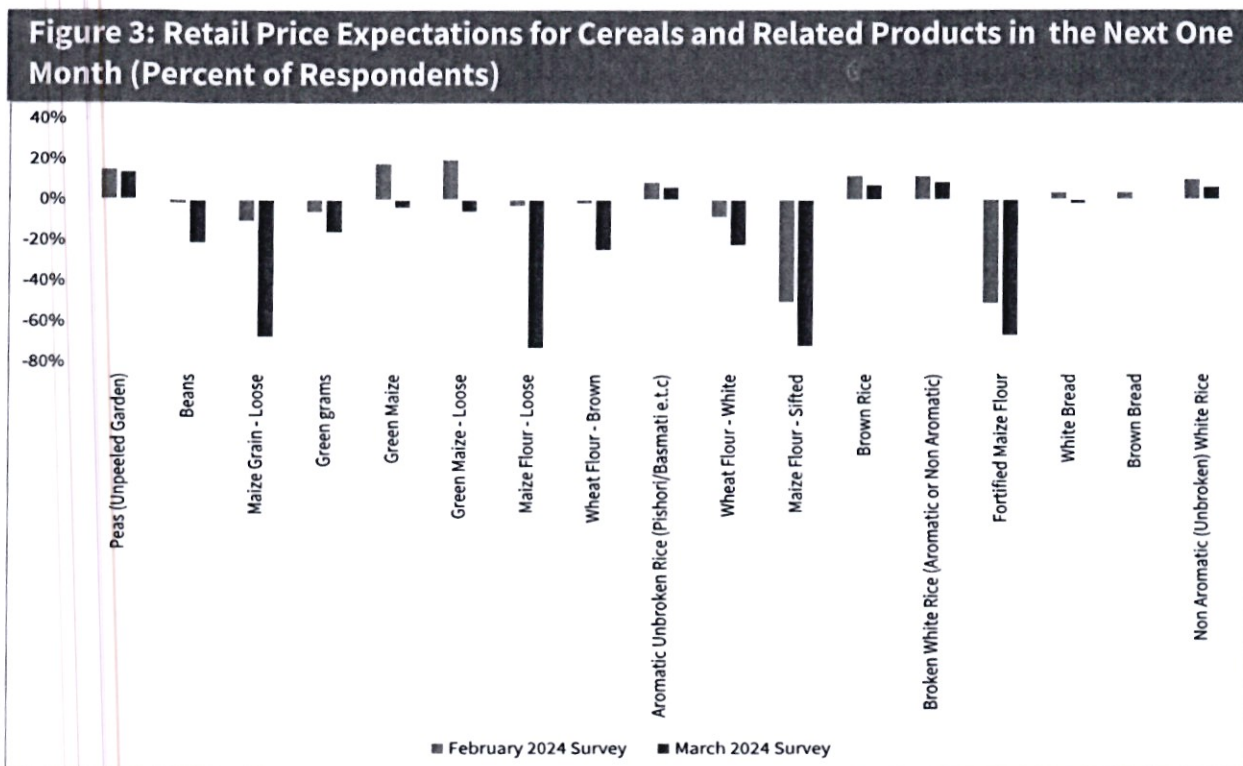
manufacturers to import 500,000 tonnes of duty-free yellow maize before August 6, 2023, which helped to stabilize prices of animal feeds and resulted in increased milk production.

The price of sugar has been declining gradually and was lower in March 2024, compared to February 2024, with some outlets posting prices of about KSh 330 per 2kg packet (KSh 155 per kg). Sugar prices have been moderating since October 2023 after local sugar companies resumed operations following temporary closure in July 2023, to undergo annual maintenance. Expectations point to a decline informed by the re-opening of local sugar factories and the moderation in global sugar prices.

### 3.2 Expectations of Prices of Key Food Items

On balance, the BOO points to an expected general decline in prices of most food items in April 2024 (Figure 3 and 4). This mainly reflects the continued impact of favourable weather, the recent appreciation of the Kenya shilling in March 2024 compared to February 2024 and the substantial reduction in pump prices in March 2024. With respect to cereals and cereal products, some respondents noted that

harvests from Eastern regions of the country had continued to boost supply of beans, maize grain, and green grams. Price expectations with respect to rice were not very different from what was observed in February 2024 with both surveys pointing to a slight increase in prices (Figure 3). Some respondents were concerned about possible increase in import costs due to supply chain disruptions arising from the crisis in the Red Sea and the Suez Canal.



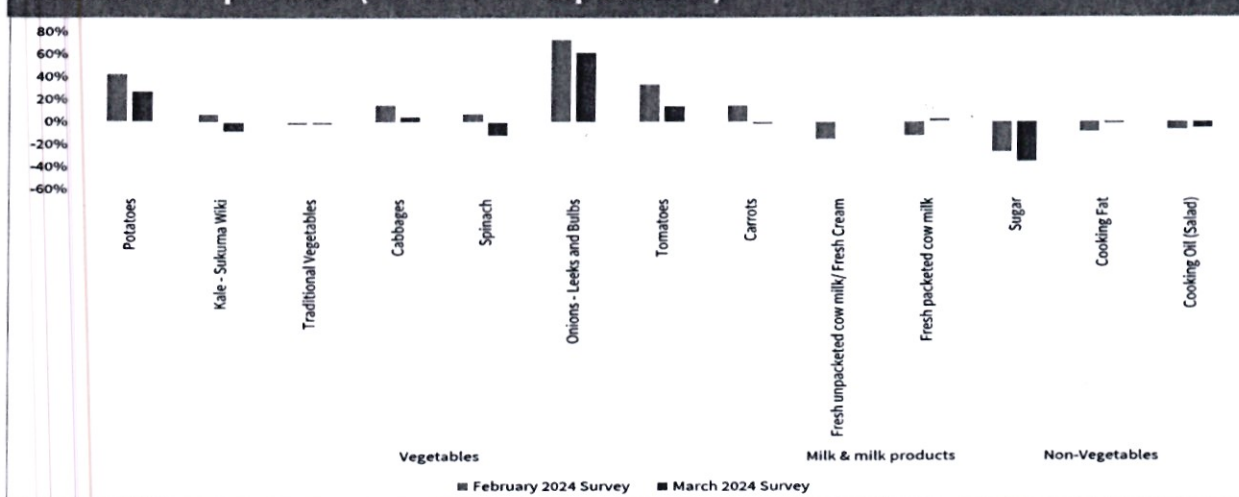
Overall expectations about retail prices were, in general, tilted towards a decline in the March 2024 survey, though not as drastic as in the February 2024 survey (Figure 4). The price of processed and unprocessed milk is expected to remain stable, supported by increased pasture resulting from favourable rainfall. Price expectations for vegetable items including kales/sukuma wiki, cabbages, spinach, and traditional vegetables in the March 2024 survey were not significantly different from the February 2024 survey. The weather conditions have been favourable for growing of fresh vegetables. Prices of potatoes and tomatoes were, however, expected to increase in the next one month, though at a subdued pace relative to the expected increase in the February 2024 survey.

Onion prices remained elevated as observed in both February and March 2024 surveys, and respondents expected a further increase in April

2024. However, only 60 percent of respondents expected an increase in onion prices in March survey compared to 70 percent in the February 2024 survey. The moderation in expected price increase during the March 2024 survey was partly informed by an expected increase in supply as the harvest of onions peaked in March 2024. However, the impact of the harvest on prices was expected to be dampened by the high demand for onions both locally and within the East Africa Community (EAC) region, particularly Tanzania, Uganda, and South Sudan. Traditionally, Tanzania has been an important source of onions, complementing local supply.

Expectations about prices of cooking oil and cooking fat in March 2024 survey point to a marginal decline in April 2024. This was informed by the observed easing of international prices of edible oils following recovery of global palm oil production and the relatively stronger Kenya shilling in March 2024.

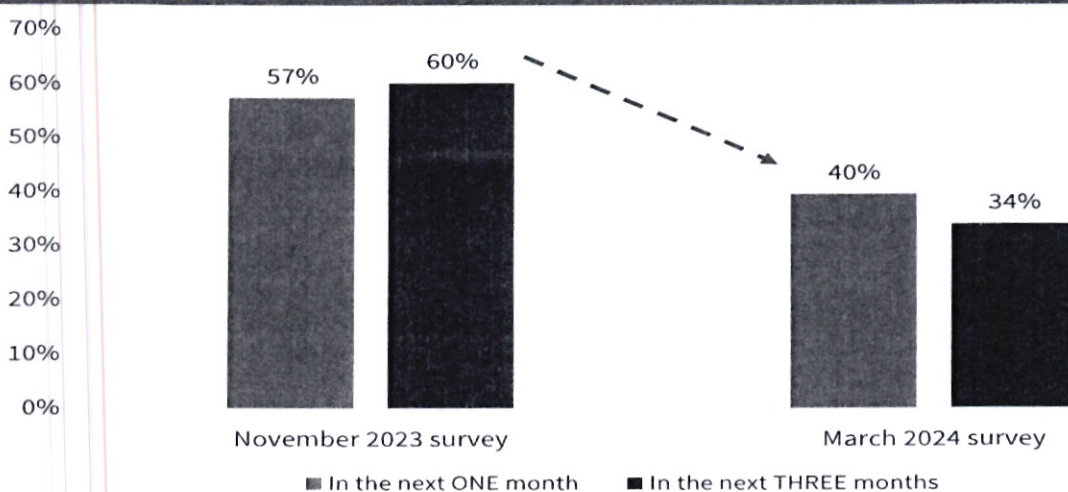
**Figure 4: Retail Price Expectations for Vegetables, Non-Vegetables and Animal Products in April 2024 (Percent of Respondents)**



The survey also sought respondents' views on expectations about price changes (inflation) of the consumer goods regularly purchased by a typical household. Viewed over a slightly longer horizon the March 2024 survey showed a significant drop in the proportion of respondents who expected inflation to increase, when compared to the outcomes of the November 2023 survey. The proportion expecting inflation to increase one month ahead was 40 percent in March 2024 compared to 57 percent

in November 2023. Moreover, the proportion of respondents who expected inflation to increase three months ahead reduced by almost half to 34 percent in March 2024, from 60 percent in November 2023 (Figure 5). This is not surprising given the significant recent developments such as the appreciation of the Kenya shilling relative to the US dollar, downward adjustment of pump prices by EPRA, and the outcome of the October-December 2023 short rain season which had a positive impact on agricultural production.

**Figure 5: Inflation Expectations (Percent of Respondents)**

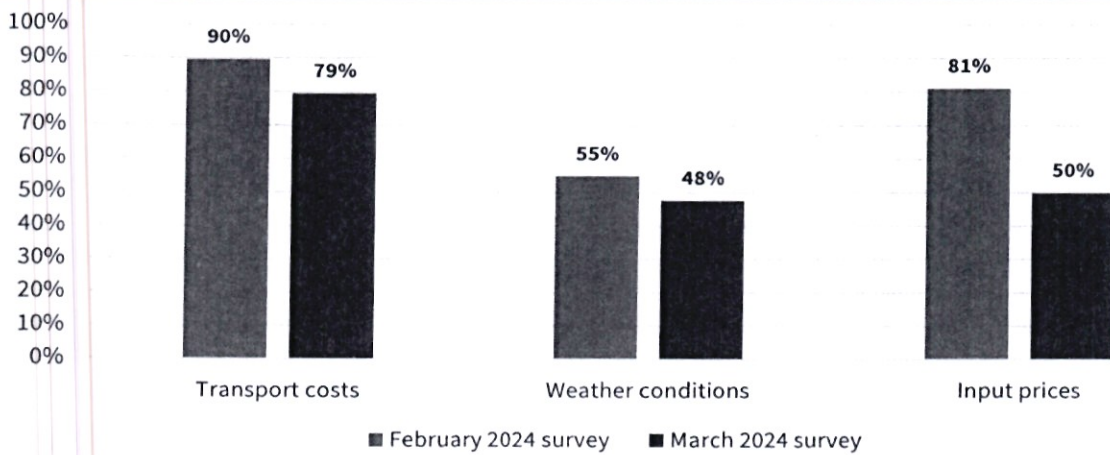


### 3.3 Factors affecting Retail and Wholesale Prices

The survey also sought to establish the factors affecting wholesale and retail prices of select food items (Figure 6). Transport costs, input costs and weather conditions were noted to be the key factors impacting both retail and wholesale prices (Figure

17 - Annex). A key outcome of the March 2024 survey is the reduction in the proportion of respondents who reported transport costs as a key factor contributing to increases in prices. This could be attributed to the sustained reductions in pump prices by EPRA since December 2023, with a significant reduction witnessed in March 2024.

**Figure 6: Factors Affecting Retail Prices (Percent of Respondents)**



### 3.4 Analysis of output

This section describes the outcomes of the agriculture survey in terms of changes in actual output and acreage, and farmers' expectations regarding the same. This information is useful in shedding light on the direction of agricultural activity and is important given the direct and indirect impact of the agriculture sector on overall economic performance, as well as potential pressures on overall inflation mainly through food inflation.

#### 3.4.1 Output performance across food crops

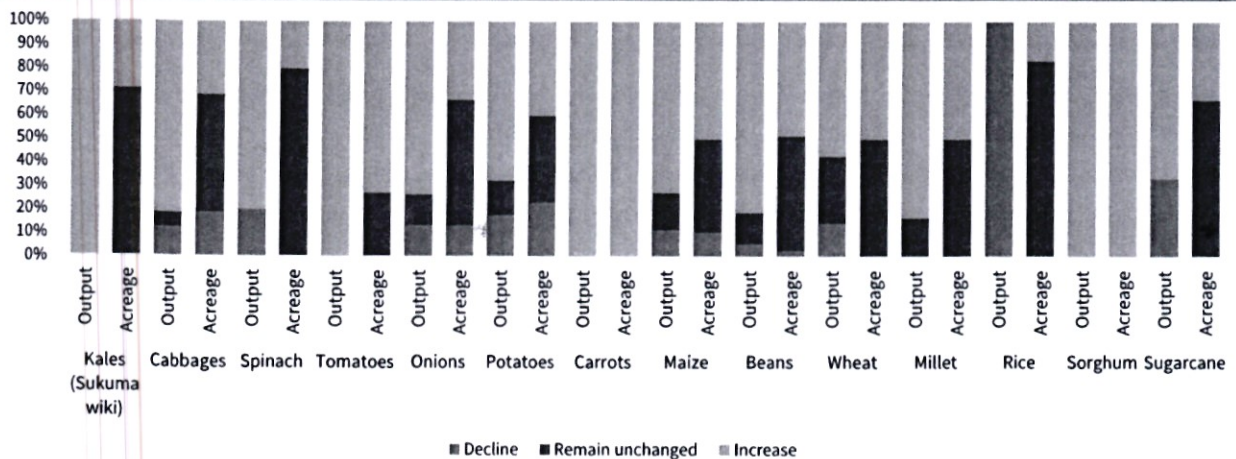
Sampled farmers observed that output and acreage of most crops increased notably in the March 2024, largely driven by the above average rainfall that was experienced between October 2023 and January 2024, and the continued availability of affordable inputs. There were,

however, a few crops whose output was reported to have declined, notably beans, rice, and cabbages. These crops are highly sensitive to excessive rainfall.

#### 3.4.2 Expectations about output and acreage

With respect to farmers' expectations about likely changes in output and acreage in the next harvest, most farmers expected the acreage under crop production to either increase or remain unchanged. Similarly, majority of farmers expected the supply of most food items to increase or remain the same on account of expected favourable weather conditions (Figure 7).

**Figure 7: Output and Acreage Expectations - March 2024 survey (Percent of Respondents)**



Farmers indicated that crop acreage was heavily influenced by several factors such as the expected weather conditions, economic outlook, and the expected rate of return from the specific crop. Several farmers indicated that proper timing in issuance of subsidized fertilizer and the quality of fertilizer accessed were important factors that support increased acreage.

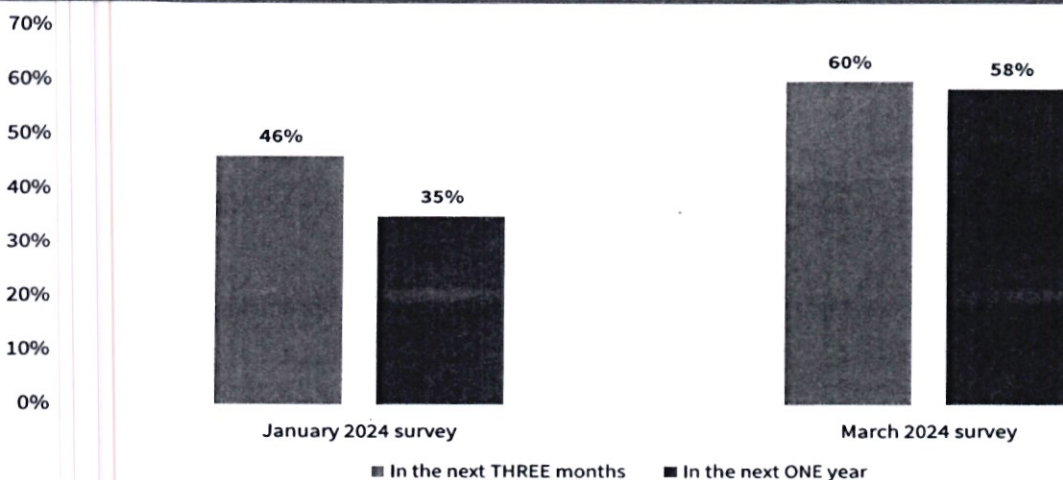
### 3.5 Expectations about overall economic performance

Respondents were asked to express their views about how they expect the overall economy to perform in the next one quarter and the next one year. A notable finding was that optimism about economic performance continues to improve. According to the March 2024 survey, respondents who expected economic performance to remain unchanged or improve in the next three months increased to 60 percent from 46 percent in the January 2024 survey. Optimism improved substantially with respect to expected economic performance in the next one year where the share of respondents expecting economic performance to improve increased

to 58 percent in the March 2024 survey from 35 percent in the January 2024 survey (**Figure 8**). The improvement in optimism reflects the positive impact of favourable weather conditions on actual and expected performance of agriculture in 2024. The favourable rainfall outcomes in 2023 and the expected favourable March–May 2024 long rain season underscored the optimism on agriculture performance and overall economic activity.

Nevertheless, some respondents expressed their reservations about the potential adverse impact of recent developments on the economy. These include heightened global geopolitical tensions which could have negative spill over effects on the Kenyan economy, as the shipping disruptions in the Red Sea and Suez Canal may undermine supply chains and lead to increased shipping costs. Other respondents expressed fears about the uncertainty surrounding global oil prices which have been gradually increasing. Some farmers were also concerned about the impact the value of the Kenya shilling would have on inflation and overall economic performance if the recent appreciation of the Kenyan shilling is not sustained.

**Figure 8: Optimism about economic performance (Percent)**



### 3.6 Factors affecting agricultural production

For further information about the dynamics of the performance of the agriculture sector, the March 2024 survey asked respondents to indicate the most critical factors that determine production. This question was meant to gauge the relative role of factors such as transport costs, weather conditions, input prices and labour costs, among other. Analysis of responses shows continued dominance of four

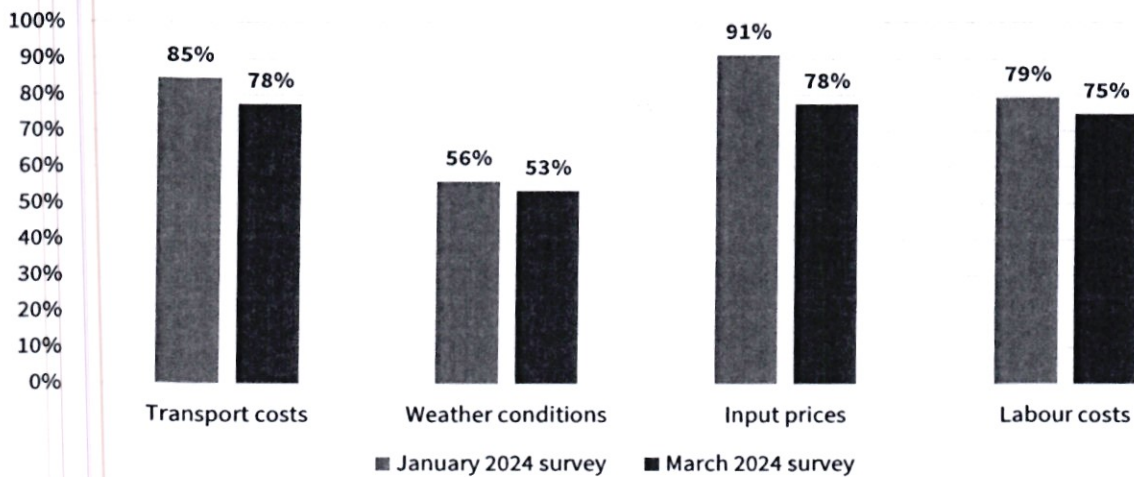
factors, namely, transport costs, weather conditions, input prices and labour costs (**Figure 9**).

A notable result is that the share of farmers citing all the four factors as key determinants of output declined in March 2024 compared to January 2024. For instance, the proportion indicating transport costs to be a challenge reduced to 78 percent in March 2024, from 85 percent in January 2024. This reduction could reflect the relatively lower fuel

prices in March 2024 compared to January 2024. The impact of weather conditions as an obstacle to production also declined slightly in March 2024 to 53 percent from 56 percent implying that the weather conditions in March 2024 were viewed as being supportive of production, compared to the situation

in January 2024 which was characterized by El Nino rains. Similarly, the impact of labour was moderate in March 2024 largely reflecting the seasonal nature of labour demand in the agriculture sector. Demand for labour by farmers tends to be high during land preparation, planting, weeding, and harvesting.

**Figure 9: Factors Affecting Agricultural Production (Percent of Respondents)**

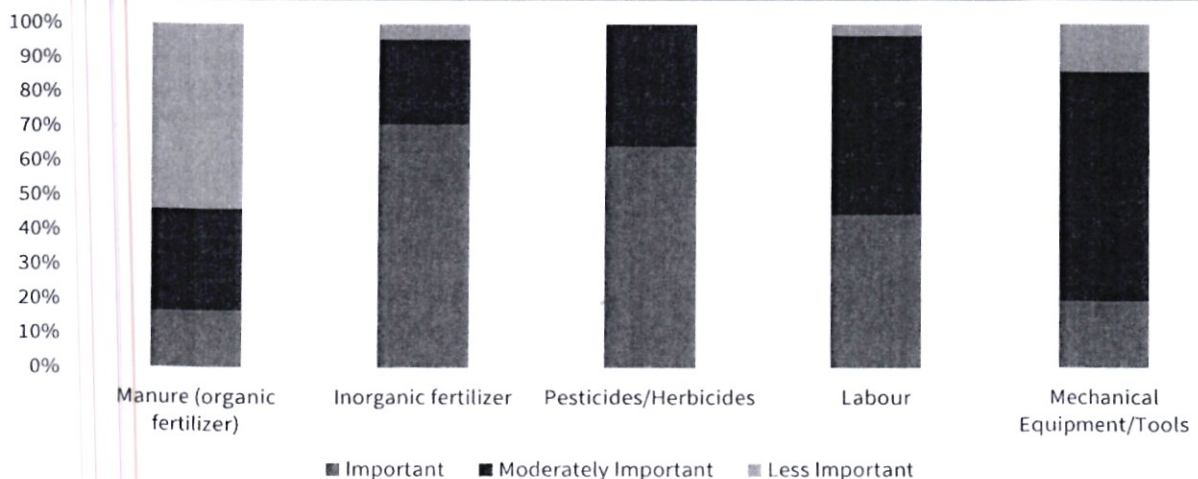


### 3.7 Use of farm inputs in agricultural production

The survey also sought to understand the type of farm inputs used and their relative importance in production. Consistent with findings in previous surveys, inorganic fertilizer and pesticides/herbicides are the two most used inputs. There is also widespread use of labour as well as mechanical equipment – particularly tractors – in land preparation, ploughing

and carrying farm materials. Most farmers indicated that use of fertilizer was necessary to boost production, both during planting and as the crop matured. Use of pesticides and herbicides was also deemed important, since they ensure that crops are protected from pests and diseases, thus preventing output loss. Use of organic manure is not as common as the other inputs (Figure 10).

**Figure 10: Significance of farm inputs in agricultural production**



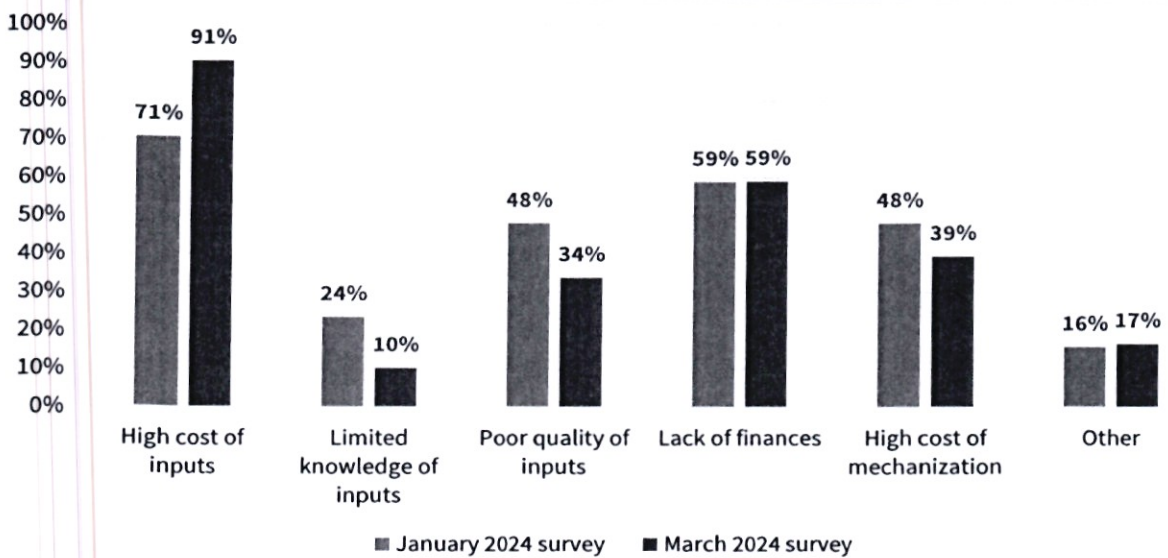
### 3.7.1 Challenges associated with access to farm inputs

Farmers face several barriers in accessing farm inputs, but the most severe is the high costs – especially when it comes to fertilizer, seeds, and pesticide. Other challenges include lack of finance and the high cost of mechanization (Figure 11).

To alleviate the challenge of high cost of farm inputs, the Government rolled out a programme to issue

subsidised fertilizer as well as subsidized tractors for hire at the county level. The Government has also initiated the Hustler Fund to help credit-constrained households access credit on favourable terms, which has enabled farmers access funds to purchase inputs. Although a relatively new initiative, the Hustler Fund enabled up to 10 percent of the sampled farmers to get credit according to results of the November 2023 survey. This share has increased marginally in the March 2024 survey.

**Figure 11: Challenges limiting access to Farm Inputs (Percent of Respondents)**

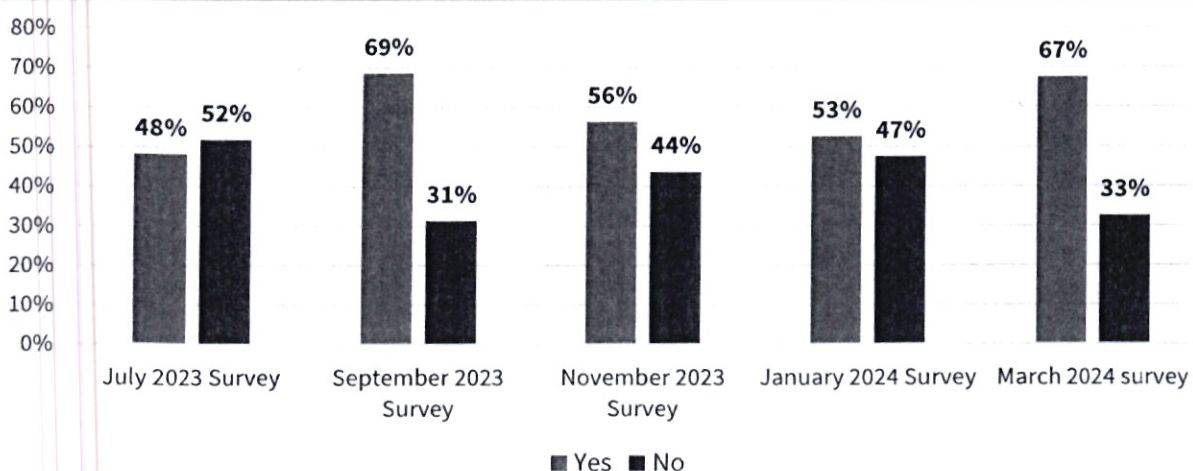


### 3.7.2 Access to government subsidized fertilizer

The proportion of respondents who reported to have accessed government subsidized fertilizer increased substantially to 67 percent in March 2024, from 53 percent in January 2024 survey. The lower percentage in January 2024 mostly reflected seasonal patterns as there are minimal farming activities in January. The proportion of respondents who reported to have accessed the subsidized fertilizer in March 2024 was noted to be close to that recorded in September 2023 survey, which stood at 69 percent, as farmers prepared to take advantage of the October-December 2023 rain season (Figure 12).

As in the previous surveys, the reasons given for not being able to get the subsidised fertilizer were similar in the March 2024 survey. These included lack of information on availability of the subsidized fertilizer, challenges around the logistics of access, and demand outstripping supply. In other instances, priority was given to farmers who were members of a farming group, making it difficult for those who did not belong to any farming group to benefit from the subsidised fertilizer. There were also instances where farmers indicated they were notified through their mobile phones to go to the nearest National Cereals and Produce Board (NCPB) depot to get the fertilizer, but they did not have the means to travel.

**Figure 12: Access to Subsidized Fertilizer (Percent of Respondents)**



### 3.8 Factors affecting marketing/sale of farm produce

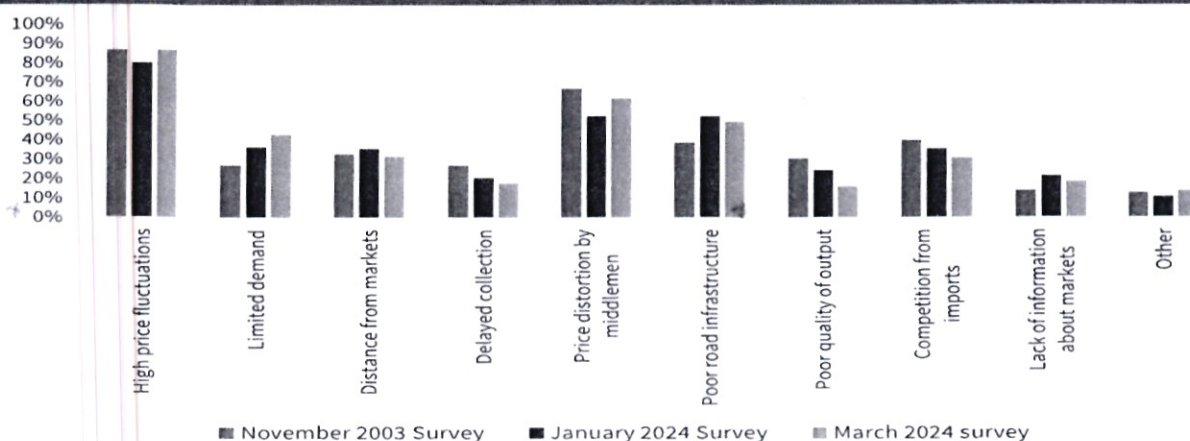
With regard to factors that critically affect marketing/sale of farm produce, sampled farmers expressed similar concerns as in the previous surveys. They cited price fluctuations from season to season, price distortion by middlemen, and poor road infrastructure as the main challenges. The price fluctuations are common because most farmers tend to harvest at the same time thereby flooding markets with farm produce, which tends to drive prices down. During periods of shortages occasioned by factors such as drought or floods, prices tend to increase. The problem of price fluctuations is particularly severe for tomatoes, maize, beans, green grams, cabbages, and carrots.

The problem of price distortion by brokers/middlemen occurs on two fronts. First, the middlemen exert significant influence on buyers

who source for fresh produce directly from farmers. Second, the middlemen provide barriers to entry in the physical markets where farm produce is sold by preventing individual farmers from selling their produce directly to customers. Other challenges cited included the long distance from markets, poor road network, limited demand, and competition from imports (Figure 13).

However, these challenges affect contract farmers less, since the terms and conditions governing the engagement between the farmers and buyers are agreed upon in advance. Additionally, the contract farmers are spared the transport costs because the produce is collected directly from the farm by the buyers. This model still has its own challenges. A sharp dip in prices due to post-harvest flooding of the market can orchestrate huge losses to the farmer because they bear the highest risk. This affects highly weather sensitive crops such as cabbages, potatoes, and tomatoes.

**Figure 13: Factors affecting marketing/sale of farm produce (Percent of Respondents)**

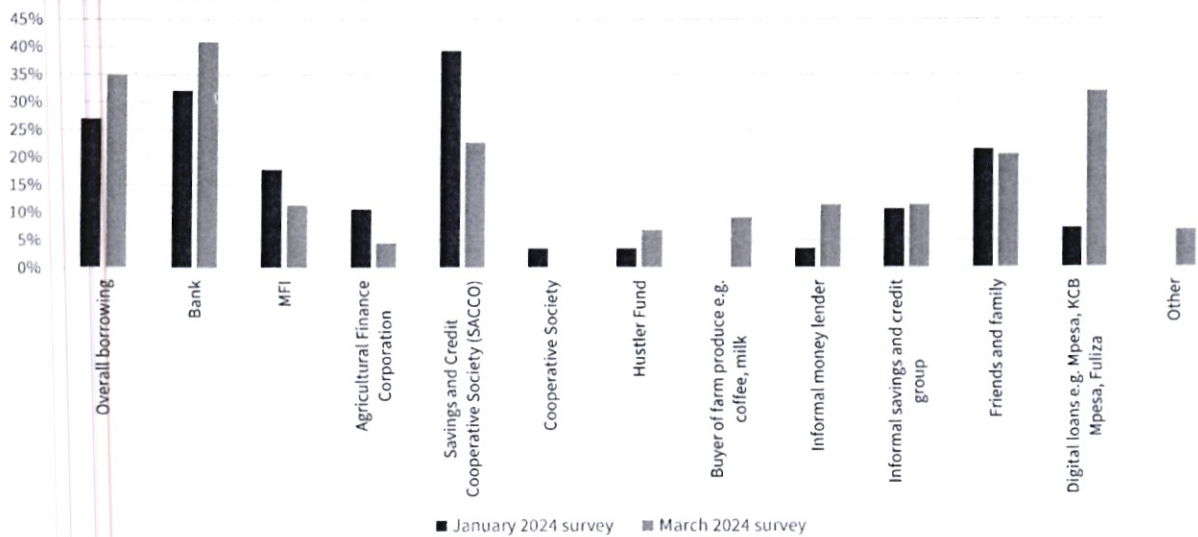


### 3.9 Access to credit facilities in agriculture

There was an increase in loans uptake by farmers in March 2024 relative to January 2024. This is expected given the need for farmers to prepare their farms for planting ahead of the March-May 2024 long rains. Preparation activities include hiring tractors

or labourers to till the farm, purchasing inputs such as seeds, fertiliser, farm implements, tools and equipment, including water generators. The main sources of finance for farmers are banks, SACCOs, and digital loans. The share of farmers who reported to have used the Hustler fund increased in March 2024 (**Figure 14**).

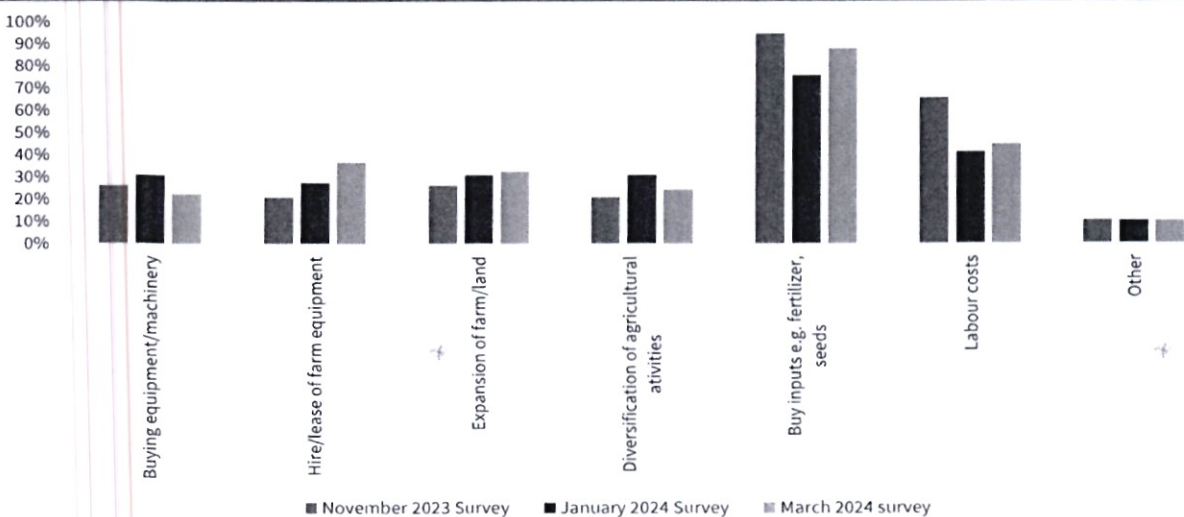
**Figure 14: Proportion of Respondents who Borrowed to Finance Farming by Source**



In terms of usage of funds, a large share of loans was used for buying inputs, followed by labour payments. This result was similar to the observations in the November 2023 and January 2024 surveys (**Figure 15**). Farmers reported having experienced higher costs of inputs in March 2024 relative to January

2024, possibly reflecting heightened demand in March 2024 as farmers prepared to take advantage of the March-May 2024 long rains season. The higher costs in March 2024 may also have reflected the lagged effects of Kenya shilling which depreciated notably in the fourth quarter of 2023.

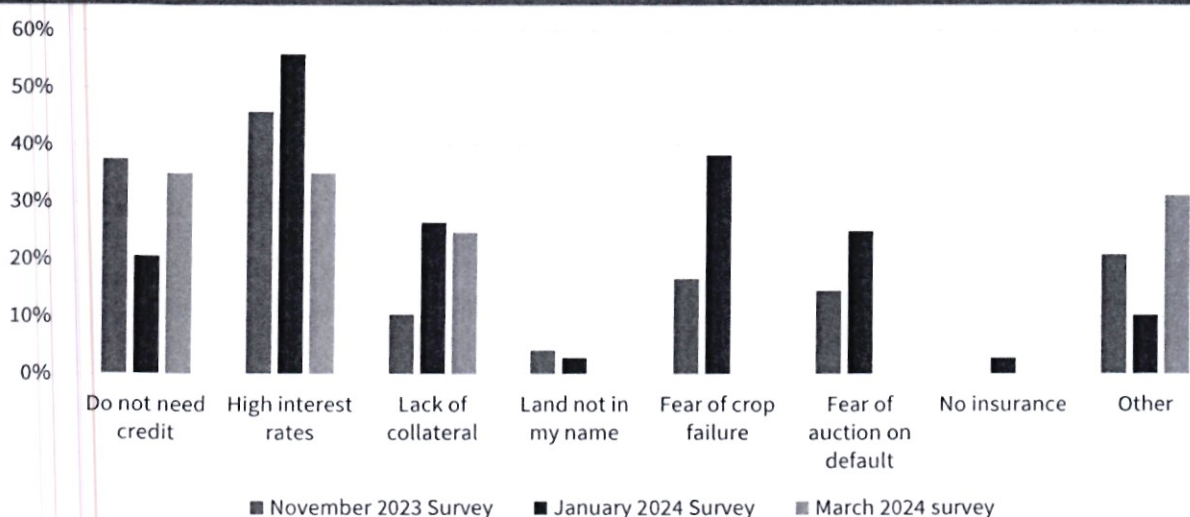
**Figure 15: Purpose of agricultural loans (Percent of Respondents)**



With respect to barriers in accessing finance, several factors were cited as shown in **Figure 16**, with high interest rates recorded as the most prominent barrier. However, many farmers were averse to acquiring any form of credit due to fear of exposure to possible auction upon default. In addition, rain fed agriculture was said to be volatile for one to seek credit, as output is often exposed to the vagaries of weather. Hence, farmers who relied on rainfall as their main source of water were reluctant to acquire loans due to fear of

crop failure. This share is quite substantial at about 76 percent in both the January and March 2024 surveys (**Annex Figure 18**). For farmers who use irrigation, their reluctance was premised on significant price fluctuations which make their incomes unstable even in periods of good harvest. Some farmers also cited lack of collateral as a deterrent to seeking loans especially in cases where farms were leased.

**Figure 16: Barriers to credit among farmers (Percent of Respondents)**



#### 4. VIEWS ON HOW TO IMPROVE THE AGRICULTURE SECTOR

The Survey sought views from farmers on how to improve agricultural production. These views differed significantly depending on the region as well as the type crop. However, there were cross cutting suggestions. For instance, most farmers emphasized the need for water conservation through construction of dams, water pans and boreholes; reduction of farm input costs through measures such as subsidies. The government has been providing subsidised fertilizer and, in some instances, free seeds to farmers to alleviate the cost burden borne by farmers in accessing inputs. Another suggestion was for the government to stabilize prices, for instance, through NCPB purchasing maize at a price that covers production costs.

To address the problem of fake seeds, some farmers suggested that the government should come up with strict measures to ensure individuals do not capitalize on limited farmer information to

supply them with low quality or fake inputs. Other farmers recommended enhanced mechanization of agriculture through subsidizing farm equipment, including hiring of tractors especially during land preparation.

Moreover, there were suggestions that the government should boost extension services by supplying more agronomists to assist farmers with relevant information in order to ensure farmers follow appropriate farming procedures, such as on optimal crop spacing, crop rotation and how to minimise post-harvest losses.

## 5. CONCLUSION

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This Agriculture Sector Survey report summarizes findings from the March 2024 survey conducted from March 11 - 15, 2024. The main objective of the survey was to obtain indicative information on recent trends and market expectations of prices and output of key agricultural commodities for the purpose of informing monetary policy.

As with previous surveys of the agriculture sector, the survey focused on gathering information on prices of key agricultural commodities in select retail and wholesale markets, agricultural output and acreage as well as output expectations from sampled farms. The survey also sought information on factors affecting agricultural production, marketing and sale of farm produce; access to farm inputs and credit facilities as well as proposals on how to improve agricultural production.

The survey drew 247 respondents from wholesale traders, retailers, and farmers in select regions across the country (Nairobi Metropolitan area, and neighbouring counties including Kiambu, Kajiado and Machakos, Naivasha area, Gilgil Nakuru, Narok, Bomet, Kericho Kisumu, Mombasa, Kisii, Eldoret, Kitale, Nyandarua, Nyahururu, Mwea, Machakos, Isebania, Meru, Nyeri, Isiolo, Oloitoktok, Namanga, Makueni and Molo).

The key findings from the January 2024 survey were as follows:

- There was a general decline in prices of key food items in March compared to February 2024.
- Most respondents expect food prices to decline in April 2024 and in the next three months.
- Majority of respondents expect inflation to either remain unchanged or decline both in the next one month and three months ahead.
- Weather conditions, transport and input costs continue to impact both output and price of key food items. However, the share of farmers citing transport costs, weather conditions and input costs as major challenges has moderated relative to the survey in January 2024.

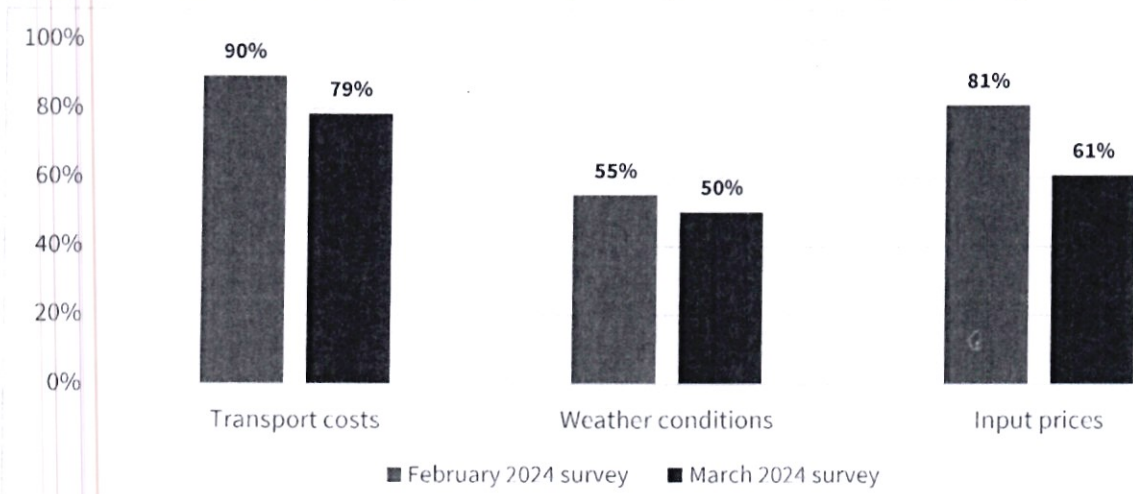
- Approximately 70 percent of sampled farmers reported to have benefitted from the subsidized fertilizer, a key input in crop production.
- Optimism about the expected performance of the economy remains high both in the next quarter and one year ahead. This is explained by several factors including the recent appreciation of the Kenya shilling against the US dollar; realized and expected continued good performance of the agriculture sector, and downward adjustment in fuel prices by EPRA in mid December 2023, January, February, and March, 2024.
- Despite the encouraging outcomes on actual and expected evolution of inflation and economic performance, farmers were concerned about the sustainability of the recent appreciation of the Kenya shilling; whether March-May 2024 long rains will be adequate; and high interest rates which undermine financing agricultural activities.
- Suggestions to improve agricultural production include the need to preserve water through construction of dams and water pans; address the high cost of inputs and create a mechanism to stabilise prices of agricultural commodities which are characterised by swings from time to time.

Based on the findings of this survey, the key recommendations mirror those contained in previous reports of the Agriculture Sector Survey:

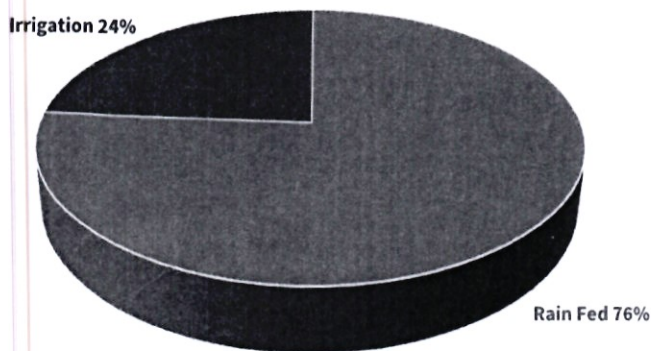
- i) Address the high fuel prices which have a direct impact on both the cost of inputs and prices of agricultural commodities.
- ii) Continue to subsidise inputs and enhance agricultural extension services.
- iii) Intensify the supply of rain harvesting and storage equipment as well as construction of dams, boreholes, and water pans.
- iv) Deepen access to affordable credit facilities.

## ANNEXES

**Figure 17: Factors affecting wholesale prices (Percent of Respondents)**



**Figure 18: Main water source for farming (Percent of Respondents)**





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**Central Bank of Kenya**

*Haile Selassie Avenue P.O. Box 60000 - 00200 Nairobi | Tel: (+254) 20 - 286 0000 / 286 1000 / 286 3000*

This is the Exhibit marked "FML-5" referred to in the annexed affidavit of declaration of Franklin Mithika Linturi. Sworn before me this 6th day of May 2024 in Nairobi in the Republic of Kenya



**GITONGI M'IMBIINE**  
Commissioner for Oaths  
ADVOCATE AND COMMISSIONER FOR OATHS AND CPS  
P. O. Box 12618 - 00100, NAIROBI  
MOBILE: 011 254 2009910  
DATE: 06/05/2024 SIGN

**MINISTRY OF AGRICULTURE AND LIVESTOCK DEVELOPMENT**  
**PROGRESS REPORT ON THE FERTILIZER INPUT SUBSIDY PROGRAMME**

**1. Introduction**

The Government through the Bottom-Up Economic Transformation Agenda (BETA) committed to support farmers with subsidized fertilizers and other inputs to increase production and productivity.

During the financial year 2023/24, the government through the Ministry of Agriculture and Livestock Development has committed to avail 12.5 M x50kg bags of subsidized fertilizers for various enterprises in the Country.

The National Fertilizer Subsidy Program is implemented through the National Cereals and Produce Board and is in charge of procurement and distribution through their Depots spread throughout the country and selling centres closer to farmers that have been identified with the support of the respective County Governments.

Beneficiary farmers targeted are those registered using the Kenya Integrated Agriculture Information Management System (KIAMIS) where 5.930M farmers have registered.

## 2. Progress

Fertilizer distribution has been done to 42 counties.

Fertilizer distribution during the October, November and December (OND) for short rains season, was a total of 2,350,788x50Kgs bags (117,539.4 MT) sold to 460,996 farmers.

### 2.1 Distribution of the 2024 Long Rains Fertilizer Programme

The Board initiated a procurement process of the required fertilizers and in January 2024, the actual distribution of the fertilizer started to counties that start early planting namely Narok, Nyamira, Kisii and Bomet Counties

Between April 2023 and April 2024, the Board had cumulatively distributed **5,349,829 bags** of assorted fertilizers which is a **175-percentage** increment compared to the same period previous year.

To date, **1,008,762 farmers** have been served across **42 counties** since the fertilizer digital programme started. The status of the 2024 long rains fertilizer implementation is as tabulated below;

S No.	Item	As at April 2023	As at April 2024
1.	Number of bags of Fertilizer redeemed	1,943,023	2,929,615
2.	Number of farmers served	270,127	538,061
3.	Disbursement Counties	28	42
4.	Depot Stock balances (50kg bags)	451,783	474,945
5.	Number of farmers registered	2.332M	5.93M
6.	Value transacted (Kshs)	6.84B	15.07B
7.	Total e-vouchers issued	2,246,100	19.587M
8.	E-vouchers redeemed to date	276,798	1.602M

Demand for planting fertilizer is subsiding and therefore the demand has shifted to top dressing fertilizer. Distribution of the 2024 fertilizer programme is expected to continue up to the end of June 2024.

For the long-rains season 2024 ie March-April-May distribution is going on and as of 21<sup>st</sup> April 2024; 2, 929,615x 50 Kgs bags (146,480.75 MT) of assorted fertilizers had been sold to 538,061 farmers (Annex 1).

Redemptions per value chain March-April-May;

- Maize Planting 1,754,245 x50kg Bags,
- Maize Top Dressing 1,502,119 x 50kg Bags,
- Beans planting fertilizer 156,107 x 50kg bags
- Sunflower planting 1,278 x 50kg bags
- Coffee planting 24,339 x 50kg bags

- Coffee Top Dressing 55,939 Bags,
- Sugarcane Top dressing 34,403 x 50kg bags
- Tea top dressing fertilizer 23,139 x 50kg bags
- Wheat 45,742 x 50kg bags
- Potato Planting 26,597 Bags,
- Potato Top Dressing 33,172 Bags,
- Sugarcane Planting 36,536 Bags,
- Rice 45,583 bags,
- Vegetable 563 bags

## 2.2 Balance/Available fertilizer stocks

As at 21st April 2024, available fertilizer stocks are 474,945 x 50kg bags in various depots.

Breakdown of available Stock:

KNTC CAN	220,205 bags	Fomi Kuzia Top dressing	18,357 bags
ETG Kynomaizec	86,451 bags	Fomi Otesha Planting	14,906 bags
ETG Falcon Urea	80,158 bags	ETG Falcon Sulphate of Ammonium	11,990 bags
Yara CAN,	59,905 bag	Yara Sulfan	3,055 bags
ETG Falcon CAN	45,901 bags	Triple Super Phosphate	2,662 bags
Yara Microp	40,912 bags	KNTC Urea	2,257 bags
KNTC NPK 17:17:17	40,391 bags	KNTC NPK 23:23:0	698 bags
Yara Topdressing Microp	28,460 bags	Yara Amidas	36 bags
ETG Falcon NPK 23:23:0	27,112 bags		
Yara Miller Power Microp	20,261 bags		

### 3. Challenges and action

#### 1. Supply of substandard fertilizers

Fertilizer Kel green NPK 10:26:10 supplied by KEL Chemicals Company were found to be substandard upon sampling and analysis. The batch comprising of 69,070 x 50kg bags were affected and stock not yet issued out have since been recalled. Farmers who have registered complaint as at 19<sup>th</sup> April 2024 are 1,252 and 7,913 x 50kg bags have been replaced with equivalent initially paid for.

#### 2. Timely availability of fertilizers

There were delays on importation of requisite fertilizer but to-date supplies are available. Last mile distribution has been enhanced through arrangements with county governments by opening points of sale closer to the farmer.



Hon. Mithika Linturi, EGH  
**CABIENT SECRETARY**

# Annex 1; Summary of Redemption per County

## Redemption per County

County	Total Bags Redeemed	Unique Farmers Redeemed	Farmer Payments
Raringo	73915	14572	185171360
Buruel	36382	14926	91018070
Bungoma	204018	58355	511163250
Busia	17397	6100	43492500
Elgeyo	90673	11414	230045790
Embu	51251	13982	128229610
Garissa	65	13	162500
Iloma	19790	6530	49498000
Isiolo	875	327	2187500
Kajiado	11721	1358	29315950
Kakamega	89838	22617	226423790
Kericho	123395	36745	311687430
Kiambu	21084	6363	52714760
Kilifi	6016	1956	15115000
Kirinyaga	54949	11001	138055330
Kisii	71740	26411	179587580
Kisumu	19309	5345	48520710
Kitui	6142	1906	15355000
Kwale	3597	1177	8992500
Lakipta	47575	5446	119427780
Lamu	667	201	1667500
Machakos	24305	9221	60762500
Makueni	24740	8225	61850000
Morogoto	73400	15633	183516660
Migori	115270	17911	288614440
Murang'a	35180	13179	88701760
Muran'ga	4811	1681	12027500
Nakuru	279544	44386	710168740

## Redemption per County (Con't)

Nandi	178975	34859	454023150
Narok	238744	14231	546832200
Nyamira	22414	7426	56084930
Nyandarua	72435	16457	181230650
Nyeri	32604	11772	81517140
Samburu	1621	367	4052500
Siaya	13995	5976	34997500
Taita	2894	911	7235000
Tana	4112	717	10285950
Tharaka	18775	5916	46947500
Trans	235148	18915	769985440
Uasin	496470	41131	1285673610
Vihiga	33724	17597	84310000
West	40237	4802	100664400
Grand Total	2930149	538061	7457327350



FML-6  
 This is the Exhibit marked  
 referred to in the annexed affidavit of  
 Franklin Mithika Linturi  
 Sworn before me this 6th  
 day of May 2024 at Nairobi  
 In the Republic of Kenya

M'LIMBINE  
 Commissioner for Oaths  
 P. O. Box 12618  
 Nairobi  
 06/05/2024

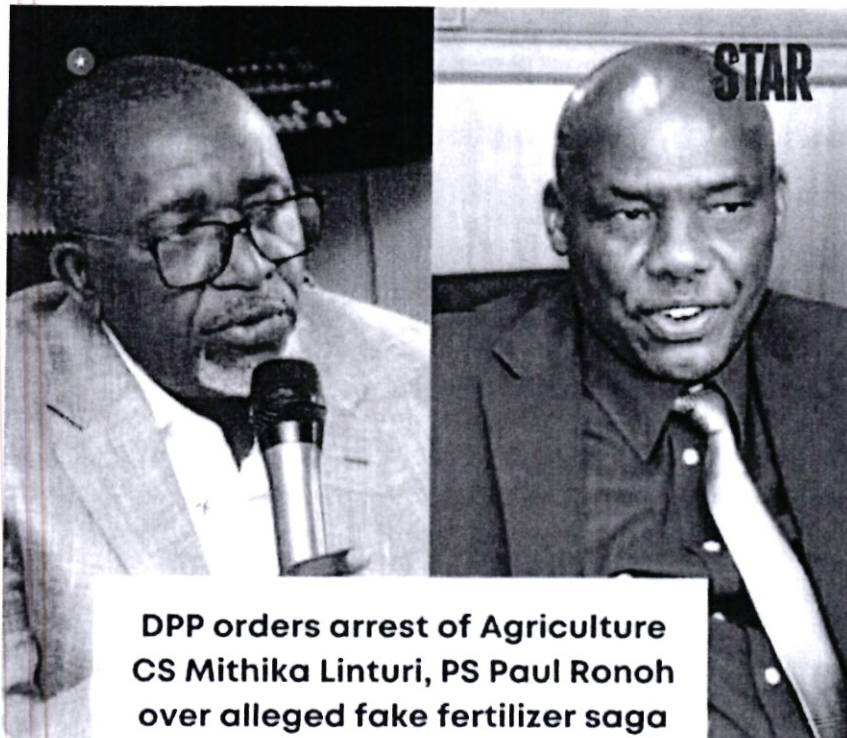
Detectives were Friday looking for Agriculture Cabinet Secretary Mithika Linturi and his Principal Secretary Paul Ronoh for arrest and prosecution.

This is after the Office of the Director of Public Prosecution approved charges for the two among others.

Officials said the two and five other senior officials including those from the National Cereals and Produce Board (NCPB) had purportedly been summoned for processing.

"We are looking for them. They were supposed to come here after being summoned but we are now looking for them," said an official aware of the issue.

Read more: <https://bit.ly/3UodVzk>



**DPP orders arrest of Agriculture CS Mithika Linturi, PS Paul Ronoh over alleged fake fertilizer saga**

Write a comment...

This is the Exhibit marked "FML-7" referred to in the annexed affidavit of Franklin Mithika Linturi

Sworn before me this 6th day of May 2024 at Nairobi in the Republic of Kenya

DATE 06/05/2024 SIGN

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

*(Coram: Koome, CJ & P, Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)*

**PETITION NO.11 (E008) OF 2022**

**-BETWEEN-**

**HON. MIKE MBUVI SONKO..... APPELLANT**

**-AND-**

**THE CLERK,**

**COUNTY ASSEMBLY OF NAIROBI CITY .....1<sup>ST</sup> RESPONDENT**

**THE SPEAKER,**

**NAIROBI CITY COUNTY ASSEMBLY .....2<sup>ND</sup> RESPONDENT**

**THE NAIROBI CITY COUNTY ASSEMBLY.....3<sup>RD</sup> RESPONDENT**

**THE CLERK OF THE SENATE OF KENYA.....4<sup>TH</sup> RESPONDENT**

**THE SPEAKER OF THE SENATE OF KENYA.....5<sup>TH</sup> RESPONDENT**

**THE SENATE OF KENYA.....6<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....7<sup>TH</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION.....8<sup>TH</sup> RESPONDENT**

**THE ASSUMPTION OF THE OFFICE OF THE COUNTY**

**GOVERNOR COMMITTEE NAIROBI**

**CITY COUNTY.....9<sup>TH</sup> RESPONDENT**

**HON. BENSON MUTURA, THE ACTING GOVERNOR,**

**NAIROBI CITY COUNTY.....10<sup>TH</sup> RESPONDENT**

**ANN KANANU MWENDA, THE DEPUTY GOVERNOR,**

**NAIROBI CITY COUNTY.....11<sup>TH</sup> RESPONDENT**

**OKIYA OKOITI OMTATAH.....12<sup>TH</sup> RESPONDENT**

*(Being an Appeal from the Judgment of the Court of Appeal (Nambuye, Okwengu & Laibuta, J.J.A.) in Civil Appeal No. E425 of 2021 at Nairobi delivered on 4<sup>th</sup> March, 2022*

## **REASONS FOR THE JUDGMENT OF THE COURT**

*(Pursuant to Rule 28(2) of the Supreme Court Rules, 2020)*

### **A. INTRODUCTION**

**[1]** Impeachment or removal from public office in the context of the Constitution of Kenya, 2010 is about integrity in leadership. To understand the past is to prepare for the future because lessons from human history are full of insights into the nature of human experience and the culture of man. History does not have to repeat itself, but it will, if we fail to learn from it.

**[2]** Based on the facts and circumstances of this case, there are lessons to be drawn from great leaders in the days of old who quickly ascended to leadership with such promise of exceptional success, only to disastrously fall into eternal disgrace. King Saul, who was technically Israel's first King, has been described as a tragic figure. Based on his reign of power, he has been given as a perfect example of how leadership can destroy a person who, by his or her character, has not been prepared for it. Though he was wealthy and charismatic, King Saul did not have integrity, humility, and a servant's heart.

**[3]** The story of Solomon is another such powerful story that demonstrates that even the wisest among us can lose their way as leaders; that leadership should never be about the quest for wealth, unbridled fame and power. From these and many other examples in history, it should be obvious that there exists a relationship between leadership, accountability, and integrity.

**[4]** On 15<sup>th</sup> July, 2022, when the Court delivered its Judgment in this appeal, it reiterated the terms of Chapter Six of the Constitution to the effect, it was not enacted in vain or for cosmetic reasons; that the authority assigned to a State officer is a public trust to be exercised in a manner that demonstrates respect for the people; brings honour to the nation and dignity to the office; and promotes public confidence in the integrity of the office. It vests in the State officer the responsibility to serve the people, rather than the power to rule them. The standard

for leadership is premised on the foundation that only those who, by their words and deeds, have demonstrated commitment to good governance, transparency and accountability should be accorded the honour to lead and serve the people.

**[5]** The Constitution creates a distinctive category of members of society called State officers, who are regarded and idolized as special pedigree of leaders in the society; and to whom much is given, and therefore much is required and expected.

They include;

(a) President;

(b) Deputy President;

(c) Cabinet Secretary;

(d) Member of Parliament;

(e) Judges and Magistrates;

(f) Member of a commission to which Chapter Fifteen applies;

(h) Member of a county assembly, Governor or Deputy Governor of a county, or other member of the executive committee of a county government;

(i) Attorney-General;

(j) Director of Public Prosecutions;

(k) Secretary to the Cabinet;

(l) Principal Secretary;

(m) Chief of the Kenya Defence Forces;

(n) Commander of a service of the Kenya Defence Forces;

(o) Director-General of the National Intelligence Service;

(p) Inspector-General, and the Deputy Inspectors-General, of the National Police Service. See **Article 260 of the Constitution**.

[6] To emphasize the critical space occupied by State officers, the Constitution makes special requirements for them to embody the spirit and values of the Constitution. For instance, they must conduct themselves with integrity, whether in public or official life, in private life, or in association with other persons. They must behave in a manner that avoids conflict between personal interests and public or official duties and, must never do anything that demeans the office. See **Article 75 of the Constitution**.

[7] On financial probity, the Constitution restricts what a State officer can receive as a gift or donation. Similarly, a State officer cannot maintain a bank account outside Kenya unless permitted by law; seek or accept a personal loan or benefit in circumstances that are likely to compromise their integrity. A full-time State officer cannot participate in any other gainful employment, while an appointed State officer cannot hold office in a political party.

[8] Some of these restrictions on State officers follow them into retirement. For instance, a retired State officer, who is receiving a pension from public funds, cannot hold more than two concurrent remunerative positions in a company owned or controlled by the State; or in a State organ. See **Articles 76 and 77**.

[9] To demonstrate the seriousness with which these basic leadership restrictions are to be taken, Article 75(2) of the Constitution provides that the contravention of those terms by a State officer will attract disciplinary proceedings, including dismissal or removal from office. Further, a person who has been dismissed or otherwise removed from office “**is disqualified from holding any other State office**”.

[10] As a further commitment to ensuring integrity in leadership, the Constitution also creates an Ethics and Anti- Corruption Commission to enforce the above provisions. It commands the enactment of legislation on leadership and integrity, the Leadership and Integrity Act, 2012, which was enacted for the effective administration of Chapter Six of the Constitution. It obliges a State officer to respect the values and principles of the Constitution. The Act establishes the

General Leadership and Integrity Code, which is a code of conduct applicable to all State officers. In addition to the said Code, the Act requires each public entity to prescribe a specific leadership and integrity code for the State officers in those entities.

**[11]** Before assuming office, a State officer must, by Article 74, take and subscribe the oath or affirmation of office, and swear or affirm before God, and the people, to obey, preserve, protect and defend the Constitution and all other laws of the Republic; and to **“protect and uphold the sovereignty, integrity and dignity of the people of Kenya”**. Specific to this case, the Assumption of the Office of Governor Act, 2019 requires the Governor and the Deputy Governor to commit in an oath or affirmation to diligently discharge the duties of the office and perform the functions in the said offices without fear, favour, affection or ill-will. The oaths to which State officers subscribe are sacred and not mere formalities. The words written in them bind the officers to be accountable to the people and to uphold the Constitution.

**[12]** One is disqualified for election as member of Parliament or member of County Assembly under Articles 99 and 193; respectively, if one is an undischarged bankrupt; is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six.

**[13]** The foregoing explanation, we believe, is a demonstration of painstaking efforts by the framers to entrench in the supreme law integrity in leadership; because citizens are entitled to expect that public officials, both elected and non-elected, ought to behave according to the highest standards of ethical behaviour.

**[14]** “Impeachment”, “recall” and “removal” are therefore the Constitution's final answer, a safety valve, to a State officer or a public servant who mistakes himself for a monarch. As they say, power corrupts, and the framers of the Constitution

being cognizant of this fact, built guardrails against autocratic exercise of power by the leaders.

**[15]** Ethics of resignation from or vacation of office is a rare trait in leadership in our society. Leaders “would rather die” than take responsibility. This is in contrast with, for example, the United Kingdom or Japan, where public resignation is relatively common and where the political culture celebrates the ethical independence of public servants. Resigning from office or what is famously referred to in this country as “stepping aside” is a critical ethical but personal decision; an exhibition of personal courage. Yet, resignation or stepping aside, where there are credible reasons for a public officer to take ministerial or personal responsibility, remains one of the basic moral resources of integrity because it buttresses responsibility and supports accountability.

**[16]** Although the Constitution uses the term “impeachment” to describe the process of removal of the President and Deputy President under Articles 146 and 150, and the term “removed” or “removal” for a county Governor and other State officers, we do not think the word “impeachment” is a term of art. Whether one is removed or impeached, the outcome is the same, though the process may not be exactly the same. In this appeal, therefore, we shall use “removal” or “remove” or “impeachment” or “impeach” interchangeably. The other constitutional remedy to address misconduct in the public office is Article 104 (1), which gives the electorate the right to “recall”, before the end of the term, their member of any of the two Houses of Parliament.

**[17]** The removal process of a Governor is, therefore, part of the oversight mandate of County Assembly and the Senate. The process is intended to serve as a reminder to the holders of office of Governor that the immense power vested in that office is to be exercised for the benefit of the people and is not a license for lawlessness.

**[18]** It must, however, be stressed for avoidance of doubt, that the power of impeachment, removal or recall is not one expected to be in constant or frequent exercise. It is only in the face of credible evidence of extraordinary wrongdoing,

that the conduct of a State officer will be investigated and even then, only upon sufficient proof of the allegations that impeachment, removal or a recall would be warranted.

**[19]** Chapter Six, in our view, is the soul of the Constitution of Kenya. Without integrity in leadership, the Constitution itself will be in utmost peril. The people, through the Constitution, have ordained integrity as a value and principle of governance, dedicating to it a whole chapter in the Constitution and, at the same time, they have determined what level of integrity is needed in leadership. A State officer may be impeached or removed from office for, among other transgressions, gross violation of the Constitution or of any other law; commission of a crime; abuse of office; gross misconduct; and violation of the Constitution or any other law.

**[20]** It is perhaps out of this realization that the appellant's impeachment Motion was founded; the need to enforce Chapter Six and Article 10 of the Constitution. More specifically, the Motion drew attention to the fact that;

**“...WHEREAS Chapter Six of the Constitution, the Leadership and Integrity Act, 2012 and the Public Officer Ethics Act provide for, primarily, the conduct of State and Public Officers, and the accountable exercise of power and responsibility assigned to State and public officers;**

**AND WHEREAS Article 10 as read together with Article 73 of the Constitution and Section 3 of the Leadership and Integrity Act, 2012 provides for the respect of the rule of law, good governance, accountability and transparency of State Officers for decisions and actions as key guiding principles of leadership; ...”**

## **B. BACKGROUND**

[21] The appellant was elected the Governor of Nairobi City County during the general election held on 8<sup>th</sup> August, 2017. A motion to remove him from office was presented and moved before the 3<sup>rd</sup> respondent (the County Assembly) on 25<sup>th</sup> November, 2020 by Hon. Michael Okumu Ogada, the Member of the County Assembly for Embakasi Ward. In the Motion, the Member alleged that the appellant had grossly violated the Constitution and other laws, namely, the County Governments Act, 2012, Public Procurement and Disposal Act, 2015 and the Public Finance Management Act, 2012. Secondly, that the appellant had abused the office of Governor by violating Article 75 of the Constitution as read with Sections 11 and 13 of the Leadership and Integrity Act. Thirdly, it was alleged that the appellant was guilty of gross misconduct for violating Article 73 of the Constitution by engaging in conducts that do not bring honour to the nation and dignity to the office. Finally, the Member was convinced that there were serious reasons to believe that the appellant had committed various crimes under the Anti-Corruption and Economic Crimes Act in light of the criminal charges he was facing at the Anti-Corruption Court.

[22] The Speaker of the County Assembly, being satisfied that the procedure for initiating the removal of the appellant was proper, served the appellant with the Motion and invited him to file a response and also to appear before the County Assembly on 3<sup>rd</sup> December, 2020 when the Motion was scheduled for consideration by the Assembly.

## **C. LITIGATION HISTORY AND PROCEEDINGS LEADING TO REMOVAL**

### ***i) Before the Employment and Labour Relations Court***

[23] The appellant first approached the Employment and Labour Relations Court in **Petition No. 35 of 2020; H.E. Governor Mike Mbuvi v. The Nairobi City County Assembly & 6 Others (ELRC No. 35 of 2020)** to challenge the

constitutionality and validity of the Motion. In the meantime, he applied for conservatory orders to stop the County Assembly from considering the Motion. *Nzioki wa Makau, J.* issued conservatory orders on 30<sup>th</sup> November, 2020 in terms of the application until the determination of the interlocutory application on 3<sup>rd</sup> December, 2020.

***ii) Before the County Assembly***

**[24]** Despite this order, and for the reasons we shall return to, on the same date, 3<sup>rd</sup> December, 2020 the Motion was considered by the County Assembly and supported by 88 Members of the County Assembly (MCAs) out of the total of 122. The two thirds threshold required by Standing Order 75(5) of the County Assembly Standing Orders and Section 33(1) of the County Governments Act was thereby attained. As a result, on 4<sup>th</sup> December, 2020 the Speaker of the County Assembly informed the Speaker of the Senate of the resolution by the County Assembly to remove the appellant.

***iii) Before the Senate***

**[25]** In turn, the Speaker of the Senate summoned the Senate which was on recess for a special sitting to consider the Motion. Despite the Senate initially appointing a Select Committee on 9<sup>th</sup> December, 2020 to investigate the proposed removal, the said Select Committee recommended that the Motion be heard by the whole Senate in plenary pursuant to Standing Order 75 of the Senate Standing Orders. A special sitting of the Senate was, as a consequence, scheduled for two days, 16<sup>th</sup> and 17<sup>th</sup> December, 2020. Before that date, on 10<sup>th</sup> December, 2020, the Clerk of the Senate sent an invitation to both the appellant and the County Assembly to appear before the Senate on 16<sup>th</sup> December, 2020. By that communication, they were also directed to file necessary responses or documents by 15<sup>th</sup> December, 2020.

**[26]** Apart from filing a response to the allegations against him, the appellant also raised a preliminary objection to the effect that there was no evidence to support the allegations as none was presented to the County Assembly; that contrary to

Standing Order 67(1) of the Nairobi City County Assembly Standing Orders, the mover of the Motion had not affirmed by way of affidavit that the charges and particulars therein were true within his knowledge; and that the MCAs who allegedly appended their signatures in support of the Motion had similarly failed to depose on oath that they did so to confirm the correctness of the charges; that the allegations before the County Assembly were also in court, and were therefore *sub-judice*; that there were conservatory orders issued in **ELRC Petition No. 35 of 2020** prohibiting the County Assembly and the Senate from proceeding with any Motion for removal from office against the appellant; and that there was no evidence of public participation prior to the removal hearing on 3<sup>rd</sup> December, 2020.

[27] Upon considering, *in limine*, the arguments advanced with regard to the preliminary objection, the Speaker of the Senate directed that the same be subsumed and determined within the Motion.

[28] Thereafter, the Senate on 17<sup>th</sup> December, 2020, after a full debate and voting, resolved to remove the appellant from office and issued a gazette notice to that effect. On 21<sup>st</sup> December, 2020, the Speaker of the County Assembly was sworn in as the Acting Governor of Nairobi City County, as the county had for some time been without a deputy Governor.

**iv) Before the High Court**

[29] Dissatisfied by his removal, the appellant filed **High Court Petition No. E425 of 2020, Hon. Mike Mbuvi Sonko v. The Clerk County Assembly of Nairobi & 7 others** while Okiya Okiiti Omtatah (the 12<sup>th</sup> respondent) filed **Nairobi High Court Petition No. E014 of 2021, Okiya Omtatah Okiiti v. Nairobi City County Assembly & 5 Others**, both of which were subsequently consolidated.

[30] Their grievances were that the Clerk and the Speaker of the County Assembly violated Articles 1, 10, 23, 25, 27, 47, 48, 50, 159 and 258 and 259 of the

Constitution, together with Section 14 of the County Governments Act as well as Standing Order No. 67 of County Assembly Standing Orders by approving the Motion which was not verified by evidence or sworn affidavits of the MCAs in support of the same; that the County Assembly did not undertake public participation as required by Articles 10(2)(a), 118(1) and 196 of the Constitution and Sections 94, 95, 100 and 101 of the County Governments Act, and as a result, denied the residents of Nairobi County the opportunity to participate in the appellant's removal as their Governor; that the appellant was not served with sufficient particulars to enable him prepare a reasonable defence; that the County Assembly considered and deliberated on the Motion whilst the conservatory orders in **ELRC Petition No. 35 of 2020** were still in force; and that, on 3<sup>rd</sup> December, 2020 the appellant's counsel, Mr. Ondieki, was denied access into the County Assembly Chambers during the hearing thereby denying the appellant the right to representation and to be heard.

**[31]** Further, the appellant complained that the requisite quorum had not been met during the hearing and voting on 3<sup>rd</sup> December, 2020 as a total of 57 MCAs had travelled to Kwale County and therefore, could not have been physically present during the hearing and voting; that the voting was marred with fraud and illegalities as evinced by affidavits of the 57 MCAs, who maintained that they had not voted in support of the Motion; that contrary to assertions by the Clerk of the County Assembly, voting could not have been conducted both physically and virtually as the Standing Orders did not allow virtual proceedings or even electronic voting.

**[32]** Concerning the proceedings before the Senate, the appellant complained that before accepting the impeachment resolution from the County Assembly, the Senate ought to have evaluated the Assembly proceedings in order to satisfy itself that the law was complied with; that the appellant's Preliminary Objection was improperly dismissed; that the County Assembly was allowed to introduce new evidence before the Senate at the eleventh hour; that the Senate served the

appellant with voluminous evidence on the evening of 15<sup>th</sup> December, 2020 yet he was expected to defend himself the following day, thereby violating his right to fair hearing; that the Senate was biased against him and had a pre-determined outcome; that the Senate violated the Constitution and the law by finding that he was in breach of procurement procedures when he was not an accounting officer and passing a resolution to remove him based on evidence that did not link him with the acts, omissions and commissions complained of; and that the appellant was neither given the reasons for the impeachment nor a report of the outcome of the proceedings by the Senate.

**[33]** Without a valid Motion, the lack of quorum in the County Assembly, there being no specific charges and the Speaker of the Senate having failed to establish whether the resolution by the County Assembly was in accordance with the law, and the proceedings being *sub judice*, the appellant asked the High Court to find that the entire proceedings and the process of his removal were a nullity and of no effect.

**[34]** The Clerk of the County Assembly, Mr. Edward Ombwori Gichana, responded to these averments insisting that the appellant had the option of attending the proceedings physically, through his duly appointed advocate or virtually but opted instead to take a vacation at the coast; that there was no evidence that the advocate allegedly sent to the County Assembly by the appellant had instructions from him; that the conservatory orders issued on 30<sup>th</sup> November, 2020 in **ELRC 35 of 2020** had lapsed at 11:30 a.m. for want of extension at the time the Motion before the Assembly was considered on 3<sup>rd</sup> December, 2020 at 3:00 p.m.; that due to the Covid-19 pandemic, the County Assembly had amended its Standing Orders on 2<sup>nd</sup> June, 2020 and introduced Order 231D to allow for virtual proceedings to complement the usual physical proceedings; that some of the MCAs alleged to have deposed that they did not take part in the hearing and voting, swore further affidavits reneging their earlier positions; and that public participation was conducted between 30<sup>th</sup> November, 2020 and 3<sup>rd</sup> December, 2020 and

questionnaires were manually distributed across the County through the County Assembly ward offices. In any case, the Clerk argued, the removal proceedings of a Governor lay squarely on the County Assembly and the Senate, and by dint of the doctrine of separation of powers, the court lacked jurisdiction to entertain the suit.

**[35]** The Clerk of the Senate, Speaker of the Senate and the Senate jointly in response to these averments asserted that both the appellant and the County Assembly were invited to appear before the Senate plenary on 16<sup>th</sup> December, 2020; that the appellant was given ample time to respond to the documentation and was accorded a fair hearing as reported in the Hansard; that there was public participation in the impeachment proceedings by virtue of the fact that the proceedings were open to the public; that the appellant was allowed to canvass his Preliminary Objection at length and a ruling was rendered; and that there was quorum and the voting was procedural. Accordingly, they maintained that the Senate voted and accordingly resolved to remove the appellant from office within the law.

**[36]** The 7<sup>th</sup> and 10<sup>th</sup> respondents similarly maintained that the impeachment process fully complied with the Constitutional and statutory requirements. Whilst the 8<sup>th</sup> respondent asserted that IEBC discharged its obligations in accordance with the Constitution, the enabling statutes and regulations by issuing a Notice of a By-Election for Governor, Nairobi City County which was to be held on 18<sup>th</sup> February, 2021.

**[37]** In the end, the High Court, after evaluating these arguments, framed three key issues as falling for its determination; whether the court had jurisdiction to determine the petitions; whether the appellant was accorded fair administrative action during the removal proceedings; and whether the appellant's impeachment met the constitutional threshold. By a unanimous judgment delivered on 24<sup>th</sup> June, 2021 (*Chitembwe, Korir & Okwany, JJ.*) found that the removal of the appellant fully complied with the constitutional and statutory requirements. The court proceeded to dismiss the consolidated petitions for lack of merit, finding on

the issue of jurisdiction, that the doctrine of separation of powers did not inhibit the court's constitutional power to examine and interrogate the removal proceedings before the County Assembly and the Senate, especially where a party alleges that there was violation of the Constitution and the law.

**[38]** On whether the appellant was accorded fair administrative action during the proceedings, the court found that the right to fair administrative action applies in both judicial/quasi-judicial or any administrative proceedings that affect the rights of an individual. In this case, the court was satisfied that the appellant was notified of the charges against him through the Speaker's letter of 26<sup>th</sup> November 2020, which also brought to his attention the existence of the Motion detailing the charges against him and a list of the MCAs who supported the Motion. These, in the court's view, were instances confirming that the appellant was accorded adequate opportunity to respond to charges against him.

**[39]** On whether the impeachment of the appellant met the constitutional threshold, the court expressed satisfaction that the charges were fully substantiated. According to the court, the appellant merely denied, intimidating, harassing, or molesting any member of the County Executive Committee but never denied the allegation of high turnover of senior staff in his government. Likewise, the appellant did not deny using abusive, embarrassing, inappropriate, and unprintable language which undermined the office of Governor. It was further satisfied that the Speaker of the Senate properly dealt with the Preliminary Objection; that in voting on the impeachment Motion, the Senators made a decision on all the issues touching on the proceedings before them, including the lawfulness of the impeachment; that no new evidence or charges were presented before the Senate because what was contained in the Motion was the same information that was presented before the County Assembly; that the late service of voluminous documents did not impinge on the appellant's right to fair administrative action and hearing as he had until 17<sup>th</sup> December, 2020 to defend himself; that the Senate's Hansard report does not indicate that the Senators had

previously met and reached a decision to impeach the appellant so as to justify his claim that the vote was predetermined; and that the Senate's Hansard report contains the entire impeachment proceedings which include the reasons thereof.

**v) Before the Court of Appeal**

**[40]** The appellant took his grievance to the Court of Appeal, seeking that the decision of the High Court be overturned and the appeal be allowed; that the resolution of the Nairobi City County Assembly dated 3<sup>rd</sup> December, 2020 and those of the Senate of 17<sup>th</sup> December, 2020 be quashed; that an order be issued declaring that the High Court had no power to extend or reduce timelines contemplated by Article 182(4) and (5) of the Constitution; and that the appellant be awarded costs both in the High Court and in the Court of Appeal.

**[41]** The combined effect of the 58 grounds of appeal was that:

- a. *The process adopted by the County Assembly and the Senate leading to the removal of the appellant from the office of Governor of Nairobi City County was flawed;*
- b. *There was no public participation; and*
- c. *The allegations brought against him were not substantiated or substantiated to the required standard.*

**[42]** For its consideration, the Court of Appeal identified the following issues: *whether the procedure adopted by the County Assembly in the removal of the appellant was in accordance with the Constitution, the County Governments Act, and the Standing Orders of the Nairobi City County Assembly and of the Senate; whether there was quorum in the County Assembly to pass a resolution for the impeachment of the appellant; whether there was adequate public participation in the impeachment process; whether there was in force a court order given on 25<sup>th</sup> November, 2020 in **ELRC Petition No 35 of 2020** barring debate on the Notice of Motion for removal from office of the appellant;† whether the proceedings at the County Assembly and the Senate were procedurally fair, or*

*whether appellant's right to fair hearing was violated; whether the charges leveled against the appellant were substantiated to the required standard; whether the 8<sup>th</sup> respondent (IEBC) complied with the relevant statutory requirements in publishing Gazette Notice No 232/10914 of 2020 declaring its intention to hold a by-election for County Governor, Nairobi City County on the 18<sup>th</sup> day of February 2021; whether the timelines set in Article 182(4) and (5) of the Constitution for the conduct of a by-election for the office of County Governor may be shortened or extended by order of the court; and costs.*

[43] By a judgment dated 4<sup>th</sup> March, 2022, the Court of Appeal dismissed the appeal, being persuaded, like the High Court, that there was nothing to suggest that the appellant was not accorded a fair hearing as there was evidence to the contrary; that the appellant instead chose not to participate in the proceedings before the County Assembly; that he had the right to legal representation, but failed to formally instruct counsel; that he was informed of the charges and given the opportunity to prepare his defence, adduce evidence and to rebut the charges; that he was presented with the report or resolution of the County Assembly to enable him prepare his response before the Senate; and that the hearing and determination of the Motion for removal was executed without delay.

[44] Again, upholding the High Court, the Court of Appeal found no requirement in law for the impeachment Motion to be verified by affidavit. It was satisfied that, in accordance with Order 67(1) of the Nairobi City County Assembly Standing Orders, all that is required in order to verify the contents of the Motion were the signatures of at least one-third of MCAs in support thereof.

[45] The Court of Appeal thus came to the conclusion, on the question of the requisite quorum in the County Assembly, that the trial court correctly found that the appellant had failed to prove that the requisite statutory quorum for a resolution to remove a Governor had not been met. The court also found as a fact that the **Hansard** report, which is the official record of the County Assembly

showed that 90 MCAs (out of 122, constituting more than 2/3 of the membership) voted on the Motion.

**[46]** Upholding the High Court's finding that the appellant was not by any means denied a fair hearing in the County Assembly, the Court of Appeal, in addition, accepted that the removal process complied with the constitutional and statutory requirements and standards for a fair hearing.

**[47]** The court, after confirming the centrality of public participation in the impeachment process, found that there was proof that sufficient public participation was carried out by both the County Assembly and the Senate; and there was nothing to the contrary to warrant interference with the trial court's finding.

**[48]** The Court of Appeal was equally persuaded that the interlocutory orders issued on 30<sup>th</sup> November, 2020 in **ELRC Petition No. 35 of 2020** barring debate on the Motion for the appellant's impeachment had lapsed on 3<sup>rd</sup> December, 2020 at 11:30 a.m while the impeachment Motion was moved and considered at 3:00 p.m.

**[49]** On the question whether the proceedings at the County Assembly and the Senate were procedurally fair, the court found; that the appellant had 7 days (between 10<sup>th</sup> to 16<sup>th</sup> December, 2020 - both days inclusive) to prepare a response. Furthermore, the court noted, nothing prevented the appellant from cross-examining members of the County Assembly on the contents of the impugned evidence. As such, the Court of Appeal agreed with the trial court that the alleged late service did not infringe on the appellant's right to fair administrative action and hearing.

**[50]** On whether any new evidence was introduced during the hearing before the Senate, the court found that besides the evidence contained in the Motion for removal moved by Hon. Ogada in the County Assembly, no other evidence was relied on.

[51] Finally, once more agreeing with the High Court, the court found that the charges were substantiated to the required standard; that the outcome of the Motion was not pre-determined by the Senators nor was their voting influenced by bias; that the Senate fully evaluated the proceedings before the County Assembly; and that, in voting on the impeachment Motion, the Senators made a decision on each of the issues presented to them.

***vi) Before the Supreme Court***

[52] To challenge the Court of Appeal's decision, the appellant filed the instant appeal specifically anchoring it on Rules 9 and 33 of the Supreme Court Rules, 2012 (which Rules, as a matter of fact have been repealed). The appeal seeks that;

- i. *The petition be allowed and the judgment of the Court of Appeal delivered on 4<sup>th</sup> March, 2022 be set aside.*
- ii. *The resolution of the Senate passed on 17<sup>th</sup> December, 2020 for the removal of the appellant from the office of the Governor be quashed and/or declared unconstitutional null and void;*
- iii. *Costs be awarded to the appellant.*

[53] The appeal has been brought on 24 grounds, listed as [a] to [x] in the Petition of Appeal but condensed in the appellant's written submissions and argued in seven (7) clusters including the ground raised in the preliminary objection on this Court's jurisdiction as follows:

- i. whether the Court's jurisdiction was properly invoked;
- ii. whether due process was followed by the County Assembly in the removal of the appellant from the office of Governor;
- iii. whether the appellant was accorded adequate time and facility to respond to the charges against him both at the County Assembly and in the Senate;
- iv. whether it was mandatory to verify the Motion for removal by affidavits or other statements on oath by MCAs who allegedly supported the Motion;

- v. whether public participation was undertaken;
- vi. whether the charges were substantiated to the prescribed standard warranting removal of the appellant from the office; and
- vii. whether the sovereignty of the people envisaged under Article 1 of the Constitution was respected and protected in the removal process.

**[54]** Save for the 12<sup>th</sup> respondent, (Okiya Okioti Omtatah) the rest, or most of the respondents have challenged the jurisdiction of the Court to entertain this appeal. The County Assembly, for instance, filed a notice of preliminary objection dated 12<sup>th</sup> July, 2022 to that effect and in which it contends that the Petition does not raise any question involving the interpretation or application of the Constitution. The 1<sup>st</sup>, 2<sup>nd</sup>, 10<sup>th</sup>, 4<sup>th</sup> 5<sup>th</sup> 6<sup>th</sup> respondents are of a similar view.

**[55]** The 7<sup>th</sup> respondent (the Attorney General), has on his part filed grounds of objection dated 12<sup>th</sup> July, 2022 to argue, like the parties in paragraph 54 above that the jurisdiction of the Court has not been properly invoked; that the appellant has not specified the jurisdiction of the Court under Article 163(4) under which he has brought the appeal; that the grounds of appeal do not challenge any specific finding of the Court of Appeal in respect of which the petition is filed; and that the appeal does not raise any issues involving the interpretation and application of the Constitution.

**[56]** Before the appeal could be set down for hearing, the 1<sup>st</sup> respondent filed a Notice of Motion dated 16<sup>th</sup> June, 2022 seeking to strike out the Notice of Appeal for failure to file the main appeal within 30 days of the delivery of the judgment appealed from. The 2<sup>nd</sup> and 10<sup>th</sup> respondents followed suit and by a Notice of Preliminary Objection dated 15<sup>th</sup> June, 2022 applied for the striking out of the appeal, for being filed out of time. The Court, upon considering these challenges rendered its ruling of 11<sup>th</sup> July, 2022 dismissing the application and overruling the preliminary objection at the same time, paving way for the hearing of the appeal.

[57] At the commencement of the hearing, Mr. Nyamu, who was appearing together with Dr. Khaminwa, made a two-pronged oral application: for adjournment and for recusal of the President of the Court, who was presiding. These applications were opposed by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 11<sup>th</sup> respondents. Upon consideration, the Court issued an *ex tempore* ruling dismissing both applications and subsequently giving detailed reasons for doing so on 18<sup>th</sup> July, 2022.

[58] Regarding the notice of preliminary objection and the grounds of objection alluded to in paragraphs 54 and 55 above, the Court directed that the whole question of jurisdiction of the Court be considered and determined in the appeal.

#### **D. PARTIES' SUBMISSIONS**

##### ***i. The Appellant***

[59] The appellant submitted that he had complained that due process was not followed both at the County Assembly and in the Senate during the proceedings for his impeachment and yet the appellate court only considered the process at the Senate and disregarded that at the County Assembly. The appellant also averred that he was not accorded adequate time and facility to respond to the charges against him in both the County Assembly and the Senate, a fact the appellate court ignored; and that during the proceedings before the Senate, he was presented with evidence against him on 15<sup>th</sup> December, 2020 at 6.00 pm when the hearing was scheduled to commence the next day on 16<sup>th</sup> December 2020, availing him no opportunity to prepare his response.

[60] Furthermore, the appellant contended that there was no public participation during his removal and that the charges against him were not published for the public to react and indeed, no evidence of public participation was adduced before court. This omission, according to the appellant, went against the holding in the persuasive authority of the South Africa Constitutional Court in the case of ***Doctors for Life International v. Speaker of the National Assembly***

**and Others** (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (1399); 2006 (6) SA 416 (CC).

[61] The appellant faulted the impugned judgment for failure to take into consideration the fact that the County Assembly was allowed to introduce evidence for the first time during the Senate proceedings, thereby denying him the opportunity to adequately respond to that evidence contrary to Articles 47 and 50 of the Constitution; that the charges brought against him were not substantiated; that the appellate court ought to have found that it was improper in law for the Senate to entertain the impeachment proceedings in light of the evidence that there were live criminal proceedings pending before the Anti-Corruption Court, thereby breaching the *sub-judice* rule; that the learned Judges of appeal also erred in failing to appreciate that the role of the Senate in the removal of a Governor from office is quasi-judicial and not legislative, and as such they were bound by the provisions of Article 47 of the Constitution as well as those of the Fair Administrative Action Act. As a consequence, the appellant has urged the Court to allow the appeal, set aside the judgment of the Court of Appeal and quash and declare as null and void the resolution of the Senate passed on 17<sup>th</sup> December, 2020 to remove him from office.

**ii. 12<sup>th</sup> Respondent's submissions**

[62] The 12<sup>th</sup> respondent, Okiya Okiiti Omtata, who supported the appeal, did not file any submissions but indicated during the hearing that he fully associated himself with the appellant's submissions.

**iii. The Clerk of Nairobi City County Assembly's (1<sup>st</sup> Respondent) submissions**

[63] The Clerk to the County Assembly (1<sup>st</sup> respondent) submitted on two issues. First, that this Court lacked jurisdiction to determine this appeal for the reason that it was filed pursuant to Rule 9 and 33 of the repealed Supreme Court Rules, 2012 which Rules do not vest jurisdiction in the Court; and that it did not specify at all any constitutional provision, leave alone Article 163(4) of the Constitution or

which limb of that Article it was anchored. For these infractions by the appellant, the 1<sup>st</sup> respondent sought to persuade us to strike out the appeal by applying the *ratio decidendi* in ***Samuel Kamau Macharia & another v. Kenya Commercial Bank Limited & 2 others***, SC Application No. 2 of 2011; [2012] eKLR; ***Suleiman Mwamlole Warrakah & 2 others v. Mwamlole Tchappu Mbwana & 4 others***, SC Petition No. 12 of 2018; [2018] eKLR, ***Daniel Kimani Njihia v. Francis Mwangi Kimani & Another***, SC Application No. 3 of 2014; [2015] eKLR; ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others***, SC Petition No. 2 of 2021; [2021] eKLR and ***Martha Wangari Karua v. Independent Electoral and Boundaries Commission & 3 others***, SC Petition No. 3 of 2019; [2019] eKLR.

[64] Secondly, the 1<sup>st</sup> respondent has contended that the appeal did not raise any issues involving the interpretation or application of the Constitution and that the appellant has not faulted the Court of Appeal on the basis of the manner it interpreted or applied any provision of the Constitution. Further, it has posited that, this being a second appeal, where only points of law are to be entertained, the appeal is incompetent for pleading mainly factual issues.

[65] In conclusion, the 1<sup>st</sup> respondent has urged us to uphold the judgment of the High Court that the impeachment proceedings were legal, procedural and constitutional, undertaken in strict compliance with the provisions of Article 181 of the Constitution as read with Section 33 of the County Governments Act and the Standing Orders of both the County Assembly and the Senate.

***iv. The Speaker, Nairobi City County Assembly (2<sup>nd</sup> and 10<sup>th</sup> respondent's) submissions***

[66] The Speaker, Nairobi City County Assembly and Hon. Benson Mutura, the then Acting Governor of Nairobi City County Assembly (2<sup>nd</sup> and 10<sup>th</sup> respondent's, respectively), fully associated themselves with the submissions by the 1<sup>st</sup> respondent, but added that, not only was the removal process carried out in accordance with the law but also that it was above the requisite bar. They explained

that the notice of impeachment was lodged with the Clerk of the County Assembly on 25<sup>th</sup> November, 2020. The Clerk upon being satisfied that the Motion itself was in compliance with Section 33 of the County Governments Act, allowed the Mover to table it; that the Motion was debated, voted and passed in the Assembly, after which the Clerk accordingly informed the Speaker of the Senate; and that at least two-thirds of all the MCAs had resolved to remove the appellant from office in terms of Article 181(1).

**[67]** On public participation, the two respondents submitted that Section 2 of the County Governments Act enjoins every state entity at national or county levels to conduct public participation before adopting, passing or signing into law any policy because all State officers derive their authority from the people. Further, that Article 196(1) of the Constitution, as well as Sections 87, 91 and 115 of the County Governments Act contemplate reasonable participation by the public. Specifically, in response to the appellant's complaint, the respondents argued that public participation was invoked by a notice of impeachment of the appellant being issued to residents of Nairobi City County and a comprehensive report dated 3<sup>rd</sup> December, 2020 prepared to confirm the participation of the people. In addition to these efforts, the Clerk published a notice of the impending impeachment Motion in the *Daily Nation Newspaper* of 27<sup>th</sup> November, 2020, calling on the residents of the county to deliver their representations to the Assembly either physically or by post. Furthermore, the County Assembly also posted on its website, the impeachment Motion giving public notice of the Assembly's intention to remove the appellant from office. Over and above these undertakings, the proceedings before the County Assembly were conducted in public.

**[68]** These respondents have also posited that the proceedings in the Senate were procedurally fair; the appellant was served with a notice to appear to which was annexed the Motion as well as the resolution of the County Assembly. The appellant was equally given sufficient opportunity to prepare before appearing to present his defence according to Article 50 of the Constitution.

[69] Finally, the respondents have contended that the charges against the appellant for gross misconduct were substantiated to the required standard; and that, as observed in *Martin Nyaga Wambora & 3 others v. Speaker of the Senate & 6 others*, Nyeri Civil Appeal No. 21 of 2014; [2014] eKLR, whether a matter amounts to gross misconduct or not will depend on the peculiar facts and the circumstances of each case. In this instance, it was their opinion that allegations of using abusive, embarrassing, inappropriate and unprintable language, publishing abusive and unbecoming words on the social media platforms were all proved. With that proof, the inescapable conclusion, according to the respondents, was that the appellant had undermined and demeaned the office of Governor.

**v. County Assembly's (3<sup>rd</sup> respondent) submissions**

[70] The three issues isolated by the County Assembly (3<sup>rd</sup> respondent) for our determination were whether the Court has been properly moved by invoking the correct constitutional or statutory provisions that clothes it with jurisdiction; whether the appeal raises any question(s) involving the interpretation or application of the Constitution within the meaning of Article 163(4)(a) of the Constitution and Sections 3 and 15 of the Supreme Court Act; and whether, based on the first two questions, the Court had the necessary jurisdiction to entertain the appeal.

[71] In the opinion of the County Assembly, the appeal as drawn appears to have been inviting the Court to assume jurisdiction by elimination contrary to the settled jurisprudence in *Suleiman Mwamlole Warrakah & 2 others v. Mwamlole Tchappu Mbwana & 4 others* [supra] and *Daniel Kimani Njihia v. Francis Mwangi Kimani & Another* [supra], among others. In addition, the County Assembly argued that the Court has consistently and resolutely stated in numerous decisions that it can only be moved by invocation of the correct provisions, either limb (a) or (b) of Article 163(4) of the Constitution. Moreover, Rules 9 and 13 of the Supreme Court Rules, 2012 (repealed), which the

appellant relied on, do not clothe the Court with jurisdiction. Consequently, to them, the appeal was incompetent and subject only to one fate, dismissal.

[72] On the second question, the County Assembly has contended that since the appellate jurisdiction of the Court can only be invoked in two instances cited in the previous paragraph, namely upon certification, which was not sought by the appellant or as of right, it would appear, by elimination that the appellant's intention must have been to bring the appeal as of right. If that be the case, it was incumbent upon the appellant to fault the Court of Appeal's decision on the basis of its interpretation or application of the Constitution. That has not been done.

[73] With these conclusions, the County Assembly has prayed for the declaration that the Court lacks jurisdiction to entertain the appeal and to dismiss it with costs.

*vi. The Clerk of the Senate, Speaker of Senate & the Senate (4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> respondents)*

[74] These three respondents have submitted that the allegations of bias and breach of principles of natural justice were made without providing any particulars or evidence in support; that the Speaker properly directed himself on the hearing of the Preliminary Objection alongside the impeachment proceedings; and similarly, the Speaker correctly applied the law in the same ruling rejecting an attempt by the County Assembly to introduce new evidence at the hearing.

[75] The respondents refuted the appellant's claim that he was denied an opportunity to file supplementary documents; that the decision was taken in compliance with the rules of procedure in the Fifth Schedule to the Senate Standing Orders, which set out the process and timelines for filing and exchange of documents. It was further submitted that the Senate gave the appellant seven (7) days from 10<sup>th</sup> December, 2020 to 16<sup>th</sup> December, 2020 to file the requisite documents in response to the charges. The Senate had the requisite quorum of fifteen (15) members to conduct the removal proceedings and that it was the

appellant's burden to prove that it did not meet the quorum envisaged in the Constitution and the law.

[76] In conclusion, they have pleaded that we bear in mind that its decision to confirm the impeachment of the appellant was strictly carried out in accordance with Article 181 of the Constitution; that it was a merit-based decision anchored on the principle of separation of powers; that the process was the exclusive reserve of the County Assembly and the Senate and therefore, the Court should be slow to engage in review of the merits of the decision because the powers to impeach lies, not with the courts, but the two legislative bodies, with the Court's role being confined only to the interrogation of the question whether due procedure was followed in the impeachment process, as was decided in *Commission for the Implementation of The Constitution v. National Assembly of Kenya & 2 others* [2013] eKLR, *Kinsella v. Jaekle*, 475 A. 2D 243, 253 (Conn. 1984), and *Republic v. Registrar of Societies & 5 Others ex parte Kenyatta & 6 Others*, Misc. Civil Appl. 747 of 2006; [2007] eKLR.

[77] In the result, the County Assembly has pleaded for a determination upholding the decision of Court of Appeal that the removal of the appellant from office was procedural and the appeal lacks merit.

**vii. Attorney General's (7<sup>th</sup> respondent) submissions**

[78] The Attorney General fully associated with the submissions by the 1<sup>st</sup> and 3<sup>rd</sup> respondents, only reiterating that a party preferring an appeal to this Court from the Court of Appeal must specify the constitutional provisions under which they seek to move this Court and that the appeal had failed on this requirement.

[79] But even if this Court were to find that its jurisdiction has been properly invoked, he maintained the view that the Court lacked the ability to determine the appeal as framed because being a second appeal, only matters of law fall for its consideration and determination. That the Court cannot sit as a court of second appeal to re-evaluate the evidence and reach a different finding on evidence from

those of the High Court and Court of Appeal; the grounds of appeal as structured are generally on points facts and not of law; and do not concern application or interpretation of the Constitution. Furthermore, that the appellant's interest in this appeal was merely to re-argue his petition as filed in the High Court in total disregard of the constitutional restrictions to this Court's jurisdiction, the Attorney-General submits in conclusion.

**viii. IEBC's (8<sup>th</sup> Respondent) submissions**

**[80]** IEBC endorsed the submissions by the 1<sup>st</sup>, 3<sup>rd</sup> and 7<sup>th</sup> respondents and only answered the question whether it was justified in law to issue Gazette Notice No. 232/10914 of 2020 in which the notice of the By-Election for Governor, Nairobi City County Government was published. IEBC relied on the determination of this question by the Court of Appeal to the effect that there was no fault and further, that the notice in question had been overtaken by events following the order issued by the High Court in **Constitutional Petition No. E425 of 2020**, where parties by consent suspended the gazette notice. This finding, it maintained, remained unchallenged in this appeal.

**[81]** In its oral highlights before the Court, IEBC drew our attention to the timelines for the conduct of the general elections and the need for us to consider giving a near date for our decision in this appeal as the process of printing of ballot papers for the position of Governor of the County of Mombasa (where the appellant has expressed the interest to contest) may be affected.

***The Judgment of the Court without Reasons of 15<sup>th</sup> July, 2022***

**[82]** We reiterate, that upon considering all the arguments, this Court dismissed the appeal in a judgment delivered on 15<sup>th</sup> July, 2022 where it held that:

- i) The Court lacks jurisdiction to determine the appeal;
- ii) The proceedings to remove the appellant from office of Governor were conducted in accordance with the Constitution and the law;

- iii) The appellant was accorded adequate time and facility to respond to the charges against him both at the County Assembly and in the Senate;
- iv) The form of verification envisaged in the context of an impeachment Motion is a signed copy of the Motion by the mover and verified by the signatures of at least a third of the Members of the County Assembly in support of the Motion and not an affidavit or any other form of deposition;
- v) There was sufficient public participation;
- vi) The County Assembly, the Senate and the two superior courts below were convinced that the charges were proved to the standard required in such circumstances. No error for their analysis and conclusion has been presented; and
- vii) The people exercised their sovereign power through their democratically elected representatives to uphold and defend Chapter Six of the Constitution.

**[83]** Pursuant to Rule 28(2) of the Supreme Court Rules 2020, we now give hereunder the reasons for these conclusions.

#### **E. ANALYSIS AND DETERMINATION**

**[84]** There were four counts of impeachable charges brought against the appellant as follows;

- i. Gross violation of the Constitution and law,
- ii. abuse of office,
- iii. gross misconduct, and
- iv. committing crimes under national law.

**[85]** Having carefully re-evaluated the arguments in this appeal, the pleadings and the unanimous decisions of the two superior courts below, we answer each of the seven framed issues and set out in **Paragraph 53** sequentially as follows;

**i. whether the Court's jurisdiction was properly invoked**

**[86]** In *Nyarangi J.A.*'s time-honoured words in the *Owners of the Motor Vessel "Lillians" v. Caltex Oil Kenya Limited* [1989] KLR 1, which were themselves originally penned by the United States of America Supreme Court in 1915 in the case of *McDonald v. Mabee*, 243 U.S. 90,91 (1915); without jurisdiction, a court has no power and must down tools in respect of the matter under review.

**[87]** The County Assembly and the Attorney-General have objected to the jurisdiction of the Court to entertain the appeal on the grounds that the Court was improperly moved by invocation of the wrong constitutional and/or statutory provisions that do not clothe it with jurisdiction; and that the issues in the appeal did not involve any question of interpretation or application of the Constitution within the meaning of Article 163(4)(a) of the Constitution and Sections 3 and 15 of the Supreme Court Act. Further, they have contended that this being a second appeal, the Court was constrained to confine itself to matters of law, yet the appeal was replete with questions of fact. These objections were supported by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 10<sup>th</sup> respondents.

**[88]** It is elementary knowledge on account of a legion of decisions of this Court that appeals from the Court of Appeal lie to this Court pursuant to Articles 163 (4) (a) or 163 (4) (b) of the Constitution as a matter of right or upon certification that a matter of general public importance (GPI) is involved; and that an appeal shall not lie to this Court, unless brought within the compass of either of the two jurisdictional limbs.

**[89]** We can confirm from the onset that the Petition of Appeal dated 1<sup>st</sup> April, 2022 but filed on 20<sup>th</sup> May, 2022 is expressed to be brought pursuant to two repealed Rules, 9 and 33 of the Supreme Court Rules, 2012, which essentially dealt with contents of a petition and institution of appeals. Rules 9 and 33 of the 2020 Rules, on the other hand relate to "Sealing of Court documents" and "Application for certification", respectively. All these provisions clearly cannot be the basis for

invoking the Court's jurisdiction. As far as appeals from the Court of Appeal are concerned, a party moving this Court must bear in mind the limits of its jurisdiction and must decide, either to seek a certification as a matter of general public importance under Article 163 (4)(b) of the Constitution or come as a matter of right under Article 163 (4)(a) thereof. Even when a party invokes the latter, it is upon that party to identify and specify how the appeal concerns interpretation and application of the Constitution.

[90] It can never be the role of the Court to wander around in the maze of pleadings and averments to ascertain by way of elimination which of the two limbs of Article 163(4) a party intends to rely on. The Court has consistently discouraged this kind of impetuous presentation of pleadings before it. For example, in ***Suleiman Mwamlole Warrakah & 2 others v. Mwamlole Tchappu Mbwana & 4 others***, [supra], the Court restated the frontiers of its appellate jurisdiction and emphasized that an appeal to it shall not lie, unless convincingly preferred within the confines of either of the two jurisdictional limbs of Article 163(4) of the Constitution. The Court said;

***“[53] In this appeal, what Counsel for the petitioners is asking us to do is to assume jurisdiction by way of elimination. This Court is being called upon to hold that, because certification was not sought by the intending appellant, then it must follow that the said appellant, is invoking the Court’s jurisdiction as of right, under Article 163 (4) (a) of the Constitution, even without demonstrating that, such right obtains in the first place. This we cannot do, as it would make a mockery of our past pronouncements on the matter...”***

[91] To this clear articulation, we can only add that, given the strict limit of jurisdiction of the Supreme Court under Article 163(4) of the Constitution, it is paramount for any party moving it for any relief under that Article to identify

which one of the two limbs, (a) or (b) is being invoked. These prerequisites were recapitulated in *Nasra Ibrahim Ibren v. Independent Electoral Boundaries & 2 others*, SC Petition No. 19 of 2018; [2018] eKLR, as follows:

***“[43]... parties seeking to appeal to the Supreme Court have a duty to outrightly state the particular jurisdiction of the Court that they invoke. Jurisdiction is thus so fundamental that it should not be left to conjecture. The court, and other parties in a matter, should not be left agonizing under what appellate jurisdiction a matter is filed. Consequently, we are surprised by the appellant’s approach to this Court and fault her for not having outrightly disclosed under which appellate jurisdiction she moved this Court. She left this fundamental indicator far late in the day during her submissions when she mentions that this Court has jurisdiction to hear this appeal under Article 163(4)(a) of the Constitution”.***

**[92]** The justification behind the requirement of specifying the limb of Article 163(4) should be obvious, but one of them is that the applicable considerations and principles for each of the limbs are different. In an adversarial system like ours, rules of pleading also serve to ensure that parties define succinctly the issues for determination so as not to take the rest of the parties by surprise. On the other hand, courts adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings.

**[93]** There has been sufficient guidance from the Court on the need to specify the jurisdiction being invoked and we hoped that the infractions identified in this appeal would not be encountered ever in this Court. We were wrong. What is constant, however, so far as the Court is concerned, is that each failure to align an appeal to those guidelines, will meet the ultimate fate suffered by the appellants in *Suleiman Mwamlole Warrakah & 2 others* [supra], *Nasra Ibrahim*

***Ibren v. Independent Electoral Boundaries & 2 others*** [supra] and ***Daniel Kimani Njihia v. Francis Mwangi Kimani & another*** [supra], in a long line of others.

[94] We will not stop there. Counsel intending to represent parties before the Court must recognize that, like any appearance before any apex Court in the world, practice of law before this Court as Kenya's court of last resort must truly represent and reflect strict standards of professional responsibility. As an officer of the court upon whose shoulders rest, in part, the responsibility for the administration of justice, counsel must, before bringing an action to the Court, identify the elementary legal foundation and ascertain as a minimum, whether the Court has jurisdiction, because as a general proposition, the relief available to a party depends not only on the pleadings but more significantly on the jurisdiction. That is why, as a matter of practice, the pleadings must always carry, at the very top, reference to the relevant provisions of the Constitution, the law and rules relied upon and specify at the end, the relief claimed. In addition, it cannot be stressed enough that, counsel is expected, indeed, required to be fully abreast with the jurisprudence of the Court.

[95] In an apex Court, there is no room for indolent and lackadaisical approach to preparation and presentation of cases. We expect nothing but precision, diligence and above all, professionalism. It is for these reasons that the Court has repeatedly cautioned in several decisions such as ***Hermanus Phillipus Steyn v. Giovanni Gneccchi-Ruscione***, SC Applic. No, 4 of 2012; [2013] eKLR, ***Daniel Kimani Njihia v. Francis Mwangi Kimani & Another*** [supra], ***Suleiman Mwamlole Warrakah & 2 others v. Mwamlole Tchappu Mbwana & 4 others*** [supra], and ***National Rainbow Coalition Kenya (NARC Kenya) v. Independent Electoral & Boundaries Commission; Tharaka Nithi County Assembly & 5 others (Interested Party)***, SC Petition 1 of 2021; [2022] KESC 6 (KLR) (Civ) (17 February 2022), against sloppiness in the invocation of the Court's jurisdiction.

[96] In any case, the appellant has failed to demonstrate as directed by the Court in *Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & another*, SC Petition No. 3 of 2012; [2012] eKLR, how the appeal involved application or interpretation of the Constitution and the manner in which the Court of Appeal erred in determining those very questions. We can do no better now than we did in *Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v. Attorney-General & 2 others*, SC Petition No. 45 of 2018; [2020] eKLR, but to re-state the jurisprudence around Article 163(4)(a) of the Constitution with these words:

***“[62] We cannot over-emphasize the specialized nature of Article 163(4)(a)’s Appellate jurisdiction of this Court. That jurisdiction is not just another level of appeal. Thus, even if the original suit in the High Court or lower Court invoked specific constitutional provisions, that fact alone is not enough for one to invoke and sustain an appeal before this Court. A party has to steer his appeal in the direction of constitutional interpretation and application. He/she should directly point to the specific instances where the Court of Appeal erred in its interpretation and application of the Constitution”.***

It explained further that;

***“The jurisdiction is discretionary in nature at the instance of the Court. It does not guarantee a blanket route to appeal. A party has to categorically state to the satisfaction of the Court and with precision those aspects/issues of his matter which in his opinion falls for determination on appeal in the Supreme Court as of right. It is not enough for one to generally plead that his case involves issues of Constitution interpretation and application.”***

[97] We find, for these reasons, that the preliminary objection meets the threshold in *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd* (1969) EA 696 and sustain it.

[98] That conclusion would, in strict application of *Owners of the Motor Vessel "Lillians" v. Caltex Oil Kenya Limited* [supra], have been sufficient to dispose of this appeal in its entirety, and the Court would have to down tools. However, in view of the public interest and nature of the dispute, the broad interests of the parties, the need for due guidance to the judicial process and to the courts below; for the sake of posterity and development of jurisprudence and in terms of the Court's decisions in, among other cases, *Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai and 4 Others*, SC Petition No 4 of 2012; [2013] eKLR, *Re The Speaker of the Senate & Another v. Attorney-General & Four Others*, SC Advisory Opinion No. 2 of 2013; [2013] eKLR (paragraph 156), *Hassan Ali Joho & Another v. Suleiman Said Shahbal & Two Others*, SC Petition No. 10 of 2013; [2014] eKLR, (paragraph 52), *Anami Silverse Lisamula v. Independent Electoral & Boundaries Commission & 3 others*, SC Petition No. 9 of 2014; [2014] eKLR and *Lemanken Aramat v. Harun Meitamei Lempaka & 2 others*, SC Petition No. 5 of 2014; [2014] eKLR, we are of the considered view that the right course is for us to determine all the pertinent questions raised in the appeal. It is not the first time we are doing this as should be evident in the number of times it has been done in the above decisions.

[99] By the very nature of its position in the hierarchy of courts, the Supreme Court has a constitutional obligation to develop jurisprudence and guide the courts below it on matters of general public interest, as well as on those involving the interpretation and application of the Constitution. This duty cannot be curtailed by a decision of any court, just the way Justices of this Court cannot be rendered superfluous, or their work made perfunctory and mechanical. The function of the Court in resolving questions of interpretation and application of the Constitution

is to remove any doubts and ambiguities in the law; mitigating hardships and correcting wrongs and not avoiding them. This was succinctly expressed in the following passage in the concurrent decision of Mutunga, CJ & President of the Court, in *Re The Speaker of the Senate & Another v. Attorney-General & Four Others* [Supra] (paragraph 156):

***“Each matter that comes [up] before the Court must be seized upon as an opportunity to provide high-yielding interpretive guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents....[Constitution-making] does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitutions borne out of long-drawn compromises, such as ours, tend to create.”***

The following passage drawn from the Court’s judgment in *Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai Estate of & 4 Others*, [supra] is equally instructive;

***“The immediate pragmatic purpose of such an orientation of the judicial process is to ensure predictability, certainty, uniformity and stability in the application of law. Such institutionalization of the play of the law gives scope for regularity in the governance of commercial and contractual transactions in particular, though the same scheme marks also other spheres of social and economic relations.....going forward it will be good practice for this Court to take every opportunity a matter affords it to pronounce on the interpretation of a constitutional issue that is argued either substantively or tangentially by the parties before it.”*** [our emphasis]

See also *David Ndi & others v. Attorney General & others* [2021] eKLR (BBI Case) per Njoki Ndungu, SCJ.

[100] It must be emphasized, however, that the generally accepted position and widely applied *ratio* expressed in the wise words of Nyarangi, JA in the *Owners of Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd* [supra] that “jurisdiction is everything”, and that a Court lacking jurisdiction “must down its tools”, holds good and retains validity. All we have expressed here is that, as far as this Court, the final court, is concerned, in appropriate cases; we repeat, in appropriate cases and only this final court, will rise to the occasion and not down tools, to resolve disputes that relate to its constitutional mandate. Even where it declines jurisdiction to entertain any particular questions, the Court may wish to achieve quality jurisprudence and also to resolve specific issues raised in the particular matter, in order to draw the whole dispute to a meaningful conclusion and to settle the law. It is not in all situations.

[101] This approach is, therefore, not a departure from *The Owners of the Motor Vessel “Lillians” v. Caltex Oil Kenya Limited* [supra] but an extended horizon to cater for the [new] Supreme Court, with its specialized and wider jurisdiction than would have been contemplated at the time the decision in “Lillian S,” was made.

[102] In *Lemanken Aramat v. Harun Meitamei Lempaka & 2 others* [supra], the Court justified this route by explaining that;

**“[101] We would make it clear in the instant case that, it is a responsibility vested in the Supreme Court to interpret the Constitution with finality: and this remit entails that this Court determines appropriately those situations in which it ought to resolve questions coming up before it, in particular, where these have a direct bearing on the interpretation and application of the Constitution. Besides, as the Supreme Court carries the overall responsibility [The Constitution of**

*Kenya, 2010, Article 163(7)] for providing guidance on matters of law for the State's judicial branch, it follows that its jurisdiction is an enlarged one, enabling it in all situations in which it has been duly moved, to settle the law for the guidance of other Courts.*

.....

*[106] Quite clearly, the foregoing provisions affirm that the Supreme Court, as the guardian of the Constitution, and the final arbiter on constitutional dispute-situations, has been entrusted with the mandate to ensure the effectiveness of the binding constitutional norm.*

*[107] The Supreme Court's special jurisdiction merits express recognition. The Constitution's paradigm of democratic governance entrusts to this Court the charge of assuring sanctity to its declared principles. The Court's mandate in respect of such principles cannot, by its inherent character, be defined in restrictive terms. Thus, such questions as come up in the course of dispute settlement (which, itself, is a constitutional phenomenon), especially those related to governance, are intrinsically issues importing the obligation to interpret or apply the Constitution – and consequently, issues falling squarely within the Supreme Court's mandate under Article 163(4)(1)(a), as well as within the juridical mandate of the Court as prescribed in Article 259(1)(c) of the Constitution, and in Section 3(c) of the Supreme Court Act, 2011 (Act No. 7 of 2011)*

...

**[111] From the principles thus stated, it is clear to us that this Court ought to maintain constant interest in the scheme and the quality of jurisprudence that it propounds over time, even where it is constrained to decline the jurisdiction to deal with any particular questions. Whatever option it takes, however, this Court ought always to undertake a methodical analysis of any issues it is seized of, and ought always to draw the whole dispute to a meaningful conclusion, bearing directions and final orders, in the broad interests of both the parties, and of due guidance to the judicial process and to the Courts below.**” [our emphasis]

[103] But above all, we are fortified in our decision to consider the remaining six grounds in this appeal by the fact that, whether we down tools at this stage or go to the end, the inevitable result is that the decision of the Court of Appeal stands upheld. For these reasons, there are exceptional circumstances and proper justification not to down tools but to consider and determine the main grounds before the Court.

[104] In view of the position we have adopted in the foregoing paragraphs, we emphasize that, not all the six grounds involve the interpretation or application of the Constitution or are matters of general public importance, the two permanent and defined coordinates of the Court’s jurisdiction in respect of appeals arising from the decisions of the Court of Appeal. Matters of fact that touch on evidence without any constitutional underpinning are not open for this Court’s review on appeal. See *Paul Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v. Attorney-General & 2 others* [supra] and *Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] KESC 34 (KLR).

In the latter decision, the Court stressed that;

***“It is to be recalled that the appellants herein, had already been evicted from their settlements, in an operation they contend was not only illegal, but which violated their right to housing and dignity. This Court has no jurisdiction to revisit the factual findings of either the High Court or Court of Appeal on this issue. We have already answered the four critical questions in exercise of our jurisdiction under Article 163 (4) (b) of the Constitution... We may however not delve into the factual findings of the Trial Court and Court of Appeal...”***

***Challenges of findings or conclusions on matters of fact by the trial Court of competent jurisdiction after receiving, testing and evaluation of evidence does not bring up an appeal within the ambit of Article 163(4)(a)”***

[105] Of the twenty-four (24) grounds of appeal alluded to in **paragraph 53**, twenty (20) urge us to find that the learned Judges of the Court of Appeal “erred in law and fact” in arriving at the impugned judgment. All these grounds, though framed partly as matters of law, are not constitutional or matters of law but of fact, as we intend to demonstrate shortly.

[106] The duty to re-evaluate evidence is the function of a first appellate court as enunciated in the celebrated case of ***Selle v. Associated Motor Boat Company Ltd*** [1968] EA 123. A first appellate court should accord deference to the trial Judge’s conclusions of fact and only interfere with those conclusions if it appears to it, either that the trial Judge has failed to take into account any relevant facts or circumstances or based the conclusions on no evidence at all, or misapprehended the evidence, or acted on wrong principles in reaching the conclusions. (See also ***Nkube v. Nyamuro*** [1983] KLR, 403-415, AT 403).

[107] Jurisdiction, we repeat, reveres judicial hierarchy so that ***“the chain of Courts in the constitutional set-up, running up to the Court of Appeal,***

*have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law” or we may add, matters of fact; “and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court”.*

See *Peter Oduor Ngoge v. Francis Ole Kaparo & 5 others* [supra].

We shall bear in mind these qualifications of the Court’s jurisdiction as we consider each of the remaining six grounds.

**ii. *Whether due process was followed by the County Assembly in the removal of the appellant from office of Governor***

**[108]** The complaint under this ground is directed at the proceedings before the County Assembly, while a similar complaint is raised in the third (iii) ground jointly against the Senate and County Assembly. Here, it is the appellant’s contention that, due process was not observed in the proceedings before the County Assembly; that there was no **proper** Motion for his removal before the County Assembly; that he was not **properly** served with the Motion; that he was denied legal representation and the right to be heard when his counsel, Mr. Evans Ondieki, was denied access to the County Assembly Chamber; that the County Assembly lacked the quorum to transact the debate and vote on the impeachment Motion; and that there was no requisite quorum to pass a resolution to impeach him.

**[109]** We start with the observation that the removal proceedings for a county Governor are textually committed by the Constitution to the legislative branch of government, that is, the County Assembly and the Senate. The constitutional mandate and the process to impeach a Governor commences in the County Assembly and terminates in the Senate. The County Assembly and Senate are the only organs involved because of their special roles in devolved governments. The Senate, according to Article 96 of the Constitution specifically **“represents the**

**counties, and serves to protect the interests of the counties and their governments”.** The Assembly, on the other hand, is the legislative arm in the county governments. The respective roles of the two institutions are important because, one of the objects of devolution is to ‘promote’ democratic and accountable exercise of power. To achieve this, the Governor and all officials in the county governments are subject to oversight and scrutiny by both the County Assembly and the Senate.

[110] The Constitution commits to both institutions the exclusive power to remove the Governor subject only to procedural requirements set out in the County Governments Act and the respective Standing Orders of the County Assemblies and the Senate: and proof of the charges. From this, it seems fair to state that both institutions through their Standing Orders are at liberty to determine the procedures for receipt and consideration of evidence necessary to satisfy the duty to conduct an impeachment hearing.

[111] It has been emphasized in accordance with the principle of separation of powers that in considering applications to review decisions of the other branches of Government, “***courts should strive to achieve a balance between their role as guardians of the Constitution and of the rule of law, including an obligation to respect what Parliament is constitutionally required to fulfill***”. In other words, where the Constitution requires Parliament to determine a matter in the first place as part of its constitutional mandate, Parliament will have the discretion and power to regulate its own affairs and the courts will be slow to interfere with the exercise of that discretion. See the decision of the Constitutional Court of South Africa in ***Doctors for Life International v. Speaker of the National Assembly and others*** [supra], which has widely been approved by the courts in this country.

[112] Likewise, in ***Justus Kariuki Mate & another v. Martin Nyaga Wambora & another***, SC Petition No. 32 of 2014; [2017] eKLR this Court signaled that it would be reluctant to question parliamentary procedures as long

as they did not breach the Constitution; and that the mandate of the courts is restricted by the doctrine of separation of powers to deciding on matters of individual rights and fundamental freedoms and not to enquire into how the County Assembly and Senate perform duties in which they alone have discretion or to review the merit of the decision by the County Assembly and Senate to impeach a Governor.

**[113]** In that sense, and in the exercise of these wide political powers, both the County Assembly and the Senate cannot act outside the confines of the Constitution and the law. For to do so would invariably invite the court's intervention. To borrow the example given by the United States Supreme Court in *Nixon v. United States*, 506 U.S. 224 (1993);

***“[i]f the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin-toss, or upon a summary determination that an officer of the United States was simply a “bad guy” ...judicial interference might well be appropriated. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence”.***

Courts are thus permitted to intervene where matters of constitutional violations arise.

**[114]** To the question whether due process was followed in the removal of the appellant, the *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome of a decision should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. They must be given an opportunity to be heard, to call witnesses, to be represented by counsel,

to be availed adequate time and facilities to prepare, and if the accusations are proved, to be given the reasons for the decision. Of course, beyond here, they are also entitled to challenge the decision, if against them, before a higher tribunal or court.

**[115]** Article 47 of the Constitution enshrines the right of every person to fair administrative action. The manner of actualization of those rights have been enacted in the Fair Administrative Action Act, 2015.

**[116]** In the process of removal of a county Governor, the right to fair administrative action under Article 47 and the right to fair hearing under Article 50 of the Constitution all accrue to the Governor before a decision to remove him or her from office is reached. An unfair removal is one which goes against the principles of natural justice; which implies that no adequate notice was given; that there was bias and where the hearing was not fair. Though a political process, impeachment is sanctioned by the Constitution and the law and is not a platform to settle political scores. Bearing in mind that the removal architecture in the Constitution, the law and the Standing Orders are designed to achieve accountability, political governance and personal responsibility and are not aimed necessarily to find criminal responsibility.

**[117]** The question to which we now must turn, after laying down these principles, is whether the appellant's constitutional right to due process was compromised. We do this without the Court constituting itself into any of the two constitutional organs in whose hands the power to remove the appellant is reposed. Article 181 of the Constitution is the starting point. It provides that:

***“181. Removal of a county governor***

***1. A county governor may be removed from office on any of the following grounds***

***a. gross violation of this Constitution or any other law;***

*b. where there are serious reasons for believing that the county governor has committed a crime under national or international law;*

*c. abuse of office or gross misconduct; or*

*d. physical or mental incapacity to perform the functions of office of county governor.*

*2. Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds mentioned in clause (1).”*

[118] In accordance with Article 181(2) aforesaid, Parliament enacted the County Governments Act. Section 33 thereof provides the following procedure, from the County Assembly to the Senate, for the removal of a county Governor:

***“33. Removal of a governor***

*(1) A member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the governor under Article 181 of the Constitution.*

*(2) If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly—*

*(a) the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and*

*(b) the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.*

**(3) Within seven days after receiving notice of a resolution from the speaker of the county assembly—**

**(a) the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and**

**(b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.**

**(4) A special committee appointed under subsection (3)(b) shall—**

**(a) investigate the matter; and**

**(b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.**

**(5) The governor shall have the right to appear and be represented before the special committee during its investigations.**

**(6) If the special committee reports that the particulars of any allegation against the governor—**

**(a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or**

**(b) have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges.**

**(7) If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.**

***(8) If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.***

***(9) The procedure for the removal of the President on grounds of incapacity under Article 144 of the Constitution shall apply, with necessary modifications, to the removal of a governor.***

***(10) A vacancy in the office of the governor or deputy governor arising under this section shall be filled in the manner provided for by Article 182 of the Constitution".*** [our emphasis]

**[119]** Further, the Standing Orders of the two Houses of Parliament and of the County Assemblies play a critical role in guiding the orderly proceedings in those houses because of their constitutional underpinning in Article 124. For the purpose of this appeal, the Nairobi City County Assembly Standing Orders provides for the steps for the removal of a Governor.

**[120]** The process is sequential based on two-stages. In the first stage, a Member of the County Assembly initiates the process by filing a notice of the Motion for removal with the Speaker. The notice must be supported by at least a third of all the members. It is only if the Motion is supported and passed by at least two-thirds of all the MCAs that the Speaker of the County Assembly informs the Speaker of the Senate of that resolution within two days. Up to this point, the Governor continues to perform the functions of the office pending the outcome of the proceedings in the Senate, because that is where the impeachment proceedings are conducted.

**[121]** Though under **paragraph 108** above, we have set out the appellant's main grievance, it bears repeating here that he complains that there was no proper Notice of Motion for his removal before the County Assembly; that he was not properly served with the Motion; that he was denied legal representation and the right to be heard; and that the County Assembly lacked the quorum to transact the debate and vote on the Motion for removal.

**[122]** The question whether the appellant was notified of the charges, is strictly speaking one of fact. Both the High Court and the Court of Appeal made concurrent factual findings that the appellant was notified of the charges through the Speaker's letter dated 26<sup>th</sup> November, 2020; that to the letter was annexed a copy of the Motion with the details of the charges together with the list of MCAs who had expressed their support for the Motion. The two courts explained that they arrived at this conclusion based on the fact that the appellant in his own affidavit swore that upon being served with the Motion and charges he instructed his advocate to proceed to the Assembly and respond to the charges; that the appellant submitted bundles of documents to counter the charges; and that out of personal choice the appellant skipped the hearing even after being asked to attend in person, join virtually through a video link or by counsel duly appointed by him.

**[123]** Similarly, the question whether the appellant was denied legal representation is one that turned on evidence; whether Mr. Ondieki, Advocate was instructed by the appellant and whether he was denied access. Both the County Assembly and the Clerk of the County Assembly maintain that by Order 237 (1) of the Standing Orders, no person, other than a Member or the Clerk or other officers of the County Assembly discharging their duties in the service of the County Assembly can be admitted into any part of the Chamber appropriated to the exclusive use of Members of the County Assembly when the County Assembly or the Committee of the whole County Assembly is sitting; that by the provisions of their Standing Orders, therefore "strangers" are not permitted in the chamber, to address members unless, like in this case, counsel had express written instructions

from the appellant to represent him. On the basis of these factors both courts were in agreement that the appellant was not by any means denied a fair hearing at the County Assembly as Mr Ondieki did not prove that he had written instructions to represent the appellant.

[124] Finally, on this ground both courts were unanimous too that, from the **Hansard** record, the County Assembly had the requisite quorum to transact impeachment proceedings; that the Standing Orders had been amended on 2<sup>nd</sup> June, 2020 to introduce Standing Order 231D to allow virtual proceedings, including electronic voting due to the Covid-19 pandemic; that the allegation that 54 MCAs did not vote was rebutted by 24 of them who swore affidavits retracting the earlier averments on the ground that the affidavits were forged; and that at least three of the remaining affidavits were unsigned, undated and bore the wrong identity card numbers of the deponents, leaving only 27 members on the appellant's side. Relying on the Hansard, the official record of the County Assembly, the Court of Appeal was satisfied that 90 MCAs were present and voted in respect of the Motion, virtually and in person; and that 88 voted for the appellant's impeachment while only 2 voted against it, thereby attaining the threshold necessary to pass the Motion. These again are findings on matters of evidence.

[125] In conclusion therefore, we have not been shown any form of misdirection, or a total lack of direction on material issues or instances where conclusions were based on 'no evidence', or where the conclusions were not supported by the established facts or evidence on record, so as to qualify those matters of fact as matters of law. See **Peter Gatirau Munya v. IEBC & 2 Others**, SC Petition No.2B of 2014, [2014] eKLR for the distinction between a question of law and a question of fact. We find no reason to depart from these concurrent conclusions of fact by the two courts below.

[126] Based on these reasons and in answer to the question posed in this ground, we are satisfied that due process was followed to remove the appellant from office. There is no merit in this ground.

**iii. *Whether the appellant was accorded adequate time and facility to respond to the charges against him both at the County Assembly and in the Senate;***

[127] Both the right to fair hearing in Article 50 and the right to fair administrative action under Article 47 of the Constitution guarantee individuals the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as well as the right to have any dispute decided in a fair and public hearing before a court or any other independent and impartial tribunal or body.

[128] In the preceding paragraphs we have expressed our satisfaction with the re-evaluation of the facts, application of the law and the conclusion arrived at by the Court of Appeal regarding the procedure and due process before the County Assembly. We find no compelling purpose to reconsider them here one more time.

[129] In the previous ground (ii) above - we categorized the process of removing a Governor into two stages. This is the second stage. From subsection (3) of Section 33 of the County Governments Act, the process moves to the Senate from the County Assembly. Within seven days after receiving notice of a resolution from the speaker of the County Assembly confirming the passage of the impeachment Motion, the Speaker of the Senate must convene a meeting of the Senate to hear charges against the Governor. The charges can be heard in the Senate plenary or in a forum of a special committee of the Senate that reports to the full Senate. In either case, the Governor is entitled to attend and to be represented by counsel during the investigations. It is only when sufficient evidence is presented to substantiate the claims that the Senate will, after according the Governor an opportunity to be heard, vote on each of the charges. If a majority of all the members of the Senate vote to uphold any of the charges, the Governor shall cease to hold office. We reiterate that proof of even a single charge will suffice for purposes of Article 181 of

the Constitution. But should the vote for removal fail, that will bring the proceedings to an end.

**[130]** Regarding the procedure adopted by the Senate, the appellant has complained that the Senate failed to ascertain whether the proceedings at the County Assembly were conducted in accordance with the law; that the Speaker of the Senate failed and/or ignored to consider the appellant's Preliminary Objection; that the Senate voted to impeach the appellant without interrogating the charges leveled against him and evaluating the evidence to ascertain whether those charges were substantiated; that the outcome of the proceedings before the Senate were pre-determined by members whose utterances left no doubt of their intention to remove him from office, with or without evidence and; that he was served with evidence on short notice, without being given adequate time to go through the same and to prepare a comprehensive response.

**[131]** From the steps enumerated above, the Senate's role clearly does not include re-assessing the procedure before the County Assembly. It is not an appellate process. Once a resolution has been passed by the County Assembly to confirm the charges for the removal of a Governor, the Speaker of the County Assembly's role is to notify the Speaker of the Senate, who in turn is required to summon the Senate to consider the Motion. In this particular instance, the Senate initially appointed a Select Committee but the Select Committee instead recommended that the inquiry be conducted by the whole Senate pursuant to Standing Order 75. It is common ground that a special sitting of the Senate was called and business transacted on 16<sup>th</sup> and 17<sup>th</sup> December, 2020. Six days before this, on 10<sup>th</sup> December, 2020 the Clerk of the Senate had sent out invitations to both the appellant and the County Assembly to appear before the plenary on 16<sup>th</sup> December, 2020. They were directed to file necessary responses or any documents they wished to rely on by 15<sup>th</sup> December, 2020.

**[132]** At the beginning of the hearing, the appellant raised a preliminary objection to the effect that the issues before the Senate were *sub-judice* as they were also the

subject of some four active court cases; that there was a conservatory order issued in **ELRC Petition No. 35 of 2020** prohibiting the County Assembly and the Senate from proceeding with any Motion for the removal of the appellant from office; and that the threshold for removal of a Governor was not met.

**[133]** The Speaker, in a reasoned ruling, directed that the objection be brought as part of the evidence to be presented during the proceedings in the plenary. Specifically, in answer to the question of *sub judice*, the Speaker ruled that *sub judice* is not an absolute rule; that Standing Order No 98(5) of the Senate Standing Orders provides that, notwithstanding that Standing Order, **“the Speaker may allow reference to any matter before the Senate or a Committee of the Senate”**; that the competence and jurisdiction of the Senate to hear and determine the question of removal of a governor from office is a constitutional mandate vested in the Senate independent of the Judiciary or any other organ.

**[134]** With that background, like the Court of Appeal, we cannot find any fault in the manner the Speaker of the Senate treated the objection. He cannot, in the least, be accused of having failed and/or ignored altogether to consider the appellant’s Preliminary Objection when he in fact allowed the appellant’s counsel to submit on the objection at length, adjourned the sitting to consider the arguments before rendering the ruling. He properly directed his mind to the relevant procedural laws and judiciously exercised his discretion. The Court of Appeal was also satisfied that despite the voluminous documents containing the charges and proceedings before the County Assembly, the appellant had sufficient time and indeed did prepare well to defend himself. In view of these findings, we have no basis to depart from them, especially considering that the proceedings took place during Covid-19 season and in view of tight timelines set by Orders 75 and 76 of the Senate Standing Orders. The procedure under these Standing Orders appears to us to have been meticulously followed by the Senate. The Motion was properly moved; adequate notice was given to the appellant; he was aware of the allegations facing him; he was given an opportunity to defend himself; to adduce and challenge evidence; the

hearing was in public; and the proceedings began and concluded without unreasonable delay. He filed a whopping 118-paged written response to the allegations, together with numerous annexures in support of his case

**[135]** His complaint that the process was expedited can be answered simply with reference to Order 75 of the Senate Standing Orders as well as Order 72 of the Nairobi City County Assembly Standing Orders, both of which set the timelines within which each step must be taken. No step was taken outside those timelines. Both the Court of Appeal and the High Court were convinced that the appellant had sufficient time within which to prepare and present his response.

**[136]** While still on this question, it is important to observe that the multi-stage nature of the process of removal from office, and the attendant litigation that follows have produced in the recent past a worrying trend that, in our view, amounts to abuse of court process by parties. Parties employ all delay tactics in the book in order to avoid the consequences of the lustration provisions in Chapter Six of the Constitution that disqualifies an individual from holding a State or public office since such disqualification is dependent on all possibilities of appeal or review of the relevant sentence or decision being exhausted. This threat to judicial process was very recently deprecated by the Court of Appeal (*Karanja, M'Inoti, and Mohammed, J.J.A.*) in *David Njilithia Mberia v. Republic*, Nairobi Criminal Application No. EO11 of 2021, where that court censured the appellant for not diligently prosecuting the appeal in order to claim that he was still eligible for State or public office because of a pending appeal touching on the violations of Chapter Six of the Constitution. The Court of Appeal issued this caution;

***“We have no illusion that Article 193(3) is not intended to enable applicants to “park” in court appeals which they do not intend to prosecute so as to obtain cover for continuing in office simply because the “parked” appeal is pending. A pending appeal under Article 193(3) is not a bogeyman. It is a serious matter to be pursued expeditiously in order to***

*urgently settle salient public law questions and give effect and meaning to other provisions of the Constitution. In the context of this application, reading the Constitution holistically and purposively demands that we give substance and meaning, in addition to Article 193(3), also to Article 10(2) (c) of the Constitution which demands integrity and accountability as national values and principles of government, Article 73(2) (c) which declares selfless service based solely on the public interest as a guiding principle of leadership and integrity, Article 193(2) (g) which demands lustration of those found to have misused or abused a State or public office or to have contravened Chapter 6 of the Constitution, and Article 159(2) (b) which demands that justice shall not be delayed. No court should allow these other provisions to be imperiled or held in abeyance by a deliberately “parked” appeal which is intended, not to vindicate an applicant’s rights, but merely to facilitate his continuance in an office that a valid judgment has otherwise found him not deserving to hold.”*

[137] To this, we add that if this phenomenon of “parking” appeals were to be allowed as the norm, the result would be to forget the constitutional aspirations of good governance and integrity in public service. In such a context, courts are not helpless. To begin with, the mandate of interpretation and application of the Constitution is vested in the courts. Judicial authority by Article 159 is derived from the people and vests in, and shall be exercised by, the courts. In exercising this authority, the courts are to be guided by the principles, that;

**“(a) justice shall be done to all, irrespective of status;**

**(b) justice shall not be delayed;**

.....

**(d) justice shall be administered without undue regard to procedural technicalities; and**

**(e) the purpose and principles of this Constitution shall be protected and promoted”.**

**[138]** The courts cannot sit back and helplessly watch as these constitutional and national values and principles are being subverted by deliberate acts of the parties. Parties who are appealing or applying for review of decisions that make them ineligible for public or state office pursuant to Chapter Six of the Constitution, have a singular obligation to diligently prosecute such cases. Justice must be done and must also be seen to be done. This must be the overriding objective of every party, counsel and the court.

**[139]** Returning to the question whether the appellant was accorded adequate time and facility to respond to the charges against him by the County Assembly and the Senate, for our part, and from the foregoing, we respectfully are equally persuaded that the appellant was accorded a fair hearing within the meaning of Article 50 and fair administrative action in terms of Article 47 of the Constitution, and under the Standing Orders.

***iv. Whether it was mandatory to verify the impeachment Motion by affidavits or other statements on oath by members of the County Assembly who allegedly supported the motion;***

**[140]** The appellant has maintained that it is a mandatory requirement in law for the impeachment Motion to be verified under Order 67 of the Nairobi City County Standing Orders; that the Motion served upon him was not accompanied by affirmations and supporting documents; there was no communication of confirmation from the 1<sup>st</sup> respondent on any verification forms filled by the MCAs supporting the Motion. According to the appellant, apart from the signatures of MCAs supporting the Motion, each MCA was required but failed to verify

individually by way of a deposition that indeed they were in support of the Motion. In his view, the term 'verify' denotes to confirm or substantiate by oath or affidavit as to the truth. The appellant further contends that under Section 109 of the Evidence Act, it was the burden of the parties alleging that the affidavits attributed to them were forged to provide proof.

[141] Order 67(1) of the County Assembly Standing Orders upon which these arguments are based provides that:

***“Before giving notice of Motion under section 33 of the County Governments Act, 2012, the member shall deliver to the Clerk a copy of the proposed Motion in writing stating the grounds and particulars upon which the proposal is made, for the impeachment of the Governor on the ground of a gross violation of a provision of the Constitution or of any other law; where there are serious reasons for believing that the Governor has committed a crime under national or international law; or for gross misconduct or abuse of office. The notice of Motion shall be signed by the Member who affirms that the particulars of allegations contained in the Motion are true to his or her own knowledge and the same verified by each of the members constituting at least a third of all the members and that the allegations therein are true of their own knowledge and belief on the basis of their reading and appreciation of information pertinent thereto and each of them sign a verification form provided by the Clerk for that purpose.”*** [our emphasis].

[142] According to the County Assembly, the verification envisaged by this Order is when each of the more than two-thirds of the MCAs append their signatures to the Motion; and in particular, for this case, they did so on a document headed: **“SIGNATURES IN SUPPORT OF A MOTION FOR THE REMOVAL OF**

**GOVERNOR BY IMPEACHMENT”**; that they did so with the full knowledge of its purpose and specifically to verify the correctness of its contents. The source of the “verification forms”, according to the Standing Order is the Clerk of the Assembly. The Assembly itself confirmed having supplied the document in question to MCAs. Again, with respect, the Court of Appeal correctly construed the meaning of “verification” in the context of the above Standing Order. The use of the above document has not been shown to have occasioned a miscarriage of justice or caused any prejudice to the appellant. If the intention was to have members who were in support of the impeachment motion swear affidavits or make other statements on oath to authenticate the Motion, the County Assembly would have, in promulgating the Standing Order, expressly made that provision.

[143] We conclude from these factors that the Motion for the removal from office of Governor Nairobi County was duly verified in accordance with Order 67(1) of the Nairobi City County Assembly Standing Orders; and that the verification is not in the form of an affidavit or any other forms of deposition. This ground, for these reasons must fail.

***v. Whether public participation was undertaken;***

[144] The appellant has contended that the Court of Appeal erred in failing to find that there was no evidence of public participation prior to his impeachment as required by Articles 10(2)(a), 118(1) and 196 of the Constitution and Sections 94, 95, 100 and 101 of the County Governments Act; and that the residents of Nairobi were denied the opportunity to participate in the proceedings.

[145] Both the High Court and the Court of Appeal, relying on the evidence of the 2<sup>nd</sup> and 10<sup>th</sup> respondents were convinced that there was public participation based on a notice issued to residents of Nairobi City County of the impending removal of the Governor from office and a comprehensive report dated 3<sup>rd</sup> December, 2020 prepared to this effect. They also found proof of public participation in the form of an advertisement in a newspaper with wide circulation, ***the Daily Nation Newspaper*** of 27<sup>th</sup> November, 2020. In that publication, the attention of the

general public was drawn to the pending Motion for the impeachment of the Governor. It called upon the residents of the county and the public to make their representations by delivering written memoranda to the Assembly either physically or by post. The courts were persuaded by counsel representing the appellant, that in response to this advertisement, over 40,000 submissions were made. Both courts also relied on a survey in the form of questionnaires conducted in the County whose outcome was published in a report dated 3<sup>rd</sup> December, 2020. According to the report, majority of Kenyans were aware of the Motion and the reasons for the intended removal of the Governor and supported it. Over and above all these, the superior courts were further satisfied that the County Assembly had posted the Motion on its website quite apart from the fact that the hearing was held in public.

[146] While we agree that;

***“[320] ...Public participation is a major pillar, and bedrock of our democracy and good governance....so that the citizens have a major voice and impact on the equitable distribution of political power and resources and the participation of the people in governance will make the State, its organs and institutions accountable, thus making the country more progressive and stable.”***

(Per Chief Justice Willy Mutunga - Concurring) in, ***In the Matter of the National Land Commission***, Advisory Opinion Reference No. 2 of 2014; [2015] eKLR, the answer to this question depends upon proof by evidence; proof whether or not public participation was conducted. While the appellant merely asserted that there was no evidence of public participation, the 2<sup>nd</sup> and 10<sup>th</sup> respondents were categorical that the requirement of public participation was fulfilled. Both superior courts below agreed with them, having evaluated and re-analyzed the evidence. The courts also observed that, on account of the restrictions

placed on physical and personal public interactions due to the Covid- 19 pandemic, all the foregoing avenues satisfied the requirements of public participation.

[147] We have not been shown how the above concurrent conclusions amount to a misdirection or conclusions based on ‘no evidence’, for us to treat them as matters of law. We find, for this reason, no justification to depart from these concurrent findings of fact and dismiss this ground.

***vi. Whether the charges were substantiated to the prescribed standard to warrant the appellant’s impeachment;***

[148] It has been observed at the beginning of the Judgment that impeachment or removal proceedings, though *quasi-judicial* are not in the nature of criminal proceedings. They do not necessarily require or depend on criminal culpability to succeed. All that is required is that the allegations be substantiated. But as a constitutional remedy, impeachment serves as an important check on the exercise of executive power. The purpose of impeachment is generally to protect public interest and to preserve constitutional norms, while at the same time observing the rules of natural justice throughout the process. Both interests must be balanced.

[149] As to the standard of proof in impeachable charges, the Court of Appeal in its judgment in *Martin Nyaga Wambora & 3 others v. Speaker of the Senate & 6 others*, Civil Appeal No. 21 of 2014; [2014] eKLR, found that, to impeach a Governor requires a high threshold but;

***“... that standard is neither beyond reasonable doubt nor on a balance of probability. Noting that the threshold for removal of a governor involves “gross violation of the Constitution”, we hold that the standard of proof required for removal of Governor is above a balance of probability but below reasonable doubt.”***

The Court of Appeal in the above case also affirmed the elements identified by High Court as constituting proof of the charges of gross violation of the Constitution or written law as follows;

- i. ***the allegations must be serious, substantial and weighty.***
- ii. ***There must be a nexus between the Governor and the alleged gross violations of the Constitution or any other written law.***
- iii. ***The charges framed against the Governor and the particulars thereof must disclose a gross violation of the Constitution or any other written law.***
- iv. ***The charges as framed must state with degree of precision the Article(s) or even sub-article(s) of the Constitution or the provisions of any other written law that have been alleged to be grossly violated.***

[150] It is the appellant's case that the Court of Appeal failed to appreciate that the Senate plenary did not adhere to the obligation under Articles 47 and 50 of the Constitution in conducting the impeachment proceedings; that the Senate relied on allegations and material contained in the Anti-corruption Court case as a basis for his impeachment in disregard of the principle of presumption of innocence; and that that court failed to appreciate that the threshold for impeachment had not been met in the appellant's case, hence the charges were not substantiated.

[151] In the impeachment Motion, the MCA for Embakasi Ward, sought the removal of the appellant under Article 181 and Section 33 of the County Governments Act on four counts of impeachable charges, that firstly, pursuant to Article 181(1)(a) he had grossly violated the Constitution and other laws (the County Governments Act, Public Procurement and Disposal Act, 2015 and the Public Finance Management Act, 2012). Secondly, that he had abused office by violating Article 75 of the Constitution as read with Sections 11 and 13 of the Leadership and Integrity Act. Thirdly, that he was guilty of gross misconduct

having violated Article 73 of the Constitution by failing to promote public integrity in the office of the Governor. Lastly, that there were serious reasons to believe that he had committed various crimes under the Anti- Corruption and Economic Crimes Act in light of the charges he was facing at the Anti-corruption court.

**[152]** We maintain that the High Court received and evaluated the evidence presented to it in support and in rebuttal of the four charges. The Court of Appeal re-evaluated that evidence before coming to its own independent determination. The two courts came to a common conclusion that Articles 47 and 50 of the Constitution were adhered to by both the County Assembly and the Senate; that the process was, in the circumstances, expeditious, lawful and procedurally fair. We cannot substitute ourselves into the two courts and take up their roles by re-analyzing the evidence afresh for the third time. We can only disturb the concurrent factual conclusions, as we have repeatedly said in this judgment, if those conclusions were based on no evidence or not supported by the established facts or evidence on record, or that the conclusions were 'so perverse', or so illegal, that no reasonable court would have arrived at the same. The four charges against the appellant were, no doubt weighty, but they were not vague. They contained detailed particulars of the alleged violations of the Constitution and the law, specifying with precision the provisions of the Constitution and the law that were alleged to have been contravened.

**[153]** Before the question of impeachment was escalated to the two courts, both the County Assembly and the Senate had equally and independently found merit in the charges. Though there is no obligation in impeachment charges to prove each and every charge, in this instance all the organs involved, from the County Assembly to the Court of Appeal, found proof of all the charges. Nothing has been placed before us to warrant our interference with those conclusions by the two superior courts. We find no merit in this ground.

***vii. Whether the sovereignty of the people envisaged under Article 1 of the Constitution was respected and protected in the removal process***

**[154]** Article 1 of the Constitution provides:

***“Article 1. Sovereignty of the people***

***(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.***

***(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.***

***(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—***

***(a) Parliament and the legislative assemblies in the county governments;***

***(b) the national executive and the executive structures in the county governments; and***

***(c) the Judiciary and independent tribunals.***

***(4) The sovereign power of the people is exercised at—***

***(a) the national level; and***

***(b) the county level.”***

**[155]** Indeed, under Article 1, all sovereign power belongs to the people of Kenya. That power can only be exercised in accordance with the Constitution itself. Further, the people may exercise that power either directly or through their democratically elected representatives. Specifically, in the instant case, sovereign

power of the people is delegated to State organs such as Parliament at the national level and the County Assemblies in the devolved governments.

[156] By virtue of the People (*Wanjiku*) delegating this sovereign power, it is exercised on their behalf and must reflect their will. Delegated power is therefore to be exercised solely for the benefit of the people.

[157] In *Attorney General & 2 Others v. David Ndi & 79 Others*, SC Petition 12 of 2021 consolidated with Petition 11 & 13 of 2021, *Njoki, SCJ* expounding on Article 1 as follows:

***“[1192] In addition, Article 1 of the Constitution of Kenya elaborates the tenets of a functioning Republic anchored by the concept of *libertas populi* which defines the characteristics of a functioning Republic. It envisions a system that has responsible citizens who exercise their rights democratically and consciously. A free *res publica* is the highest value for all citizens. This Article preserves the exercise of the actual legal authority or power which is exercised by the people directly or through their democratically elected representatives.***

...

***[1194] Furthermore, it is a fundamental right of the Kenyan people to elect their representatives and that those so elected speak on their behalf. To limit the ability of an elected representative to speak, to act, to work on behalf of his or her electorate is in itself a limitation of people’s political rights under Article 38 of the Constitution. Such a proposition would amount to Limited Republicanism limiting the extent to which people exercise their powers either directly or through their elected representatives.***

**More poignantly, limiting the powers of the people donated to their representatives reorganizes the architecture of the Constitution's order of delegated governance.**" [our emphasis]

[158] Therefore, to completely lock out the electorate from being heard in a matter as important as the removal of their Governor, would be against the spirit of Article 1(2) of the Constitution. However, having found in this appeal that there was meaningful public participation, we hold that the people participated directly and also exercised their power through their elected representatives, at both national and county levels to uphold and defend Chapter Six of the Constitution. To that extent, this ground also fails.

#### **F. CONCLUSION**

[159] In conclusion, Article 10 (1) of the Constitution binds all State organs, State officers, public officers and all persons to abide by national values and principles of governance, which include integrity, transparency and accountability. The entire Chapter Six of the Constitution, comprising eight Articles is dedicated to Leadership and Integrity of State officers, signifying the importance of the State office they occupy. In essence, Article 181 is intended to function as a vital instrument for ensuring that the constitutional ethos of integrity, discipline and the proper exercise of public power are maintained.

[160] Impeachment and removal from office of State officers are constitutional remedies to gross violations of the Constitution, the law, abuse of office and gross misconduct. The consequences of impeachment are grave and may include disqualifications from engaging in any elective public position or to hold a public office.

[161] The principles governing the process of impeachment or removal of a county Governor that flow from this decision may be summarized as follows;

- i. All sovereign power belongs to the people of Kenya to be exercised directly or through their elected representatives at the national and county levels, and State organs.
- ii. The spheres of jurisdiction of the removal of a County Governor is exclusively reposed in two legislative organs, the County Assembly and the Senate, the representatives of the people.
- iii. Where it is alleged that any of the two organs has failed to act in accordance with the Constitution, or in conformity with the law and principles of natural justice, the courts are bound to review their decisions.
- iv. The removal of a Governor is both a constitutional and political process. The mandate of the courts is restricted by the doctrine of separation of powers to determine whether individual's rights, dignity and fundamental freedoms have been preserved and protected in the process without usurping the powers and functions of the legislative branch of Government.
- v. During the process of removal, the right to fair administrative action under Article 47 and the right to fair hearing under Article 50 of the Constitution all accrue to the Governor.
- vi. Public participation is an integral element of the process of removal of a State officer from office.
- vii. The removal of a Governor relates to accountability, political governance and personal responsibility and is not necessarily about criminal responsibility or culpability.
- viii. The grounds for impeachment and removal from office must be substantiated. The standard of proof is intermediate, that is, above a balance of probability but below all reasonable doubt, and the proof of any one of the charges is sufficient to discharge the burden of proof.
- ix. The courts must be involved in active case management to ensure efficient and expeditious yet fair determination of questions arising from Chapter Six of the Constitution.

**[162]** In the end, and on the basis of the opinions expressed in this judgment, we come to the ultimate conclusion that the removal from office of the appellant, Mike Mbuvi Sonko, was in compliance with the Constitution and the law.

We find no merit in this appeal and accordingly dismiss it.

**G. REASONS FOR THE CONCURRING JUDGMENT OF P.M. MWILU; DCJ & VP & S.C. WANJALA, SCJ**

**[163]** We have read the majority Judgment and the reasons thereof. We agree that this appeal has been rightly dismissed for lack of merit. However, having determined that the appellant has not properly invoked this Court's jurisdiction under Article 163 (4) of the Constitution, and having sustained the Preliminary Objection; we would have struck out the appeal at this stage without more. Such action on our part, would have been in keeping with this Court's decision in *Suleiman Mwamlole Warrakah & 2 Others v. Mwamlole Tchappu Mbwana & 4 Others* [2018] eKLR. In that case, we were categorical that a party must properly and specifically invoke the Court's appellate jurisdiction under Article 163 (4) (a) or 163 (4) (b) of the Constitution. Failure to do so, we held, would lead to the intended appeal being struck out. We would therefore, have downed our tools as indeed we did in the case under reference.

**[164]** Notwithstanding our misgivings about the majority's determination of the merits of the appeal, we concur with the final disposition and Orders.

**H. REASONS FOR THE CONCURRING JUDGMENT OF M.K. IBRAHIM, SCJ**

**[165]** I have keenly and carefully read and considered the Judgment of the majority. The factual rendition of the facts and relevant laws are meticulously

considered therein. I am in agreement with the conclusion of the majority. However, I write separately to address the question of jurisdiction.

[166] It is crucial to point out that in matters jurisdiction, I dissented in ***Lemanken Aramat v. Harun Meitamei Lempaka & 2 others***, SC Petition No. 5 of 2014; [2014] eKLR. I had agreed with the majority in that case that the proceedings in the High Court were a *nullity ab initio* having been premised on a petition filed out of time. However, my point of divergence was on the basis of the *locus classicus* on jurisdiction, the celebrated case of ***the Owners of the Motor Vessel “Lillians” v. Caltex Oil Kenya Ltd***, (1989) KLR 1. It was my considered opinion that the Court should have downed its tools and not delve into any other question on their merits.

[167] It was, and still is, my considered opinion that the Supreme Court as the Court of final judicial authority in Kenya, is bestowed with jurisdiction and mandate pursuant to Section 3 of the Supreme Court Act, No. 7 of 2011, to settle constitutional questions with finality. It is for this reason that I agree with the sentiments of Mutunga, C.J. & P. in the ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai and 4 Others***, Sup. Ct. Petition No 4 of 2012 [supra] that the Supreme Court should be ready to pronounce itself on the interpretation of constitutional issues. He expressed himself thus:

***“[I]t will be good practice for this Court to take every opportunity a matter affords it, to pronounce [itself] on the interpretation of a constitutional issue that is argued either substantively or tangentially by parties before it.”***

[168] It was my humble view that the context of the ***Aramat Case*** did not give rise to a constitutional moment for the Court to depart from the principle in ***Lillian “S”***, seize and go into any other issues on merit.

[169] However, in the present case, I am persuaded and indeed convicted in my principles, that this is one such case that warrants the Court to depart from the

long-held decision in *Lilian “S”*. I reiterate the words of the concurring opinion of Mutunga, CJ & P in *the Matter of the Speaker of the Senate & another* [supra] where he stated as follows:

**“[156] The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that lower courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretive guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship-gaps; and settle constitutional disputes. In other words, constitution-making does not end with its promulgation; it continues with its interpretation.**

[170] I fully endorse the characterisation of Chapter Six of the Constitution as the soul of the Constitution of Kenya. I can do no more than to echo the words of the majority decision, that the authority assigned to a State officer is a public trust that vests the responsibility to serve the people, rather than the power to rule them. To take up a State Office, whether it be by election or appointment, requires commitment to good governance, transparency and accountability. This

commitment must be espoused in both the words and deeds of the office holder in both public and official lives as well as their private lives. Indeed, in every association, this commitment must, at all times, be consistent with the purposes and objects of this Constitution, demonstrate honour for the people of Kenya, bring honour to the nation and dignity to the office as well as promote public confidence in the integrity of the office. Chapter Six codifies the guardrails against autocratic exercise of power by the leaders.

[171] Accordingly, it is the reason why the context of the present case presents an opportunity for this Court to settle fundamental questions of law surrounding impeachment proceedings in the framework of the Constitution of Kenya, 2010. Impeachment being a remedy for breaching the public trust entrusted to State Officers. It is my considered view that this was an opportunity to provide high-yielding interpretive guidance on the Constitution that the Court had an obligation and duty to seize.

[172] Taking that into consideration, I emphatically support the principles set out at the tail end of the decision as well as the final orders as enunciated by the majority.

[173] Be that as it may, just as the majority have done, I too render a clarification, that this is not an endorsement for departure from the principles in the *Lillian “S”* decision, rather a singular exemption for the Supreme Court due to its specialised mandate pursuant to the Constitution and the Supreme Court Act.

## I. COSTS

[174] Costs follow the event but are in the discretion of the Court. We are guided by the principles on the award of costs enunciated in *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai Estate of & 4 others*; SC Petition 4 of 2012; [2013] eKLR. Without doubt, the Petition raises substantive issues of law and of great public interest, we think for these reasons, it is appropriate to order parties to meet their own costs.

**J. FINAL ORDERS**

***i) The Petition of Appeal dated 1<sup>st</sup> April, 2022 is hereby dismissed;***

***ii) Parties to bear their own costs.***

It is so ordered.

**DATED and DELIVERED at NAIROBI this 5<sup>th</sup> Day of December, 2022.**

.....  
**M.K. KOOME**  
**CHIEF JUSTICE & PRESIDENT**  
**OF THE SUPREME COURT**

.....  
**P.M. MWILU**  
**DEPUTY CHIEF JUSTICE & VICE**  
**PRESIDENT OF THE SUPREME COURT**

.....  
**M.K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....  
**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....  
**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR,**  
**SUPREME COURT OF KENYA.**



This is the Exhibit marked "FMI-8" referred to in the annexed affidavit of Franklin Mithika Linturi Sworn Declared before me this 6th day of May 2024 at Nairobi in the Republic of Kenya  
J. M' LIMBIINE  
P. O. BOX 123456  
MOB 0722 240594  
DATE 06/05/2024 SIGN

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**ELECTION PETITION NO. 2 OF 2017**

***(APPL. NO. 2 TO STRIKE OUT THE PETITION)***

***(CORAM: J.A. MAKAU - J.)***

**IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF: THE ELECTION ACT, NO. 24 OF 2011**

**IN THE MATTER OF: THE ELECTIONS OFFENCES ACT NO. 37 OF 2016**

**IN THE MATTER OF: THE INDEPENDENT ELECTORAL AND BOUNDARIES ACT NO. 9 OF 2011**

**IN THE MATTER OF: THE ELECTIONS (GENERAL) REGULATIONS, 2012**

**AND**

**IN THE MATTER OF: ELECTIONS (PARLIAMENTARY AND COUNTY) PETITION RULES 2017**

**AND**

**IN THE MATTER OF: THE ELECTION FOR MEMBER OF NATIONAL ASSEMBLY, FOR WEST MUGIRANGO CONSTITUENCY.**

**BETWEEN**

**STEPHEN M. MOGAKA.....PETITIONER/APPLICANT**

**VERSUS**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION (IEBC).....1<sup>ST</sup> RESPONDENT**

**VINCENT KEMOSI MOGAKA.....2<sup>ND</sup> RESPONDENT**

**RETURNING OFFICER-WEST**

**MUGIRANGO CONSTITUENCY.....3<sup>RD</sup> RESPONDENT**

**RULING:**

1. The Petitioner herein **STEPHEN M. MOGAKA** was one of the fourteen (14) aspiring candidates including the 2<sup>nd</sup> Respondent **VINCENT KEMOSI MOGAKA** for the Member of National Assembly, West Mugirango Constituency, in the election held on 8<sup>th</sup> August, 2017. That after the 1<sup>st</sup> Respondent, IEBC and the 3<sup>rd</sup> Respondent, Returning Officer, West Mugirango Constituency conducted the election, the 2<sup>nd</sup> Respondent garnered 12004 whereas the **Petitioner garnered 9906**; consequently the 3<sup>rd</sup> Respondent declared and certified that the 2<sup>nd</sup> Respondent duly elected Member of Parliament, West Mugirango Constituency and issued him with certificate of Election on 10<sup>th</sup> August, 2017. The 2<sup>nd</sup> Respondent was subsequently gazetted under special issue of Kenya Gazette Vol. CXIX – No. 121 Gazette Notice Number 8239 published on 22<sup>nd</sup> August, 2017 as the Member of Parliament for the West Mugirango Constituency, having garnered 12004 votes.

2. The Petitioner herein filed this petition dated 6<sup>th</sup> September 2017, on the same day, together with his supporting affidavit dated 6<sup>th</sup> September 2017 and annexures thereto. The Petitioner filed the Petition together with 6 affidavits dated 6<sup>th</sup> September, 2017, made by the Petitioner's intended following witnesses:-

*1. Eric Mokuu*

*2. Peterson Nyaruri*

*3. Charles Obiero Mogwambo*

*4. Kennedy Mongare*

*5. Andrew Omoyo*

*6. Justine Gekong'a Orina*

All the six (6) affidavits as well as that of the Petitioner were sworn before one Mercy Moragwa Mogusu Advocate and Commissioner for Oaths, at Nairobi, for some of the witnesses and Nyamira for others as per the affidavits.

3. The Petition was duly served upon the Respondents, who filed their responses and the matter was subsequently set down for pre-trial conference on 3.10.2017 when the trial Court set down pre-trial directions. The Court set the applications already filed for hearing on 9.10.2017 and delivered ruling on the applications which had been filed on 30<sup>th</sup> October, 2017 and on which date the petition was set down for hearing on 20<sup>th</sup> – 22<sup>nd</sup> November, 2017 and 27<sup>th</sup> – 29<sup>th</sup> November 2017.

4. That before the Petition came up for hearing, the 2<sup>nd</sup> Respondent drew a Notice of Motion dated 8<sup>th</sup> November 2017 and filed the same on the same day. The application is brought pursuant to **Section 4 (1) of the Oaths and Statutory Declarations Act (Cap. 15) Laws of Kenya, Rule 7 (4) (b), 12 (1), (2), (3), (4) (ii) and 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 and Order 19 of Civil procedure Rules** and seeks the following orders:

*1. That this application be certified urgent and then heard exparte in the first instance.*

*2. That this Honourable Court be pleased to hear this application in priority to the hearing of the main election petition herein.*

*3. That this Honourable Court be pleased to strike out and expunge from the Court records Affidavits of:-*

*1) Stephen M. Mogaka Sworn on 6.9.2017.*

*2) Eric Mokuwa sworn on 6.9.2017.*

*3) Peterson Nyaruri sworn on 6.9.2017.*

*4) Charles Obiero Mogwambo sworn on 6.9.2017.*

*5) Kennedy Mongare Mogaka Sworn on 6.9.2017.*

*6) Andrew Omwoyo sworn on 6.9.2017.*

*7) Justine Gekong'a Orina sworn on 6.9.2017.*

*4. That upon grant of prayers 3 herein above the Election Petition herein to stand dismissed for want of evidence in support.*

*5. That the costs of this application be provided for.*

5. The Notice of Motion is premised on the grounds on the face of the Application and annexed affidavit of Hon. Vincent Kemosi Mogaka. The grounds are as follows:

*a) The main election petition is set down for hearing as from 20<sup>th</sup> November 2017.*

*b) That the Affidavits of Stephen M. Mogaka, Erick Mokuwa, Peterson Nyaruri, Charles Obiero Mogwambo, Kennedy Mong'are, Andrew Omoyo and Justine Gekong'a Orina were commissioned by person who has an interest in the matter contrary to the clear provisions of the law.*

*c) That the said affidavits are therefore incurably defective.*

6. The 2<sup>nd</sup> Respondent in his affidavit of support dated 8<sup>th</sup> November, 2017 has deponed interalia:- that on 7.11.2017 while with his Advocates perusing the pleadings, they went through all the seven (7) affidavits filed by the Petitioner in support of the petition and discovered the same were commissioned by an Advocate known as Mercy Moragwa Mogusu, (annexed and marked "VKMI"), that the last time the 2<sup>nd</sup> Respondent talked to Mercy Moragwa Mogusu, she informed him, which information he believes to be true, that she was practicing in the law firm of Musyoki Mogaka & Co. Advocates, which is the firm of Advocates, that had drawn and filed all the documents in this petition, that he was taken aback because as an Advocate practicing in that firm, she is definitely interested in the matter and cannot in law commission her law firm's documents, that the 2<sup>nd</sup> Respondent then checked with the Law Society of Kenya, Portal and the Law Society itself, to confirm whether M/s. Mercy Moragwa Mogusu, is still practicing from M/s. Musyoki Mogaka & Co. Advocates or not, that to his surprise as per official records of Law Society, it was confirmed M/s. Mercy Moragwa Mogusu, is still practicing in the law firm of Musyoki Mogaka & Co. Advocates (annexed and marked "V KM 2 (a) and 2 (b)" copies of M/s. Mercy Moragwa Mogusu's Advocates profile) obtained from the law society of Kenya Advocate search engine and Law Society of Kenya letter confirming the position, that M/s. Mercy Moragwa Mogusu being an Advocate in the law firm of Musyoki Mogaka & Co. Advocates by dint of **Section 4 of the Oaths and Statutory Declaration Act** is barred from commissioning documents drawn by her own firm of Advocates, that the affidavits commissioned by M/s. Mercy Moragwa Mogusu, being drawn by her own firm are fatally defective and that they should be expunged from the Court file.

7. The 1<sup>st</sup> and the 3<sup>rd</sup> Respondents filed a Replying affidavit to the 2<sup>nd</sup> Respondent's Notice of Motion dated 8<sup>th</sup> November, 2017, through Samson Mayo, the 3<sup>rd</sup> Respondent and the Returning Officer for West Mugirango Constituency during the election held on 8<sup>th</sup> August, 2017, stating interalia:- that all the affidavits sworn by Stephen M. Mogaka, the Petitioner, Eric Mokuwa, Peterson Nyaruri, Charles Obiero Mogwambo, Kennedy Mong'are, Andrew Omoyo and Justine Gekong'a Orina on 6<sup>th</sup> September 2017 and filed by the Petitioner on the same day, were purportedly commissioned by M/s. Mercy Moragwa Mogusu, that the said commissioner for oaths, M/s. Mercy Moragwa Mogusu, is an Advocate Practicing in the firm of the Petitioner's Advocate, M/s.

Musyoki Mogaka & Co. Advocates, that the Advocate has a direct interest in this matter, hence she has no capacity to commission the aforesaid affidavits by virtue of **Section 4 (1) of the Oaths and Statutory Declarations Act**, that the said affidavits having been drawn and filed by her firm, that the Commissioning of the aforesaid affidavits by the said Advocate renders them incurably defective, hence the same are null and void and that in the interest of justice the said affidavits ought to be struck out of the Court records for being fatally defective.

8. The Petitioner filed a Notice of Preliminary Objection dated 20<sup>th</sup> November 2017, raising the following preliminary point of objection:-

***“This honourable court is divested of the jurisdiction to entertain the Notice of Motion Application dated 8<sup>th</sup> November, 2017 by dint of the provisions of Articles 162 (2) (a) and 162 (3) of the Constitution of Kenya 2010, Section 12 (1) (a) of the Employment and Labour Relations Act No. 20 of 2011 and Rules 15 (1) (c) and 15 (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017”***

9. The Petitioner further filed a Replying Affidavit dated 10<sup>th</sup> November 2017, stating inter alia, that the Replying affidavit is filed without prejudice to Petitioner’s right to raise and argue the Notice of Preliminary objection, that the Petitioner in filling the Petition he complied with all provisions of the **Constitution of Kenya 2010, the Elections Act, the Oaths and Statutory Declarations Act and the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, that the 2<sup>nd</sup> Respondent’s failure to disclose when he talked last to M/s. Mercy Moragwa Mogusu is intended to misled the Court into believing that Mercy Moragwa Mogusu is an employee of Musyoki Mogaka and Company Advocates, a position the Petitioner stated is not true at all, that the Petitioner stated that he is a founder of Musyoki Mogaka & Company Advocates, a sole proprietor and that he has not been in partnership since inception of the firm to date and that at the time of Commissioning the Affidavits M/s. Mercy Moragwa Mogusu was not an employee, Associate or partner of Musyoki Mogaka and Company Advocate or at all. That he is aware M/s. Mercy Moragwa Mogusu works with the firm of Momanyi and Associates, Windsor House 6<sup>th</sup> Floor and not with M/s. Musyoki Mogaka and Company Advocates that there is no interest whatsoever that M/s. Mercy Moragwa Mogusu has in the firm of M/s. Musyoki Mogaka and Company Advocates that drew and filed the pleadings to fetter her commissioning of the impugned affidavits, that on the LSK letter dated 8.11.2017, Ref. P.105/4591/03 addressed to the 2<sup>nd</sup> Respondent, he responded by stating that the 2<sup>nd</sup> Respondent’s letter to LSK of 8.11.2017 was deliberately not filed in the Court, that it does not show when the said Advocate last furnished LSK with her address, leaving it to speculation, that he learned of the purported address of Mercy Moragwa Mogusu only through the 2<sup>nd</sup> Respondent’s present application, that by a letter dated 14.11.2017 to LSK by M/s. Musyoki and Company Advocates, complained on the mistake in address for Mercy Moragwa Mogusu (attached and marked “SMM1”), that by a letter dated 15.11.2017 addressed to Momanyi & Associates by M/s. Musyoki Mogaka & Company Advocate and copied to LSK, they highlighted the mistake and asked for correction (annexed and marked “SMM2”), that the Petitioner visited LSK offices 16.11.2017 to correct the mistake and wrote a letter dated 16.11.2017 (annexed and marked “SMM3”).

10. The Petitioner depones that the 2<sup>nd</sup> Respondent had been passing of as the Mogaka of Musyoki Mogaka and Company Advocates and he amended a Sale Agreement drawn by the 2<sup>nd</sup> Respondent marked “SMM4” prepared by the Petitioner’s firm and urging the mistake of address of M/s. Mercy Moragwa Mogusu was caused by the 2<sup>nd</sup> Respondent’s law firm yet Mercy Moragwa Mogusu was not an employee in his firm but that of M/s. Momanyi and Associates, that there were many other Advocates listed on the LSK website as currently working in Musyoki Mogaka and Company Advocate but in reality they are not working in Musyoki Mogaka and Company Advocates, such as:-

***(a) Agonda Jacqueline Adhiambo: who is currently a Magistrate at Mavoko Law Courts. See Gazette Notice No. 2114 dated 24<sup>th</sup> March, 2016. (Annexed hereto and marked “SMM5” is a copy of the said gazette notice.)***

***(b) Gisemba Paul Nyamweya: who is state Counsel working for Attorney General in Nyeri.***

***(c) Mwae Dorcas Wanjiru: who is a Partner at Hussein Mwae & Co. Advocates situate at 680 Hotel, 5<sup>th</sup> Floor, Room 605.***

That the negligent acts of the commission and/or omission by LSK, should not be visited on the Petitioner, that the Notice of Motion dated 8<sup>th</sup> November 2017, be dismissed with costs.

11. That before hearing of the Preliminary Objection upon hearing all the Advocates for the Petitioner and the respondents, the Court directed both the Preliminary Objection and the Notice of Motion be heard together, starting with Preliminary Objection then the Notice of Motion and ruling be delivered together.

**NOTICE OF PRELIMINARY OBJECTION:**

12. The Petitioner through a preliminary objection dated 20<sup>th</sup> November 2017 and filed on the same day, raised the following preliminary point of objection.

*“This Honourable Court is divested of the jurisdiction to entertain the Notice of Motion Application dated 8<sup>th</sup> November, 2017 by dint of the provisions of Articles 162 (2) (a) and 162 (3) of the Constitution of Kenya 2010, Section 12 (1) (a) of the Employment and Labour Relations Act No. 20 of 2011 and Rules 15 (1) (c) and 15 (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017”*

13. At the hearing Mr. Mokua Ndubi, Learned Advocate, for the Petitioner appeared jointly with Mr. Omari, Learned Advocate, whereas Mr. Mogikoyo, Learned Advocate, appeared for the 2<sup>nd</sup> Respondent and Mr. Maloba, Learned Advocate, appeared for the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents.

14. Mr. Mokua Ndubi, Advocate, urged the preliminary objection pointing out that this Court has no jurisdiction to entertain the 2<sup>nd</sup> Respondent's application by dint of **Article 162 (2) (a) and Article 162 (3) of the Constitution of Kenya 2010**. He submitted the 2<sup>nd</sup> Respondent's application is inviting the Court to make a determination of employment of Mercy Moragwa Mugusu, Advocate when the determination of that issue is exclusively restricted to the **Employment and Labour Relations Court (ELRC) pursuant to Section 12 (1) (a) of the Employment and Labour Relations Court Act No. 20 of 2011**. He urged the issue as he understands it, is where does that Advocate work”

15. Under **Rule 15(1) (c) of the Elections (Parliamentary and County Elections) Petitions Rules 2017**, he urged the Notice of Motion before this Court should have been determined at the pre-trial stage. That the time frame between pre-trial and the hearing he urged is to enable parties to prepare their witnesses. **Rule 15 (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, he urged the Court should not allow the application save where application could not have been brought before the commencement of the hearing of the Petition. He therefore prayed for the Notice of Motion to be dismissed with costs.

16. Mr. Maloba, Learned Advocate, appearing for the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents, submitted that he has very carefully looked at the preliminary objection, as well as the Notice of Motion dated 8.11.2017 and submitted to claim, that this is a dispute on employment is stretching the law to its elastic limits. He submitted that there is no dispute on employment of M/s. Mercy Moragwa Mugusu. He urged from the application and the responses by all parties in this matter, the Court is being asked to make a finding of fact on the current physical address of the concerned Advocate, thus M/s. Mercy Moragwa Mugusu, at the time she commissioned the Petitioner's affidavits and as such he urged that this is not a matter for ELRC but a matter for this Court. **On rule 15 (1) (c ) and 15 (2) (c ) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** he urged it is clear parties are at liberty to file any application as long as it is brought before commencement of the hearing of the Petition.

17. Mr. Mogikoyo, Learned Advocate, representing the 2<sup>nd</sup> Respondent associated himself fully with the submissions made by Mr. Maloba, learned Advocate, for the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents, submitting the issue before the Court is not a labour and employment issue but one that revolves around an Advocate who commissioned affidavits before the Court and on compliance and Ethics under the **Oaths and Statutory Declarations Act** and further it is based on the communication from a professional body, the Law Society of Kenya, which regulates the professional conduct of the Advocates in Kenya. He urged further if there is an issue between Musyoki Mogaka and Company Advocates and Mercy Moragwa Mogusu, Advocate that is fully a private issue, under the contract of law which is not a preserve of on Election Court. He **urged Article 162 (2) and (3) of the Constitution of Kenya 2010**, is not applicable in this matter. On **Section 12 (1) (a) of the Employment and Labour Relations Court Act**, he urged the same is not applicable in this Petition. On **Rule 15 (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** he urged the issue is, whether the application before Court is an interlocutory application, urging that he has filed supplementary authorities in support. Referring to authority No. 1 on the **Black Law Dictionary, 9<sup>th</sup> Edition on page 155**, pointing out the application seeks final orders and if prayers are granted the matter in issue shall finally be resolved. He referred to page 889 of the same authority on definition of interlocutory application urging if the matter on application is granted it will resolve the controversy completely. He therefore submitted that the matter is not an interlocutory application. He urged further the application is not barred by the virtue of **Rule 15 (2) of the Election (Parliamentary of and County Elections) Petitions Rules, 2017**, as the hearing of the main petition is yet to commence. He pointed out that the door to file any application at the time of pre-trial conferencing was not closed as the court stated any application could be brought by way of formal application before commencement of the hearing. He urged the preliminary objection be dismissed.

18. Mr. Mokua Ndubi, Learned Advocate, in a rejoinder stated the Court in determining the application will make a determination of where the advocate works. He urged what is before the Court in the 2<sup>nd</sup> Respondent's application is an interlocutory application referring to page 115 of the Black's Law Dictionary. On **Rule 15 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, he urged it talks of interlocutory application and the Rule is couched in a mandatory terms and urged the Court to uphold the Petitioner's Preliminary objection.

19. **Article 162 (2) (a) and (3) of the Constitution of Kenya 2010**, as regards the jurisdiction of the ELRC provides as follows:-

**162. (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.**

**(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause”**

20. The jurisdiction of the High Court is provided under **Article 165 (3), (4), (6) and (7) of the Constitution of Kenya 2010**. The High Court however do not have jurisdiction in respect of matters reserved for the exclusive jurisdiction of the supreme Court under the constitution or falling within the jurisdiction of the Employment and Labour Relations Court or the Environment and Land Courts.

**Article 165 (5) (a) and (b) of the Constitution of Kenya 2010** provides:-

**“165 (5) The High Court shall not have jurisdiction in respect of matters—**

**(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or**

**(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”**

21. **Section 12 (1) (a) of the Employment and Labour Relations Court Act No. 20 of 2011**, on the jurisdiction of ELRC Court provides as follows:-

**“12 (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including:-**

**(a) Disputes relating to or arising out of employment between an employer and an employee;”.....**

22. In view of the above an Election Court cannot deal with matters which fall within the jurisdiction of Courts contemplated under **Article 162 (2) of the Constitution**. The **employment and labour Relations Court Act No. 20 of 2011** clearly spells out the jurisdiction of the ELRC under **Section 12**. That include matters relating to dispute relating to or arising out of employer and an employee relationship. In the instant application, the issue is not an issue relating to an employer and employee as contended by the petitioner as it does not fall under any situation envisaged under **Section 12 of the Employment and Labour Relations, Court Act No. 20 of 2011**. This Court in the application before it, is being asked to make a finding of a fact whether the impugned affidavits were commissioned by an unauthorised person in view of the provisions of the provisions of the **Oaths and Statutory Declarations Act** or make a finding of the physical address of the Advocate who commissioned the Petitioner's and his witnesses affidavits. In the application before this court, there is no issue or prayer seeking a declaration that M/s. Mercy Moragwa Mogusu is an employee of the firm of Musyoki Mogaka and Company Advocates, nor has the application raised the issues as regards of employment and labour in the affidavits, rather than non-compliance with the ethics under the **Oaths and Statutory Declarations Act**. The Application is purely based on the communication received from the LSK, the professional body, which regulates the professional

conduct of its members. This Court in dealing with this application, has not been invited in the 2<sup>nd</sup> Respondent's application to determine the issue of employer and employee in respect of the firm of Musyoki Mugoka & Company Advocates and one M/s. Mercy Moragwa Mogusu Advocate. This is an Election Court and is bound by **Rule 12 (14) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** to apply the provisions of the **Oaths and Statutory Declarations Act (Cap 15)** which provides:-

*"The Oaths and Statutory Declarations Act (Cap 15) and Order 19 of the Civil Procedure Rules, 2010 (L.N. No. 151/2010) shall apply to affidavits under these Rules."*

In addition to the above all Courts whether its High Court or ELRC or ELC or Magistrates Courts including tribunals have jurisdiction to determine whether an affidavit intended to be used before it is lawfully commissioned or not. No Court can be said it has no jurisdiction when it comes to considering the legality of an affidavit intended to be used before it.

**23. Rule 15 (1) (c) and 15 (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides:-**

*"(15) (1) Within seven days after the receipt of the last response to a petition, an election court shall schedule a pre-trial conference with the parties in which the election court shall:-*

*(c) determine interlocutory applications*

*and*

*15 (2) An election Court shall not allow any interlocutory application to be made on conclusion of the pre-trial conference. If the interlocutory application could have, by its nature, been brought before the commencement of the hearing of the petition."*

24. The issue raised by both the Petitioner's Counsel and the Counsel for the 2<sup>nd</sup> Respondent is what is "interlocutory application" The **Black's Law Dictionary, Ninth Edition on page 115** an interlocutory application is defined as follows:-

*"Interlocutory application A motion for equitable or legal relief sought before final decision."*

Further on the same **Black's Law Dictionary at page 889** "interlocutory" is defined as:-

*"an Order, judgment, appeal, etc, interim or temporary; not constituting of final resolution of the whole controversy - also termed medial, (Cases appeal and error - 66 - 84: Criminal law - 1023 (3)"Federal courts - 572 - 583"*

From above though "Interlocutory application" may result in final determination of a matter on a point of law by making of a final order or judgment, my view is that interlocutory application is the one which is filed and heard before final decision is made in a matter, thus all applications filed before determination of Election Petition are in my view interlocutory applications inspite of the eventual outcome, save where an application is on a point of law.

**25. Rule 15 (1) (c) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** states that an election court shall schedule a pre-trial conference with the parties in which under election Court shall determine interlocutory applications and further under **Rule 15 (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** states that an elections Court shall not allow any interlocutory application to be made on conclusion of the pre-trial conference, if the interlocutory application could have, by its nature, been brought before commencement of the hearing of the Petition.

26. The 2<sup>nd</sup> Respondent's application was filed on 8<sup>th</sup> November 2017 after the conclusion of the pre-trial conference, after the 2<sup>nd</sup> Respondent and his Counsel, as they were preparing for the hearing of the case discovered all affidavits in support of the case were commissioned by one M/s. Mercy Moragwa Mogusu. On the conclusion of the pre-trial conference, the Court had directed that any further applications were to be brought forward by way of formal application. The Court had not closed the door for filing interlocutory applications before commencement of the hearing of the petition. I have perused the 2<sup>nd</sup> Respondent's affidavit and reasons for bringing up the application after pre-trial conferencing and before commencement of the hearing and I am satisfied the interlocutory application could not have, by its nature been brought before pre-trial conferencing. The application was filed on

8.11.2017 and served on 10.11.2017 ten (10) days before the intended commencement date of the hearing of the petition. The petition has not been heard yet. I therefore do not find any breach of **Rule 15 (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**. At any rate, my view is that any application, for striking out a petition which is purely based on a point of law can be filed at any time before conclusion of the hearing of the petition.

27. The upshot is that the preliminary objection is devoid of merits. I find and hold that this Court has jurisdiction to entertain the Notice of Motion dated 8<sup>th</sup> November 2017 by virtue of the reasons stated in this ruling. The preliminary objection is dismissed with costs to the 1<sup>st</sup>, the 2<sup>nd</sup> and the 3<sup>rd</sup> Respondents.

#### **NOTICE OF MOTION DATED 8<sup>TH</sup> NOVEMBER, 2017.**

28. The Notice of Motion by the 2<sup>nd</sup> Respondent dated 8<sup>th</sup> November 2017, is based on the provisions of the law on the top part of the Motion, and seeks prayers on the face of the application and is based on the grounds on the face of the application and an affidavit of the 2<sup>nd</sup> Respondent dated 8<sup>th</sup> November 2017, particulars whereof are well captured under paragraphs 4, 5, and 6 of this ruling which I need not reproduce. The 1<sup>st</sup> and the 3<sup>rd</sup> Respondents Response to the application is captured under paragraph 7 of this ruling and the petitioner's Response to the Motion is captured under paragraph 8, 9 and 10 of this ruling.

29. Mr. Mogikoyo, Learned Advocate, representing the 2<sup>nd</sup> Respondent/Applicant relied on the grounds on the face of the Notice of Motion and the 2<sup>nd</sup> Respondent/Applicant's Affidavit. He urged under **Rule 8 (4) (b) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** a petition shall be supported by an affidavit sworn personally by the petitioner as per **Rule 12 (1) (b) of the aforesaid Rules 2017**. Under **Rule 12 (2) (f) of the aforesaid Rules** the name and address of the advocate, if any acting for the petitioner, has to be provided, which shall be address of service. That the Petitioner's affidavit of support on page 49 of the petition, gives the name of the firm of Advocates acting for the petitioner as Musyoki Mugaka and Company Advocates, that under **Rule 12 (3) of the aforesaid Rules 2017** it is provided that each person who the Petition intend to call as a witness at the hearing, shall swear an affidavit and **Rule 12 (4) of the aforesaid Rules**, requires the Petitioner to file the affidavits sworn under **12 (3) of the aforesaid Rules 2017**. Mr. Mogikoyo, learned Advocate, urged it is mandatory the aforesaid affidavits, be filed together with the petition. He urged the petitioner listed six (6) witnesses whose affidavits, he filed together with the petition referring to pages 3 – 19 of the Petitioner's Petition filed on 6<sup>th</sup> September 2017. He urged all affidavits must be sworn before Commissioner for Oaths in accordance with the Rules and provisions set out under the **Oaths and Statutory Declarations Act** referring to **Section 4 (1) of the Oaths and Statutory Declarations Act** which he urged is relevant to this application, and submitted a commissioner cannot commission his or her own documents or documents prepared by firm of Advocates from where he/she works or where he/she has an interest. He pointed out that all witnesses affidavits in support of the petition including the petitioner's affidavit in support of the Petition, were commissioned by M/s. Mercy Moragwa Mogusu, Advocate, which fact he urged the 2<sup>nd</sup> Respondent discovered on 7.11.2017 when preparing with his Advocates for the hearing of the Petition, and who the 2<sup>nd</sup> Respondent was aware was working in the firm of Musyoki Mogaka & Company Advocates. The 2<sup>nd</sup> Respondent took further action to confirm with the aforesaid Advocate whether she was still in the aforesaid firm of Advocates. That he went to LSK Portal and did a search from which he confirmed she had declared to LSK her work place was Musyoki Mogaka & Co. Advocates (Annexure "VKM 2 (a).") That the 2<sup>nd</sup> Respondent took further action to make an inquiry with LSK and got confirmation through (annexure "VKM 2 (b).") provoking the filling of the Notice of Motion. The Advocate for the 2<sup>nd</sup> Respondent/Applicant referred the Court to the following authorities in support of the application.

*(i) Kenya Federation of Labour & Another V. Attorney General and 2 Others [2014] eKLR.*

*(ii) Caltex Oil (Kenya) Ltd V. New Stadium Station Ltd & Another [2002] eKLR.*

30. Mr. Mogikoyo, submitted that the Replying affidavit by the Petitioner contravenes **Order 19 (2) (3) (a) of Civil Procedure Rules**, as it is argumentative and most of the paragraphs are based on hearsay and that M/s. Mercy Moragwa Mogusu did not file response denying that she does not work for Musyoki Mogaka and Company Advocates. That the allegation she works for Musyoki Mogaka and Company Advocates has not been controverted.

31. Mr. Maloba, Learned Advocate, appearing for the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents, supports the Notice of Motion dated 8.11.2017 and relied on the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents Replying affidavit dated 18<sup>th</sup> November 2017, contents whereof are found on paragraph 7 of this ruling. He urges the Petitioner denies M/s. Mercy Moragwa Mogusu works in the firm of M/s. Musyoki Mogaka and Advocates, yet no affidavit from her was filed denying the allegation, that she works in the said firm of Advocates. He pointed out the letter annexed by the 2<sup>nd</sup> Respondent/Applicant dated 8.11.2017 from LSK confirmed M/s. Mercy Moragwa Mogusu's current

address is at Musyoki Mogaka & Co. Advocates, the same firm in which the Petitioner practices in and named after him. On the Petitioner's Replying affidavit he urged the same is evasive, diversionary and purely intended to mislead the Court. He pointed out the Petitioner has served the 3<sup>rd</sup> Respondent with Replying affidavits which are not commissioned and signed as required by Law, urging Court to strike the affidavits off. He urged that the law is clear as per **section 4 (1) of the Oaths and statutory Declarations Act** which he relied upon. He referred to the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents list of authorities being as follows:

*“1. Kenya Federation of Labour & Another V. Attorney General & 2 Others [2014] eKLR.*

*2. Caltex Oil (Kenya) Limited v. New Stadium Service Station Ltd & Another [2002] eKLR.*

*3. Dickson Mwenda Kithinji v. Gatirau Peter Munya & 2 Others [2014] eKLR.*

On the effect of affidavit commissioned by the same firm:

32. On the authorities submitted by the Petitioner, to the effect that the Court can allow the Petitioner to file fresh affidavits in case his affidavits are struck out from record, Mr. Maloba, Advocates, in his response referred to **Rules of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, urging under **Rule 8 (4) (b) of the aforesaid Rules** which is couched in a mandatory terms, the Petition shall be supported by an affidavit and that under **Rule 19 (2) of the aforesaid Rules**, it is provided that Court cannot extend the time within which a Petition is supposed to be filed or determined. He urged that the Court has no jurisdiction to grant leave to the Petitioner to file fresh affidavits once it finds the affidavits on record are defective.

33. Mr. Omari, Learned Advocate, representing the Petitioner in response to the Respondent's Counsel Submissions, urged the Counsel urged two points on facts and law. That on the basis of facts he submitted are that one Mercy Moragwa Mogusu works for Musyoki Mogaka & Co. Advocates, is based on LSK Portal and attached documents over the said Counsel Adm. No. P.105/4951/03. He submitted that there is no dispute the Counsel is a Commissioner for oaths nor is it disputed the witnesses appeared before her and that she commissioned the affidavits. Urging the question is whether she works in the firm of Musyoki Mogaka and Co. Advocates.

34. Referring to the said Advocates, profile exhibit “VKM 2” which shows since 2009, Mercy Moragwa Mogusu Advocate was with Musyoki Mogaka & Company Advocate, he urged the Physical address is Uganda House, 4<sup>th</sup> Floor, Kenyatta Avenue, whereas in the pleadings it is clear where the law firm is situated, stating it is situated at the same place but suite 19 and not Door 19. He stated the Letter as regards the last known contact address as declared by Mercy Moragwa Mogusu, it is not provided when the address was declared, urging the same is ambiguous, as it is not clear when the commissioner declared her contact address. He urged contact address is not similar to work place, submitting contact means a place where one can be found and one can avail documents or information, may be, where letters from LSK can be send to. He submitted contact has nothing to do with where one works.

35. On the Website he challenged the LSK Website, doubting whether the same is even updated and whether it is correct referring to contents of Replying Affidavit under **paragraph 22 (a)** in respect to **Agonda Jacqueline Advocates**, where it is indicated as working as employees of Musyoki Mogaka & Co. Advocates, notwithstanding, that she left the firm long time ago. The Petitioner referred to Kenya Gazette Notice (“SMM5”) in respect of Agonda Jacqueline, now a Magistrate, who was once his employee and currently working at Mavoko Law Courts, and (“SMM6”) a cause list for the said Agonda Jacqueline, urging that is one of the credibility question on the website. He urged another credibility question is raised on **paragraph 22 (b)** of the affidavit of the Petitioner, on the website where it is stated one **Gisemba Paul Nyamweya** is an Advocate in that firm, but that is not so as he is a State Counsel working for gain in the Attorney General's Office and urged he cannot as such be said to be working for Musyoki Mogaka & Co. Advocates, attaching his pay slip marked “SMM9” and allegedly based at Nyeri. He added an Advocate, in private law firm of Musyoki Mogaka & Co. Advocates, cannot and will never be a State Counsel in the Attorney General's Office. On **paragraph 22 (c) Mwae Dorcas Wanjiru** in the LSK website, he urged is shown as an Advocate, yet he urged she is a partner in the firm referred to as **Hussein Mwae & Co. Advocates** situated at six-eighty Hotel, 5<sup>th</sup> Floor Room 605, as per annexure “SMM7.” He urged that the same LSK website depicts Mercy Moragwa Mogusu as an Advocate, in the firm of Musyoki Mogaka and Company Advocates, which the Petitioner denies. He asked whether the LSK website in view of the above can be relied. Submitting that whatever is in the LSK website cannot be truthful but is a misrepresentation of the true facts. He urged the Court to take Judicial Notice that, the LSK website is not updated and cannot be relied upon, referring to “VKM 2 (a) and “VKM 2 (b)” the 2<sup>nd</sup> Respondent's annexures urging it is not certain when the last known contact address in respect of Mercy Moragwa Mogusu Advocate, were given to LSK and urged the address given is different as there is difference between the “door” and “suite” pointing

the details are always given to LSK by the Advocates.

36. On the letter by Mary M. Kitonga, the Program Officer Compliance and Ethics, the Petitioner urged she should have made an affidavit. He urged under the **Law Society Act, 2014, No. 21 of 2014 under Section 26(3)**, the Secretary of LSK, who is C.E.O. of LSK is responsible to the council for the day to day administration and Management of the Secretariat and as such all compliance for the LSK, he urged are signed by the Secretary in respect to any communication and any communication by Mary M. Kitonga are not legitimate and has no full force of the Law. He urged the Court to interpret the Constitution guarded by **Schedule 6 (7) of the Constitution, Article 10 and 19 – 22 of the Constitution of Kenya 2010**, in regard to the matter before the Court, pointing out that the **Oaths and Statutory Declarations Act**, was enacted before the Constitution of Kenya 2010. He urged under **Article 259 of the Constitution** the interpretation must be purposeful and lead to the development of the law in strictly following the provisions of **Article 10 of the Constitution. On Section 4 (1) of the Oaths and Statutory Declarations Act**, Mr. Omari, Advocate submitted that it was made to bar Advocates from Commissioning documents for Commercial gain.

37. Mr. Mokuia Ndubi, learned Advocate, appearing jointly with Mr. Omari, learned Advocate, of the Petitioner in his response reiterated that the Petitioner in filing the Petition he complied with the provisions of the Constitution, Elections Act and all provisions of the elections Rules. He reiterated that at the time of swearing the impugned affidavits, the commissioner, who witnessed the affidavits was not an employee of the petitioner's firm of Musyoki Mogaka & Co. Advocates. He urged the Court to place more weight on the affidavit of the Petitioner rather than the Letter by LSK. He further submitted the author of the letter can be examined. In support of the Petitioner's case he relied on the case of **Henry Okello Nadimo V IEBC & 2 Others HCEP NO. 2 of 2013**. He submitted in case the Court finds the affidavits defective, it can exercise its discretion and admit them but submitted that the said affidavits are not defective. He further urged the Court to summon Mercy Moragwa Mogusu, Advocate, for cross-examination under **Section 80 of the Elections Act**.

38. In reply to the Petitioner's Counsel submissions Mr. Mogikoyo, learned Advocate, for the 2<sup>nd</sup> Respondent/Applicant stated the Petitioner's Counsel has gone ahead to discredit the LSK's website submitting the Petitioner and his Counsel are professional lawyers and members of Law society of Kenya and they very well know the procedure for applying for practicing Certificate pointing out the application for practicing certificate for current practicing year is made between December the previous preceding year and 28<sup>th</sup> February of the current year, with information declared by the Applicant in the application form for practicing certificate, which information LSK puts in its website. Amongst the information required from the advocate applying for practicing certificate to LSK, is to disclose where he or she either practices or work place or if is a sole legal practitioner, that must be disclosed including the name to his or her firm, give physical address of where he or she practices or of his firm. He pointed out that the information contained in annexure "VKM 2 (a) and 2 (b)" is the information that was given to LSK by Mercy Maragwa Mugusu, Advocate, when she was tasking out her practicing certificate for the year 2017, Pointing out there is no information of change of her current address. That the information as contained in "VKM 2 (a) and 2(b)" he urged is current and updated and a true reflection of where Mercy Moragwa Mogusu, Advocate, practices. On claim set out under paragraph 22 of the Petitioner's affidavit, he stated the LSK website captured the correct and updated information as regards the individuals referred to by the Petitioner and that the LSK cannot be faulted. On the discrepancies of the address on Uganda House, Kenyatta Avenue, he urged there are no "suites" or "doors" labelling.

On allegation the Programs Officer of LSK cannot or is not an official person to write letters on issues touching on the advocate before Court, he urged the arguments is self-defeating referring to the Petitioner's Replying affidavit. (Annexure "SMMI") a letter dated 14.11.2017 from the office of Musyoki Mogaka and company Advocates signed by Mr. Dunston Omari, Advocate in this petition addressed to the Program Officer, compliance and Ethics and another letter copied to the same person by the same firm dated 15.11.2017 and even a third letter dated 16.11.2017 to the said Program Officer, compliance and Ethics, LSK signed by the petitioner. He submitted the Advocates in the firm of Musyoki Mogaka & Co. Advocates and the Petitioner have questioned the competence of the Program Officer, compliance and Ethics, LSK. He pointed that under **Section 28 (2) (b) of the Law Society of Kenya Act, 2014, No. 21 of 2014**, the structure of the Secretariat is structured in a manner that consist of various directorate and creating the compliance and ethics directorate.

39. On reference to the various **Articles of the Constitution and Schedule 6, Article 10, 19 – 22 and 159 (2) (d)**, he urged that this is not a Constitutional and Divisional Human rights of the High Court of Kenya, which deals with the infringement of rights provided for under Article 19 – 22 as read with Article 10 of the Constitution of Kenya 2010. He argued Articles referred to cannot be used by the Petitioner as a defence for non-compliance with the clear provisions of the law. He submitted on authority submitted by the Petitioner **Henry Okello Nadimo V. IEBC & 2 Others (supra)** at Busia, that the same is distinguishable.

40. Mr. Maloba, Learned Advocate, for the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents on his part, responded by associating himself with

submissions by Mr. Mogikoyo Advocate, urging much has been spent on discrediting the LSK portal but no time has been spent to inform the Court the firm under which Mercy Moragwa Mogusu Advocate practices. He urged no documentary evidence was produced by the Petitioner to show at what place she practices, notwithstanding the Petitioner's side stated she was working at Petitioner's brother's-in-Law firm thus M/s. Momanyi & Co. Advocates. On the LSK website he submitted it was upon the Petitioner to demonstrate Mercy Moragwa Mogusu updated the LSK, with her current contact and it failed to update the same in their website and Database. On the issue of the physical address of Musyoki Mogaka & Co. Advocates as being "Door 19" to their preferred "Suite 19" he urged it was not shown that the two phrases "Door 19" refer to different physical locations. On the letter "VKM 2 (b)" and Petitioner's submissions that the Petitioner's affidavit should be given more weight than the LSK letter he pointed out that the letter "VKM 2 (b)" before Court is brought through an affidavit by the 2<sup>nd</sup> Respondent dated 8.11.2017 hence it is equally weighty. On allegation that the Petitioner is an innocent litigant he referred to paragraphs 1 and 42, of the Petitioner's affidavit which confirms he is an Advocate of the High Court of Kenya practicing as a sole practitioner in the firm of Musyoki Mogaka & Co. Advocate. He is therefore a person who is well aware of the effects of swearing of an affidavit and the provisions of the Oaths and Statutory Declarations Act. He urged that there has been no dispute on legal position that an Advocate cannot commission an affidavit drawn by his or her own firm.

41. I have taken a lot of time to meticulously reproduce the rival submissions for and in opposition of the Notice of motion dated 8.11.2017 by the 2<sup>nd</sup> Respondent. I have equally captured the respective responses by the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents and the Petitioner. I have also, have had time to go through the respective supportive authorities on the rival positions taken by both sides in the application. Having considered the pleadings and the submissions the issues arising for consideration in this application can be summed up as follows:

*(i) Where was the commissioner of the Petitioner's supportive affidavit dated 6<sup>th</sup> September 2017 and the six affidavits of the Petitioner's six (6) witnesses all dated 6<sup>th</sup> September 2017 one Mercy Moragwa Mogusu, Practicing at the time of the commissioning of all the seven (7) affidavits"*

*(ii) Can a commissioner for Oaths exercise the powers given under the Oaths and Statutory Declarations Act in any proceedings or matter in which he or she is the Advocate for any of the parties to the proceedings or concerned in the matter or in which he or she is interested"*

*(iii) Can Court strike out and expunge the seven (7) affidavits referred in the 2<sup>nd</sup> Respondent's Notice of Motion dated 8.11.2017"*

*(iv) Can the Petition proceed to hearing if the seven (7) affidavits are struck out and expunged from the record"*

*(v) What order can the Court make on costs"*

42. The first issue for consideration in this application is where was the commissioner of the Petitioner's supportive affidavit dated 6<sup>th</sup> September 2017" and the six (6) affidavits of the Petitioner's six (6) witnesses all dated 6<sup>th</sup> September 2017 one Mercy Moragwa Mogusu practicing at the time of the commissioning of all the seven (7) affidavits" In the submissions and affidavits filed in support and in opposition of the application there is no dispute that the affidavits were sworn by the parties mentioned in the respective affidavits and were commissioned by one Mercy Moragwa Mogusu either at Nairobi or Kisii as shown in the various affidavits. What is in dispute is where was the commissioner practicing law. The 2<sup>nd</sup> Respondent's position is that Mercy Moragwa Mogusu was at the time of commissioning the seven (7) affidavits practicing law with the firm of Musyoki Mogaka & Co. Advocates, whereas the Petitioner contests that position and states Mercy Moragwa Mogusu was not working in that firm but that of Momanyi and Associates Advocates. The Petitioner has not attached any documentary evidence to demonstrate indeed Mercy Moragwa Mogusu was not practicing law at the firm of Musyoki Mogaka & Co. Advocates but with the firm of Momanyi & Associates Advocates as submitted by the Petitioner. The 2<sup>nd</sup> Respondent on his part as per the contents of his affidavit attached documentary evidence showing where Mercy Moragwa Mogusu was at the time in question working or practicing.

43. The 2<sup>nd</sup> Respondent in his affidavit in support of the Notice of Motion dated 8<sup>th</sup> November, 2017 averred that he talked to Mercy Moragwa Mogusu, after perusing the seven (7) affidavits while he was preparing for hearing of the petition and after noticing all affidavits were commissioned by her. This was immediately after 7<sup>th</sup> November 2017 as per paragraph 4 of the 2<sup>nd</sup> Respondent's affidavit. She informed him, which, information he believed to be true, she was practicing in the law firm of Musyoki Mogaka & Co. Advocates, the firm which had drawn and filed all the documents in this petition. He then checked with the Law Society of Kenya portal and the Law Society itself, which confirmed indeed Mercy Moragwa Mogusu is still practicing from M/s. Musyoki

Mogaka & Co. Advocates and was supplied with copies of M/s. Mercy Moragwa Mogusu's Advocate's profile "VKM 2 (a) and 2 (b)" LSK Advocate search Engine on Advocate profile Mogusu Mercy Moragwa P105 number P. 105/4951/03, practicing status:

**Mogusu Mercy Moragwa**

**P105/ 105/4951/03**

**Practicing Status: Active (2017)**

**Practice Number: LSK/2017/739**

**ABA Status: Non Life**

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**Work Place: MUSYOKI MOGAKA & CO. ADVOCATES**

**Physical Address: UGANDA HSE., 4<sup>TH</sup> FLR. DR. 19, KENYATTA AVENUE**

**TOWN: NAIROBI**

**TELEPHONE: -**

*The above contacts are the last known contacts as declared by Mogusu Mercy Moragwa*

*The document indicate further:*

*"The above contact are the last known contacts as declared by Mogusu Mercy Moragwa*

**Area of Practice**

**Year: 2017**

The document further gives details of practicing status and CLE compliance form 2009 – 2017 showing under practicing status Active. On annexure VKM 2 (b) a letter from LSK by Mercy M. Kitonga, Program Officer, compliance and ethics, **Re: Mogusu Mercy Moragwa** it confirms according to the record, held by LSK, the current address for the advocate mentioned thereto is care Musyoki Mogaka & Co. Advocates Uganda House, 4<sup>th</sup> Floor Door 19, Kenyatta Avenue, P. O. Box 571800 – 00200, Nairobi.

44. The Petitioner in his affidavit aver that Mercy Moragwa Mogusu is not an employee of Musyoki Mogaka & Co. Advocate and under paragraph 13 of his affidavit averred that he is a sole proprietor registered under the Registration of Business Names Act and added at the time of commissioning the affidavits, Mercy Moragwa Mogusu, was not an employee, Associate or partner of Musyoki Mogaka & Co. Advocates, urging he is aware she works with and/or the firm of Momanyi & Associates, Windsor House, 6<sup>th</sup> Floor and adding she has no interest whatsoever in his firm, which had drawn and filed the pleadings to fetter her commissioning the impugned affidavits. He attached a letter addressed to Program Officer, compliance and Ethics dated 14.11.2017, (Annexure SMMI") written by Mr. Danstun Omari Mogaka Advocate, in the same firm stating partly as follows:-

*"We write to inform you that Mogusu Mercy Moragwa has never worked in our firm since the inception of this law firm. Kindly but urgently contact the said Advocate on 0727650027 with a purpose of establishing where she practices law. In the meantime, we will be most obliged if you would update your website to indicate that she does not work in our firm. Urgently issue the bearer of this letter with a letter indicating that Mogusu Mercy Moragwa has never worked in Musyoki Mogaka and Company Advocates. Also issue him with a copy of the letter dated 8/11/17 from Nyameta, Mogaka and Magiya Company Advocates to yourself, if any. "*

The Petitioner by further letter dated 15.11.2017 to M/s. Momanyi & Associates written by D. Omari Mogaka, Advocate, over Mogusu Mercy Moragwa, Advocate, P.105/4951/03 stated Party as follows:-

*"We note that the above advocate had previously taken out her practicing certificate from our firm but ended up joining your firm.*

*For purposes of ascertain her current address, kindly do confirm to us with a copy to the Law Society of Kenya that the said Advocate has been at your law firm more particularly from September 2017 to date."*

From the Petitioner's annexures it is depicted that the Petitioner by his letter of 14.11.2017 did not know where Mercy Moragwa Mogusu was practicing law, yet the following day 15.11.2017 he wrote to Momanyi & Associate directing them to confirm to them with a copy to LSK the said Advocate has been at Momanyi & Associates and more particularly from September 2017 to date. That if Musyoki Mogaka & Co. Advocates were candid and/or honest that they did not know where Mercy Moragwa Mogusu was working, why ask Momanyi & Associates to do a letter stating she had been at their firm more particularly in September 2017"

45. In the instant case there is sufficient evidence from the 2<sup>nd</sup> Respondent's affidavit and annexures from LSK that Mercy Moragwa Mogusu in seeking for current practicing certificate and in completing her application forms for current practicing certificate for the year 2017, in which the applicants are required to declare to the Law Society their work place, she declared her work place as M/s. Musyoki Mogaka & Co. Advocates, vide "VKM 2 (a)" she voluntarily and truthfully gave her particulars to the Law Society of Kenya. The LSK confirmed her particulars through annexure "VKM 2 (b)." I find the two documents weighty and clearly pointing to where Mercy Moragwa Mogusu practices laws as they were issued by Regulatory Professional body which deals with issues touching on practicing Advocates. I take Judicial Notice that an application for practicing certificate for the current practicing certificate for any practicing Advocate, is made between December of the previous preceding year and 28<sup>th</sup> of February as of the current year and that the information declared in the form by the Applicant for practicing certificate is the same information the Law Society puts in its website. The LSK is not under any duty or obligation to investigate on the information given by the Applicant but takes it as the whole gospel truth as declared by the member who is applying for the certificate. The certificates are applied for individually, so it is the duty of the Applicant to give the correct information as to where he or she either practices or work place. I therefore find the information in "VKM 2 (a) and 2 (b)" to be correct and to have been given by no other person, other than Mercy Moragwa Mogusu and as truly reflecting her contact address and her place of practice or work place. That if there were changes say on the place of practice or work place it was upon her to have advised the LSK of the change. I find that no evidence inform of documentary evidence or otherwise has been adduced before this Court to decide otherwise. I find the information in the LSK's website credible, correct and updated and as a true reflection of where Mercy Moragwa Mogusu works otherwise she would have sworn an affidavit contraverting the same. On issues raised under Petitioner's **paragraph 22 (a) (b) and (c)** as regards the contact addresses of the three Advocates who once worked with M/s. Musyoki Mogaka & Company Advocates and failure to update the LSK website as regards the contact addresses of the said Advocates, I have perused annexures "SMM 5" "SMM 6" "SMM7", as regards Jacqueline Adhiambo Agonda, "SMM7" shows practicing status of **Agonda Jacqueline Adhiambo inactive (2017)** ABA status: unpaid, "SMM8" of **Gisemba Paul Nyamweya**, practicing status inactive (2017), ABA status: unpaid, "SMM9" is pay slip for **Gisemba Paul Nyamweya** for October 2016, November 2016, December 2016, Office of A.G. and Department of Justice "SMM10" **Mwea Dorcas Wanjiru** shows practicing status Active 2017. ABA status: non-life. All the annexures given by the Petitioner are clear, that the contact addresses thereto are the last known contacts as declared by the respective parties, that where the parties have not bothered to update or contact LSK to change their addresses, that does not mean as urged by the Petitioner, the website of LSK is incredible or unupdated. That apart, the issue mainly before this court is the contact address of Mercy Moragwa Mogusu and not that of the former employees of the Petitioner.

All the annexures relied upon by the Petitioner gave the physical address as Uganda House, 4<sup>th</sup> Floor, DR. 19, Kenyatta Avenue. There is no mention of "suite 19" as urged by the Petitioner, though the pleadings mention suite 19. The Petitioner has failed to demonstrate that there is difference between the "Door 19" and "suite 19" and if it is there, it is of what" I find "door 19" and "Suite 19" are the same and one, whether one chooses to refer to the entrance as "door 19" or "suite 19" it is the same entrance to the Petitioner's office.

46. On the Program Officer, compliance and ethics, **Section 26, 27 and 28 of the Law Society of Kenya Act, 2014, No. 26 of 2011 provides as follows:**

*"26 (1) There shall be a secretary to the Council who shall be the chief executive of the Society and in charge of the secretariat of the Society.*

**27(1) The secretariat**

*(1) There shall be a secretariat of the Society to be headed by the secretary.*

**28(1) Structure of the secretariat**

*(1) The secretariat shall be structured in a manner that promotes the commitment to practice excellence and client care in the profession.”*

*(28) (2) (a) the practice standards directorate which shall be responsible for the promotion of excellence in practice, client care and the achievement of full compliance with the rules of good practice in the profession through advice, support and other forms of assistance to advocates and law firms;*

*(b) the compliance and ethics directorate which shall be responsible for the receipt and evaluation of complaints against advocates and the prosecution of matters before the Disciplinary Committee;*

In view of the above I find and hold that the Program Officer, compliance and ethics, in the Law Society of Kenya is a statutory creature and M/s. Mary M. Kitonga is the current holder of that post with full mandate and responsibility for the receipt and evaluation of complaints against Advocates and the Prosecution of matters before Disciplinary Committee. I find she acted within her powers and authority in responding to the 2<sup>nd</sup> Respondent's request and in issuing annexure "VKM 2 (b)." In fact the Petitioner recognises her position as he wrote more than one letter to her and even approached her in matters related to her duties. I find annexures "VKM 2 (a)" and "VKM 2 (b)" to have been issued by the right officer from the Law Society of Kenya.

47. The Petitioner's Counsel referred to **Article 10, 12, 19 – 22, 159 (2) (d) of the Constitution of Kenya 2010 and Schedule 6 of the Constitution of Kenya 2010**, in urging the Court to be guided by the same in the interpretation of the Constitution, however, the Counsel was not specific on the issue that needed interpretation. I am in this Petition sitting as an Election Court and not as a Constitutional Court. This Court was not told what rights, if any rights, were being violated or infringed or threatened to be breached and by who and how. I am dealing with an Election Petition, which has to be determined within timelines set by the **Elections Act and the Constitution of Kenya 2010**. No single Article of the "**Constitution of Kenya 2010**" has been brought forward in this Petition for interpretation by this Court. In this Petition and more specifically what this Court is dealing with, is not an issue of technicalities but on issue of non-compliance of the law, regarding commissioning of the affidavits under **the Oaths and Statutory Declarations Act**. The Articles referred to by the Petitioner and which this Court was asked to interpret do not exempt any party from complying with the provisions of the Law. I find the Articles referred to, not relevant in the application before the Court and not forming any defence for non-compliance with statutes. This Court being a Court of Law is called upon and obligated to interpret the law and apply it as it is. The Court cannot close its eyes to non-compliance within the law nor can it forgive it. On **Section 4 (1) of the Oaths and Statutory Declarations Act**, the Petitioner urges that its purpose is to prevent commercialization of affidavits or documents by commissioners. I find that not supportable by any written law as **Section 4 (2) of the Oaths and Statutory Declarations Act** provides that the commissioner for Oaths is entitled to charge and be paid such fees as may be authorized by any rules of Court for time being.

48. Having said that much and having noted that Mercy Moragwa Mugusu never swore any affidavit to controvert the contents of the affidavit of the 2<sup>nd</sup> Respondent and challenge her contact address as given on the annexures "VKM 2 (a) and 2 (b)," and the petitioner having not demonstrated through documentary evidence that Mercy Moragwa Mogusu does not work in his firm but that of Momanyi and Associates, and having perused his affidavit which I have noted is not only evasive diversionary but is argumentative in nature, and considering all the submissions from both sides, I am satisfied that on balance of probabilities the 2<sup>nd</sup> Respondent has proved that Mercy Moragwa Mogusu, who commissioned the seven (7) impugned affidavits dated 6<sup>th</sup> September 2017 as of that time was practicing at the time of the commissioning of all seven (7) affidavits or her work place was at Musyoki Mogaka and company Advocates.

49. The next issue for consideration is whether a **commissioner for Oaths can exercise the powers given under Oaths and Statutory Declarations Act in any proceedings or matter in which he or she is the Advocate for any of the parties to the proceedings or concerned in the matter in which he or she is interested"** The relevant law on this point is found under **Section 4 (1) of the Oaths and Statutory Declarations Act**, which provides:-

*"A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any Court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:*

*Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested."*

50. In *R.E BAGLEY (1911) 1 KBD 317* at the hearing the Court highlighted thus:

*"Now one of those affidavits was sworn before Mr. Goddard, who was the solicitor for the trustee of the deed, and they also have been interested in it. It is sufficient to say that he was solicitor for the trustee of the deed, as appears from the endorsement of the deed itself. That is the really important point in this case. Is an affidavit, or what purport to be an affidavit, sworn before the solicitor of the trustee of the deed a nullity and is its effect to render the deed void?"* .....

It was held thus:-

*"Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding in which he is solicitor to any of the parties to the proceeding, or clerk to any such solicitor, or in which he is interested."*

*"That is to say, although under the first part of the section he is generally empowered to administer an oath whether the oath be in the form of an affidavit or of a statutory declaration, yet there is a proviso that this general power may not be exercised by any person who is solicitor to any of the parties in any proceeding."* .....

*"If am right in the view that Goddard had no authority to administer this particular oath, it seems to me that there was no affidavit at all, and, that being so, the deed to the validity of which the filing of the debtor's affidavit is essential is no deed at all and is gone."* .....

51. In the case of *James Francis Kariuki & Another V United Insurance Co. Ltd Civil Appeal No. 1450 of 2000*, Hon. Justice Onyango Otieno, as he then was; held as follows:

*"That the verifying affidavit sworn by the plaintiffs is incurably defective as the Commissioner for Oaths while exercising the powers given, offended the mandatory proviso of Section 4(1) of the Oaths and Statutory Declarations Act."*

*"The simple facts of this case are that the Plaintiffs are, according to the Complaint represented by Njenga Mwaura and Company, Advocates. Mr. Njenga Mwaura is a Partner in the firm of Njenga Mwaura and Company, Advocates, who are the Advocates representing the Plaintiffs. The Verifying affidavit has been sworn before Njenga Mwaura as Commissioner for Oaths."* .....

*"It will be clear from the above that Mr. Njenga Mwaura, being an Advocate in the firm that is acting for the plaintiff should not have allowed the verifying affidavit to be sworn before him as in any event, is an interested party."*

52. In *Kenya Federation of Labour & Another V. Attorney General & 2 Others Industrial Court of Kenya at Nairobi, Case No. 735 of 2012*, Hon. Justice Nzioki wa Makau held:

*"The short answer to that is that it would be against the provisions of the Oaths and Statutory Declarations Act. A Lawyer cannot commission a document drawn by his/her firm. Indeed the further affidavit by the claimants was defective in form as the jurat was not in conformity with the Oaths and Statutory Declaration Act."*

53. *Caltex Oil (Kenya) Limited Vs New Stadium Services Station Limited & Another [2002] eKLR* Hon Justice Onyango Otieno, as he then was, stated as follows:

*"I do think that the courts have a duty to rightly interpret the laws and to ensure that they do not condone any breaches of the same laws under any pretenses whatsoever. I still stand by what I did say in the case of James Francis Kariuki & Another Vs. United Insurance Co. Ltd HCCC No. 1450 at 2000 that such an affidavit sworn in violation of section 4 (1) of the Oaths and Statutory Declarations Act is for all intents and purposes not an affidavit as envisaged in law and is not capable of being received under Order 18 Rule 7 as it offends a provision of an Act of Parliament and does not represent a mere irregularity either in defect as to form or by misdirection of the parties, or in the title."*

54. In view of the above authorities and the provision of **Section 4 (1) of the Oaths and Statutory Declarations Act**, it is clear from the facts of this petition, that the Petitioner in this petition is represented by the firm of M/s. Musyoki Mogaka & Co. Advocates, the firm which drew and filed this petition. The affidavits were sworn before Mercy Moragwa Mogusu, a Commissioner for Oaths who practices or works with the said firm, which is representing the Petitioner. It was clear at the time of commissioning of the affidavits that M/s. Mercy Moragwa Mogusu, being an Advocate practicing law in the firm, that is acting for the Petitioner should not have allowed the supportive affidavit of the Petitioner as well as the six witnesses affidavits to be sworn before her as in the event she is an interested party.

55. The next issue is whether the Court can strike and expunge the seven (7) affidavits referred in the 2<sup>nd</sup> Respondent's Notice of Motion dated 8.11.2017. The Petitioner and his witnesses affidavits offends **Section 4 (1) of the Oaths and Statutory Declarations Act**. The seven affidavits have been sworn before an unauthorized commissioner by virtue of **Section 4 (1) of the Oaths and Declarations Act** as a Commissioner cannot commission his or her own documents or documents prepared by the firm where that Commissioner works or where he/she is interested. The said Section is couched in a mandatory form. The swearing of the aforesaid affidavits by the said commissioner offends an Act of Parliament and in my view that do not represent a mere irregularity either in a defect in form neither can it be said to be a technical irregularity as it goes to the root of the substantive issue before court. It is an irregularity that is incurably defective. All the affidavits in the Petition having been commissioned by an unauthorized person or contrary to the law are in my view defective. I accordingly strike out and expunge from the Court records the affidavits by:-

1. *Stephen M. Mogaka*

2. *Eric Mokuu*

3. *Peterson Nyaruri*

4. *Charles Obiero Mogwambo*

5. *Kennedy Mongare Mogaka*

6. *Andrew Omoyo*

7. *Justine Gekong'a Orina*

56. Whether the Petition can proceed to hearing if the seven (7) affidavits are struck out and expunged from the record"

Rule 8 (1) (4) (b) of the Elections (Parliamentary and County Elections) petitions Rules, 2017, provides:

*"8 (4) The petition shall:-*

*(b) be supported by an affidavit sworn by the petitioner containing the particulars set out under rule 12: and" .....*

Rule 12 (1) (b) of the Elections (Parliamentary & County Elections) Petitions Rules, 2017 provides:-

*"12.(1) A petition shall be supported by an affidavit which shall:-*

*(b) be sworn personally by the Petitioner or by at least one of the Petitioners, if there is more than one Petitioner." .....*

From the above Rules the petition should be accompanied by an affidavit sworn personally by the petitioner

**Rule 12 (2) (f) of Elections (Parliamentary & County Elections) Petitions Rules, 2017 provides:**

*“12. (2) An affidavit in support of a petition under sub-rule (1) shall state:-*

*(f) the name and address of the advocate, if any, acting for the Petitioner which shall be the address for service. ” .....*

**57. Rule 12 (3) and (4) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, provides:**

*“12 (3) Each person who the petitioner intends to call as a witness at the hearing, shall swear an affidavit.*

*12 (4) A petitioner shall, at the time of filing the Petition, file the affidavits sworn under sub-rule (3)”*

From the above Rules a Petition is required to be filed with Petitioner’s supportive affidavit accompanied by affidavits of witnesses the petitioner intends to call as his or her witnesses. It is mandatory that the affidavits mentioned under the above Rules, be filed together with the Petition. In view of the aforesaid requirements it is my view that the Petitioner’s witnesses affidavits are part and parcel of the petition. They must accompany the petition at the time of filing and cannot be filed after the timelines set under the constitution and the Elections Act for filing a petition of 28 days has lapsed.

58. The Petitioner’s supportive affidavit and those of his witnesses having been struck out and expunged from the record, the petition is not supported by any affidavit, and cannot proceed to hearing without affidavits being on record. The Petitioner’s Counsel urged, incase the Court finds the affidavits defective, it can exercise its discretion to admit them or allow the petitioner to file fresh affidavits in support of the petition. The petitioner relied on the case of **Henry Okello Nadimo V IEBC & 2 Others (supra)**. Under **Rule 12(1), (b), (3) and (4) of the Elections (Parliamentary & County Elections) Petitions Rules, 2017** which is couched in a mandatory form, it is provided that an affidavit by the Petitioner and those of the persons, who the petitioner intends to call as witness or witnesses at the hearing shall be filed at the time of filing the petition. There is no provision for filing affidavits after petition has been filed and after expiry of the time for filing a petition.

**Section 76 (1) of the Elections Act provides:**

*“76(1) A Petition:-*

*“(a) to question the validity of an election shall be filed within twenty eight days after the date of declaration of the results of the election and served within fifteen days of presentation.”*

**Article 87 of the Constitution of Kenya 2010 provides:-**

*“87. (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.*

*(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.*

*(3) .....*

59. From the above, it is clear the timelines within which a petition and all accompanying documents should be filed is 28 days from the time of the declaration of the results of the Elections. The High Court has no jurisdiction to extend the timelines within which to file further affidavits or fresh affidavits after the expiry of the constitutional timelines nor can Court exercise any discretion to re-admit the expunged or struck out affidavits. **Rule 19 (2) of the Elections (Parliamentary & County Elections ) Petitions Rules, 2017** provides:

*“19(2) Sub-rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard or determined.”*

60. In **Henry Okello Nadimo V IEBC & 2 Others (supra)**, Hon Justice F. Tuiyot, after striking out the affidavits in support of the Petition addressed himself thus:

*“Paragraph (20) This Court savours the challenge because the unusual circumstances of this case calls for an unusual approach. I am persuaded that the affidavit is not an intergral part of the Petition and its absence cannot deal a fatal blow to these proceedings. Secondly the approach does not prejudice the Respondents. The Rules, it bears repetition, require that the Supporting Affidavit should contain the grounds on which the relief is sought and set out the facts to be relied on by the Petitioner. One reason for this requirement is that the Respondent should be aware, with reasonable specificity about the case which they are required to answer. Ambush and surprise are eliminated. In the instant case the affidavits which I have found to be invalid gave that information to the instant case the affidavits which I have found to be invalid gave that information to the Respondents. It is little wonder that they robustly answered to and participated in the Petition.”*

61. The above case is distinguishable from the present case in that, that case was clearly decided on the basis of the **Elections (Parliamentary and County Elections) Petition Rules, 2013**, in which there were no features of the petition, as is the case now, under the **Elections (Parliamentary and County Elections) Petitions Rules, 2017**. The features are clearly spelt out under **Rule 8** which sets out the contents and form of the petition contrary to **the Rules of 2013**. Secondly that case was very unique in its own way as 22 out of 27 witnesses had already testified on their affidavits when the issue of the defects of their affidavits arose. The Court was agonizing that 22 witnesses had given evidence on Oath and thoroughly cross-examined and was wondering what to make out of it even if the affidavits were struck out, the evidence was already on record and Court had to look for a balancing act and that is why the Court stated under paragraph 20 of its judgment that it had to apply unusual approach to save the situation as **Rule 10 of Elections (Parliamentary and County Elections) Petition Rules 2013** did not provide for features of the petition, unlike **Rule 8 of the Elections (Parliamentary and County Elections) Petitions Rules 2017**. The Court ruled the affidavits were not integral part of the Petition. I find the facts of that petition are not similar nor are they near similar to this case as the hearing in this petition has not started. The unique principle of that case cannot therefore apply nor is it applicable as **Rule 8 and 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, are couched in a mandatory manner and Court cannot extend timelines in view of the above. I find and hold that this Court cannot exercise its discretion to re-admit the affidavits struck out nor allow for filing fresh affidavits as it also lacks jurisdiction to do so, after the mandatory period of filing petitions together with all affidavits by the Petitioner has lapsed.

62. The Upshot is that the Petitioner's Preliminary Objection is devoid of merits and the same is accordingly dismissed with costs to the 1<sup>st</sup>, the 2<sup>nd</sup> and the 3<sup>rd</sup> Respondents.

63. The 2<sup>nd</sup> Respondent's Notice of Motion dated 8<sup>th</sup> November 2017 is meritorious and is accordingly allowed. I proceed to make the following orders: -

(a) The affidavits by (1) Stephen M. Mogaka, the Petitioner in support of the petition; the affidavit by Petitioner's intended witnesses (2) Erick Mokua; (3) Peterson Nyaruri; (4) Charles Obiero Mogwambo; (5) Kennedy Mongare Mogaka; (6) Andrew Omwoyo and (7) Justine Gekong'a Orina all sworn on 6<sup>th</sup> September 2017 before Mercy Moragwa Mogusu Advocate, are all struck out and expunged from the record for being incurably defective for being sworn before a person, unauthorised by law and having interest in the matter.

(b) The petition being unsupported by supportive affidavit and there being no witnesses affidavits after the same having been struck out and expunged from record, the petition is defective for non-compliance with mandatory Rules, being Rules 12(1)(2)(3)(4) and (14) of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017**.

(c) The Petitioner's petition dated 6<sup>th</sup> September 2017 being not supported by supportive affidavits and witnesses' affidavits after the same having been struck out and expunged from record, the Petition is defective, incompetent and is accordingly struck out with costs with interest to the Respondents against the Petitioner.

(d) Having heard the Counsel on the issue of costs and having considered the proceedings and considering the time taken in preparing for the petition, the applications urged before Court and that the same did not go to full hearing, I award costs limited to Kshs. 1,200,000/=(one million and two hundred thousand shillings) to the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents and Kshs. 1,500,000/=(one million and five hundred thousand shillings) to the 2<sup>nd</sup> Respondent being instruction fees, the rest of the fees due, be taxed by Deputy Registrar upon filing of the respective bill of costs.

DATED, AT NYAMIRA THIS 14<sup>TH</sup> DAY OF DECEMBER 2017.

HON. J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

Court Assistants:

1. Karlbean K. Mobisa
2. Maurine Akinyi

Mr. Mokuu Ndubi for the Petitioner

Mr. Maloba: for the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents

Mr. Mogikoyo: for the 2<sup>nd</sup> Respondent

HON. J.A. MAKAU

JUDGE



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**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 226 OF 2019**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF ARTICLE 2(1), 10(1), 20(1)(3)(4), 21(1), 22(1)(2)(c), 23(1), (3), 35, 41(1), 159(1),  
162(2)(a), 232(1), 260 AND 258(1)(2)(c) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010**

**AND**

**IN THE MATTER OF THE STATE CORPORATIONS ACT (CAP 446), PUBLIC OFFICER  
ETHICS ACT (NO 4 OF 2003), PUBLIC FINANCE MANAGEMENT ACT (NO. 18 OF 2012),  
ANTI-CORRUPTION AND ECONOMIC CRIMES ACT (NO 3 OF 2003) AND THE  
EMPLOYMENT AND LABOUR RELATIONS ACT (NO 20 OF 2011)**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION AND/OR APPREHENDED  
CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER  
ARTICLES 2(1), 20(1), 22(1), (2)(c), 23(1)(3), 35, 41(1), 162(2)a, 232(1), 260 AND  
258(1)(2)(C) OF THE CONSTITUTION OF THE REPUBLIC KENYA, 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTIONALITY AND LEGALITY OF THE APPOINTMENT OF  
MR BERNARD NGUGI AS MANAGING DIRECTOR KENYA POWER ANNOUNCED**

**ON 29<sup>TH</sup> OCTOBER 2019**

**BETWEEN**

**MAUREEN NYAMBURA NGIGI WARUI.....PETITIONER**

**VERSUS**

**THE BOARD OF DIRECTORS, KENYA POWER**

**AND LIGHTING COMPANY LIMITED.....1<sup>ST</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT**

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

**RULING**

The petition herein is filed by the firm of D. Muriuki and Company Advocates. The petition which is dated 22<sup>nd</sup> November 2019 was filed on 26<sup>th</sup> November 2019 together with a Notice of Motion of even date under Certificate of Urgency of Samuel Ndungu who describes himself as an Advocate of the High Court of Kenya duly instructed by the firm of D. Muriuki and Company Advocates which is on record for the Petitioner/Applicant. The said Samuel Ndungu, Advocate is also the one who signed the Notice of Motion and the Petition. He is also the said advocate who commissioned the affidavit of the Petitioner MAUREEN NYAMBURA NGIGI WARUI in support of the motion.

By its Notice of Preliminary Objection dated 3<sup>rd</sup> December 2019, the 1<sup>st</sup> Respondent's advocates seek to be heard *in limine* as a preliminary point of law as follows –

*"That the Notice of Motion dated 22<sup>nd</sup> November 2019 and the Petition are incurably defective as the Commissioner for Oaths who purportedly Commissioned the Supporting Affidavit to the Notice of Motion that was purportedly sworn by the Petitioner on the 22<sup>nd</sup> November 2019 is the very same Advocate who has signed the Certificate of Urgency dated the 22<sup>nd</sup> November 2019."*

The Preliminary Objection was disposed of by way of written submissions.

**1<sup>st</sup> Respondent's Submissions**

The 1<sup>st</sup> Respondent submits that on the face of the Petitioner/Applicant's Notice of Motion, the Advocate acting for the Petitioner/Applicant and who signed the Certificate of Urgency is one Samuel Ndungu Advocate who is also the Commissioner for Oaths who commissioned the affidavit supporting the motion.

That **Section 4 of the Oaths and Statutory Declarations Act (Cap 15) Laws of Kenya** gives commissioners for oaths powers, in any part of Kenya to administer oath or take affidavit evidence for the purpose of any court matter in Kenya. That Section 4(1) of the Oaths and Statutory Declarations Act (Cap 15) Laws of Kenya provides that:

*"a commissioner for oaths shall not exercise any of the powers given by this section in any proceedings or matter in which he is the advocate for any of the parties to the proceedings concerned in the matter, or clerk to any such advocate or in which he is interested."*

That any affidavit filed in violation of these provisions would be incurably defective.

That in the case of **Caltex Oil (Kenya) Limited v New Stadium Service Station and Another (2002) eKLR** the court held that:

*"...I still stand by what I did say in the case of **James Francis Kariuki and Another v United Insurance Co Ltd HCC No. 1450 of 2000** that such an affidavit sworn in violation of Section 4(1) of the Oaths and Statutory Declarations Act is for all intents and purposes not an affidavit as envisaged by law...it offends a provision of an Act of Parliament and does not represent a mere irregularity...."*

That in similar circumstances to the present case, in the case of **Kenya Federation of Labour and Another v Attorney General & 2 Others Industrial Court of Kenya at Nairobi Case No 735 of 2012** Nzioki Wa Makau J. held:

*"The short answer to that is that it would be against the provisions of the Oaths and Statutory Declarations Act. A Lawyer cannot commission a document drawn by his/her firm. Indeed the further affidavit by the claimants was defective in form as the jurat was not in conformity with the Oaths and Statutory Declarations Act."*

That in the case of **Stephen M. Mogaka v Independent Electoral and Boundaries Commission [2017] eKLR** Makau J. struck out seven affidavits that were commissioned in violation of section 4 of the Oaths and Statutory Declarations Act (Cap 15) Laws of Kenya.

That issues raised regarding affidavits are not mere technicalities that can be cured by reference to Article 159 of the Constitution. That the Supreme Court decision in the case of **Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC) & 4 others [2015] eKLR** in a unanimous decision stated:

*"Although the Appellant invokes the principle of prevalence of substance over form, this Court did single in **Law Society of Kenya v The Centre for Human Rights and Democracy & 12 others, Petition 14 of 2013** that "Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls" Not all procedural deficiencies can be remedies by Article 159..."*

The 1<sup>st</sup> Respondent further submits that Courts in the past have maintained that the requirement under the Oaths and Statutory Declarations Act must be adhered to citing the case of **Charles Muturi Mwangi v. Invesco Assurance Co. Ltd [2014] Eklr**, a decision made while the Constitution, 2010 was in place, where while dealing with the issue of an undated affidavit the Court rendered the position thus:

*"[18] These are mandatory provisions. There is no discretion for this court to vary these provisions as these are statutory provisions with regard to what constitutes a valid disposition to matters before court. The omission to indicate the date of swearing of the affidavit attached to the application before court renders the same defective and should be struck out which leaves the current application unsupported with regard to averment of ..... Auma Okoth. This was the holding in **Jayantkumar Vrajilal Shah versus Chandulal Mchanlal Shar and another, HCCC 1280 of 1997**. The defect on the affidavit is not a mere technicality that can be addressed under Article 159 of the Constitution. The undated affidavit violates a statutory mandatory provision and thus the striking out. The claimant's advocate stated that the affidavit in his possession was dated, however the affidavit in the court file and the one served on the respondent's advocate is undated a fact that was noted by the respondent's advocate. The court record should be taken as it is and in this case, the official record indicates the supporting affidavit is undated as held in **Duncan Mwangovya versus Meena Bhangwandas Patel, HCCC 196 of 2005**."*

It is further submitted by the 1<sup>st</sup> Respondent that in keeping with the decisions on Petitions by the Superior Courts as in the case of **Justus Achinga Kebari & 25 others v The Attorney General [2018] eKLR** the court emphatically held:

*"It is trite law and process that a petition shall be accompanied and supported by a valid affidavit in such support. In the instant case, the affidavits in support are dubious for want of veracity in their commissioning. The petitioner has failed to controvert the clear provisions of the law negating their case in the circumstances, it must fail.... This application does not stand the test of law and process. The affidavits in its support are inadmissible for want of form and compliance with the law. They must be struck out."*

It is submitted that the current case is on all fours with the case of **Justus Achinga Kebari & 25 others v The Attorney General [2018] eKLR**. The affidavit is incurably defective and inadmissible for want of form and compliance with the law and ought to be struck out.

The 1<sup>st</sup> Respondent submitted that the Petitioner cannot be aided by the perceived informality of the rules relating to Constitutional

Petitions as the informality does not dispense with the need for evidence in Constitutional Petitions. That the Constitutional and Human Rights Division of the High Court in the case of **Isaac Aluoch Polo Aluochier v The National Alliance and 542 others [2016] eKLR** quoting the earlier decision in **Bryson Mangla v Attorney General & Others Nairobi HC Petition No 284 of 2016** considered Rule 10 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 ("Mutunga Rules")** summarised the law on evidence in Constitutional Petitions in the following manner:

***"Want of supporting evidence in the petition***

10 ... In *Bryson Mangla v A. G. & Ors Nairobi Pet. No. 284 of 2016*, this court held that

*"13. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013 do not require that a petition must be supported by an affidavit, see Rule 11 thereof in these terms;*

**11. Documents to be annexed to affidavit or petition**

*(1) The petition filed under these rules may be supported by an affidavit.*

*(2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit."*

*14. It is conceivable that a petition which challenge for example constitutionality of a particular legislative text may not require an affidavit. Where however, a petition relies on matters of evidential fact, this must be proved by affidavit or oral testimony as the court may direct."*

*11. So where, as here, it is sought to rely on matters of fact a suitable affidavit with documentary annexures ought to be filed in discharging the burden of proof of a plaintiff in terms of section 107, 108 and 109 of the Evidence Act...."*

The 1<sup>st</sup> Respondent submitted that in the absence of evidence in a valid Affidavit, there is no evidence to support the Notice of Motion dated 22<sup>nd</sup> November 2019 or the Petition. That in the absence of evidence, the allegations in the Notice of Motion and Petition are unsupported and there is nothing that the Respondents can be invited to answer to. The absence of a valid affidavit is not a procedural technicality. That it follows therefore that the Notice of Motion dated 22<sup>nd</sup> November 2019 and the Petition must necessarily collapse and the court should hold so.

**2<sup>nd</sup> Respondent's Submissions**

Mr. Kioko for the 2<sup>nd</sup> Respondent informed the court that the 2<sup>nd</sup> Respondent will be associating itself with the 1<sup>st</sup> Respondent's submissions.

**Petitioner's Submissions**

The Petitioner filed submissions in opposition to the 1<sup>st</sup> Respondent's preliminary objection in which it submits that the preliminary objection is procedural, that the petition is not supported by an affidavit and a defect in the motion cannot cause the striking out of the petition as the motion and petition are two independent pleadings. That under Rule 10 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules)**, a petition does not have to be supported by an affidavit. That Rule 11 of the Mutunga Rules provides that a petition may be supported by an affidavit, making the affidavit optional.

The Petitioner submitted that striking out ought to be a measure of last resort, relying on the decision in **D. T. Dobic and Co. (Kenya) Limited v Joseph Mbaria Macharia (1980) eKLR** where the court held that:

*"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause*

*of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."*

That the 1<sup>st</sup> Respondent has not indicated that the Notice of Motion cannot be cured by attaching a compliant supporting affidavit. That it would be a very draconian measure to strike out the Petition where there are genuine concerns raised about the administration of a vital public entity.

That when dealing with an objection with regards to a defective affidavit, among the locus classicus cases is **Caleb Gulam (Suing as the Executor of the Estate of Sadrudin Shamsudin Esmail Nurani) & another v Cyrus Shakhhalaga Kwah Jirongo [2004] eKLR**, Ringera J. in considering an issue of a defective affidavit stated as follows;

*"The court has discretion not to strike out a plaint which is accompanied by a defective verifying affidavit. The affected party may make an oral application for the exercise of the court's discretion and the court should exercise its discretion as appropriate in the light of the circumstances.*

*Rules of procedure should be seen as hand maidens of justice and not its mistress and, accordingly, unless procedural lapses have caused adversely a prejudice that cannot be compensated with costs or there is clear manifestation of an intention to overreach, they should not be accorded fatal consequences.*

...

*Here I cannot see what prejudice the defendant has suffered for the suit is at its very early stages and the plaintiff far from attempting to overreach has done his incompetent best to comply with the rules. I am accordingly inclined to strike out the verifying affidavit and to grant leave to the plaintiffs to file a proper and compliant affidavit within 7 days of today."*

The Petitioner submitted that in the preliminary objection and their submissions, the 1<sup>st</sup> Respondent has not demonstrated that;

- (a) The Petitioner has caused great prejudice to them by filing the impugned affidavit;*
- (b) There is clear manifestation that by filing the impugned affidavit the Petitioner was overreaching; and*
- (c) The defect alleged goes to the jurisdiction of the Court.*

That the Court should not strike out the Petition and the Notice of Motion but allow the Petitioner to file a compliant supporting affidavit in order to allow the Petition to proceed for determination on merit.

That in another locus classicus decision on the issue of defective affidavits, **Microsoft Corporation v Mitsumi Computer Garage Ltd & another [2001] eKLR**, Ringera J. stated as follows;

*"The next matter for consideration is whether I should consequently strike out the suit itself. Rules of procedure are the hand maidens and not the mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not to fetter or choke it. In my opinion, where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances the Court should rise to its higher calling to do justice by saving the proceedings in issue. In the matter at hand I am of the view that the error manifest in the verifying affidavit neither goes to the jurisdiction of the Court nor prejudices the defendants in any fundamental respect. Indeed, no prejudice has been alleged."*

The Petitioner further submitted that in the case of **Geology Investments Ltd v Rogonyo Njuguna David Njuguna Peter Mwangi All T/A Turuti Service Station [2004] eKLR**, Azangalala J. refused to strike out a suit where there was a defective affidavit,

choosing to sustain the suit.

The petitioner urged the court to adopt a determination that will lead to enablement and enforcement of Article 48 of the Constitution of Kenya 2010 on the right to access to justice.

On the submission by the 1<sup>st</sup> Respondent that the petition is not supported by affidavit, it is the Petitioner's submission that this was never raised in any response by the Respondent and the court has no jurisdiction to determine the same, relying on the decision in **Nairobi City Council v Thabiti Enterprises Limited**. It submitted that a new issue cannot be introduced in submissions.

That in the case of **Republic v Chairman Public Procurement & another Ex-Parte Zapkass Consulting and Training Limited & another [2014] eKLR** Korir J. stated as follows;

*"The Applicant, the respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored."*

It urged the court to dismiss, the preliminary objection.

#### **Determination**

Section 4 of the Oaths and Statutory Declarations Act provides as follows –

#### **4. Powers of commissioner for oaths**

**(1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:**

**Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.**

**(2) A commissioner for oaths shall, in the exercise of any of the powers mentioned in subsection (1), be entitled to charge and be paid such fees as may be authorized by any rules of court for the time being.**

It is clear from the proviso to Section 4(1) that a Commissioner for Oaths cannot commission documents in a matter in which he acts.

It is apparent on the face of the pleadings filed herein that Samuel Ndungu Advocate and Commissioner for Oaths is the Counsel on record for the petitioner and indeed signed the pleadings filed herein. It is also evident from the face of the record that the said Samuel Ndung'u Advocate commissioned the affidavit supporting the motion herein. As was held in the case of **Caltex Oil (Kenya) Limited v New Stadium Service Station and Another (supra)**, such an affidavit sworn in violation of Section 4(1) of the Oaths and Statutory Declarations Act is for all intents and purposes not an affidavit as envisaged by law. That this does not represent a mere irregularity, as was stated in the case of **Charles Muturi Mwangi v Invesco Assurance Co. Ltd (supra)**. The court emphasised that a defect in an affidavit is not a mere technicality that can be addressed under Article 159 of the Constitution if it violates a statutory mandatory provision.

For these reasons, I strike out both the motion and the supporting affidavit for being bad in law as the motion, without the affidavit, cannot stand the test of evidentiary proof as required by law.

**Should the petition too suffer the same fate as the application"**

Under the **Constitution of Kenya Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013**, it is not mandatory for a petition to be supported by an affidavit. Rule 11 provides –

**11. Documents to be annexed to affidavit or petition.**

**(1) The petition filed under these rules may be supported by an affidavit.**

**(2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.**

There are no documents annexed to the petition herein. It is evident that the petitioner intended to rely on the documents attached to her impugned affidavit to support the averments of fact in the petition. Indeed, at paragraph 4 of the affidavit, the petitioner states as follows –

*"That I have read the Application and Petition filed herein and I verify that the matters as set out therein are correct to the best of my knowledge, information and belief, save where otherwise stated the source of which information has been stated."*

It is evident that without the affidavit and the documents attached thereto, the averments of fact in the petition are incapable for proof. It is therefore my considered opinion that the petition will be a hollow shell without the documents attached to the affidavit.

I therefore make a finding that the petition must suffer the same fate as the application.

The upshot is that the preliminary objection succeeds and the petition together with the application are struck out with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF NOVEMBER 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**



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This is the Exhibit marked FML-9 referred to in the annexed affidavit of Franklin Mithika Linturi Sworn before me this 6th day of May 2024 at Nairobi In the Republic of Kenya  
GITONGA J. M'LIMBIINE  
ADVOCATE  
P. O. BOX 11222  
Nairobi  
DATE 06/05/2024 SIGN

**18THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. E068 OF 2021**

**BETWEEN**

HON.FML.....1<sup>ST</sup> PETITIONER

EMILY NKIROTE BUANTAI.....2<sup>ND</sup> PETITIONER

ATTICON LIMITED.....3<sup>RD</sup> PETITIONER

**VERSUS**

DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT

THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

MJK.....4<sup>TH</sup> RESPONDENT

**AND**

REGISTRAR OF COMPANIES..... 1<sup>ST</sup> INTERESTED PARTY

BARONS ESTATES LIMITED..... 2<sup>ND</sup> INTERESTED PARTY

NONIKO HOLDINGS LIMITED..... 3<sup>RD</sup> INTERESTED PARTY

COLLINS KIPCHUMBA NGETICH.....4<sup>TH</sup> INTERESTED PARTY

DOROTHY CHEPKURUI.....5<sup>TH</sup> INTERESTED PARTY

BILLY ODERO ONYANGO..... 6<sup>TH</sup> INTERESTED PARTY

JOSEPH GITONGA M'LIMBINE.....7<sup>TH</sup> INTERESTED PARTY

DOUGLAS KAILANYA.....8<sup>TH</sup> INTERESTED PARTY

FAMILY BANK LIMITED..... 9<sup>TH</sup> INTERESTED PARTY

EXPORT PROCESSING ZONES AUTHORITY.....10<sup>TH</sup> INTERESTED PARTY

REGISTRAR OF LANDS..... 11<sup>TH</sup> INTERESTED PARTY

### JUDGMENT

#### The Petition

1. The petitioners filed a petition dated 4<sup>th</sup> March 2021. The petition was later on amended and filed on 9<sup>th</sup> March 2021. The amended petition is filed under Articles 22(1), 23(1) & (3), 159(2)(a)(e), 165(3)(b)(d), (6) & (7) and 258 of the Constitution for the alleged contravention of Articles 3, 10(1) & (2), 19, 20, 21(1), 25(c), 27(1) & (2), 29, 35, 40, 47(1), 50(1), 50(2)(a, b, c, j, k), 79, 157(11) and 249 of the Constitution.

2. The amended petition seeks the following orders: -

*i. A declaration do issue to the effect that any intended arrest, charge and prosecution of the petitioners and/or institution of criminal proceedings against the petitioners in relation to all pending civil, commercial and family suits namely;*

*a) High Court of Kenya at Nairobi (Commercial Division) Civil Suit No.E138 of 2018 ;Barons Estate Ltd vs. Atticon Ltd & 6 Others;*

*b) High Court of Kenya at Nairobi (Family Division) Civil Suit 17 of 2019 (OS) (Previously High Court of Kenya at Meru (Family Division) Civil Suit No.37 of 2018; MJK vs FML;*

*c) High Court of Kenya at Nairobi (Commercial Division) Civil Suit E086 of 2019; Gulf African Bank Ltd. Vs. Atticon Ltd & 4 others;*

*d) High Court of Kenya at Nairobi ( Commercial Division) Civil Suit E316 of 2020; Linkit Ltd vs Brenda Mithika Mwenda;*

*e) High Court of Kenya at Nairobi (Commercial Division) Civil Suit No.E029 of 2019; Noniko Holdings Ltd & 2 Others vs. Atticon Ltd & 6 others;*

*f) Milimani Commercial Chief Magistrate's Court Miscellaneous Civil Suit No.1044 of 2018; MJK vs FML;*

*g) Milimani Commercial Chief Magistrate's Divorce Cause No.272 of 2019 (Previously ,Meru Chief Magistrate's Court Divorce Cause No.26 of 2018) MJK vs FML; and*

*h) All other civil, commercial and/or family disputes that are currently pending before various courts and tribunals between the petitioners and 4<sup>th</sup> Respondent and interested parties (and their proxies).*

*is an infringement and an affront to the Constitution of Kenya, 2010 and infringement of the petitioner's rights under Articles 10(2), 27, 28, 29, 38, 47, 48 and 50 of the Constitution.*

*ii. An order of prohibition be issued prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> respondents together with their agents from investigating or recommending the prosecution of the petitioners based on matters revolving around the credit facilities, bank securities and changes on the ownership and control of Atticon Limited pending the outcome and further orders in the following ongoing litigation;*

*a) High Court of Kenya at Nairobi (Commercial Division) Civil Suit No.E138 of 2018 ;Barons Estate Ltd vs. Atticon Ltd & 6 Others;*

*b) High Court of Kenya at Nairobi(Family Division) Civil Suit 17 of 2019 (OS) (Previously High Court of Kenya at a Meru (Family Division) Civil Suit No.37 of 2018; MJK vs FML;*

*c) High Court of Kenya at Nairobi (Commercial Division) Civil Suit E086 of 2019;Gulf African Bank Ltd. Vs. Atticon Ltd & 4 others;*

*d) High Court of Kenya at Nairobi ( Commercial Division) Civil Suit E316 of 2020;Linkit Ltd vs Brenda Mithika Mwenda;*

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*g) Milimani Commercial Chief Magistrate's Divorce Cause No.272 of 2019 (Previously ,Meru Chief Magistrate's Court Divorce Cause No.26 of 2018) MJK vs FML; and*

*h) All other civil, commercial and/or family disputes that are currently pending before various courts and tribunals between the petitioners and 4<sup>th</sup> Respondent and interested parties (and their proxies.*

*iii. An order of compensation of the petitioners do issue for the infringement of the petitioner's rights under Articles 10(2), 27, 28, 38, 47, 48 and 50 of the Constitution of Kenya, 2010.*

*iv. An order of compensation to the petitioners for general damages for the distress, mental anguish and contravention of their various fundamental rights and freedoms caused by the actions of the respondents.*

*v. An order of exemplary and punitive damages do issue against the respondents.*

*vi. The costs of this petition to be awarded to the petitioners.*

*vii. Any other or further orders, writs and directions this honourable court considers appropriate and just to grant for the purposes of enforcement of the petitioners fundamental rights and freedoms.*

### **Background of the case**

3. This case revolves around the assertion that the petitioners in the month of October 2018 discovered fraudulent changes in the 3<sup>rd</sup> petitioner's directorship, shareholding and share capital. The petitioners proceeded to notify the Registrar of Companies. The Registrar informed the relevant parties of this issue and sought their response before making a determination in the matter. The 7<sup>th</sup> and 8<sup>th</sup> interested parties in a letter dated 19<sup>th</sup> October 2018 and 22 October 2018 to the Registrar made know that they had not been part of the meeting that passed the resolution to effect these changes. With no response from the 5<sup>th</sup> and 6<sup>th</sup> interested parties the Registrar ensued to inform the parties that the illegal documentation would be expunged. Soon after, the petitioners lodged their complaint with the 2<sup>nd</sup> respondent calling for investigation into the matter.

4. The petitioners state that the complaint lodged with the 2<sup>nd</sup> respondent has not been investigated this far. Instead the 2<sup>nd</sup> respondent summoned the petitioners as reported by the 2<sup>nd</sup> interested party in its suit. According to the petitioners the 1<sup>st</sup> and 2<sup>nd</sup> respondents are intent on arresting, charging and prosecuting them. The petitioners state that the 2<sup>nd</sup> interested party's criminal claim is without legal foundation as this court's commercial division has since dismissed the 2<sup>nd</sup> interested party's issues concerning the validity of the credit facilities and alleged fraudulent securities as will soon be seen in the petitioners affidavit in support. In addition, the petitioners say that the 2<sup>nd</sup> interested party's suit amongst the others is properly before competent courts awaiting determination.

5. The petition is founded on the grounds that the 1<sup>st</sup> and 2<sup>nd</sup> respondents intent to arrest, charge and prosecute the petitioners is negated by the following facts:

i. Their apparent ulterior motive due to their avoidance of the High Court's ruling on the issues, the biased treatment against them in favour of the 4<sup>th</sup> respondent and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested parties suit, harassing and intimidating the 1<sup>st</sup> petitioner to change his stand and double standards displayed;

ii. The 2<sup>nd</sup> respondent's failure or omission to conduct objective investigations of the petitioner's complaints against the 4<sup>th</sup> respondent and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested party and instead preferring to investigate this parties complaints;

iii. The 2<sup>nd</sup> respondent's refusal to objectively consider the petitioner's complaints against the 4<sup>th</sup> respondent and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested party;

iv. The 4<sup>th</sup> respondent and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested party's improper influence in the matter; and

v. Their failure to consider relevant matters including, the alleged marital and family relationship between the 1<sup>st</sup> petitioner and the 4<sup>th</sup> respondent; the pendency of the ongoing suits before various courts; the findings of the court in the suits and failure to wait for the final determination in this suits; the petitioner's complaints against the 4<sup>th</sup> respondent and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> interested party and the abuse of power by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in light of the nature of the suits which fall outside the criminal law jurisdiction.

6. The amended petition is supported by the averments in the sworn affidavits of the 1<sup>st</sup> petitioner and 2<sup>nd</sup> petitioner both dated 9<sup>th</sup> March 2021. The 2<sup>nd</sup> petitioner in her affidavit in support reiterated and emphasized the 1<sup>st</sup> petitioner's averments in support of the petition.

7. The 1<sup>st</sup> petitioner while reiterating their grounds as stated in the petition says that in March 2021, he was notified of two documents submitted in his office by a whistleblower. The contents revolved around the 2<sup>nd</sup> respondent's inquiry vide a letter to the 1<sup>st</sup> respondent whether he would make a decision to charge based on a draft charge sheet with 38 counts which was the second document. He reveals that the charges were based on the validity of the credit facilities and securities as well as the fraudulent change of the 3<sup>rd</sup> Petitioner's ownership and control.

8. On 8<sup>th</sup> March 2021, the 1<sup>st</sup> petitioner was summoned by the 2<sup>nd</sup> Respondent but he was not able to comply due to official duties and illness. He says that he was made aware of his imminent arrest through the local dailies that published the story on 8<sup>th</sup> March 2021. The petitioner while reiterating the grounds in the petition opines that the respondents actions violate his right against discrimination by virtue of the numerous suits and not in line with Article 157 of the Constitution. In addition he says that their actions have violated their legitimate expectation.

9. Borrowing from the 2<sup>nd</sup> interested party's application in Nairobi HCCC No.E138 of 2018; Barons Estate Limited vs. Atticon Limited & 5 others the petitioner avers that one of the reliefs sought was a temporary injunction. This was to first restrain the respondents from selling or reconstructing Atticon Limited. Secondly to release to the court all the title documents to assets allegedly held illegally by the 3<sup>rd</sup> petitioner as security. He states that this prayer was declined by the court but the 2<sup>nd</sup> interested party still made another application on 29<sup>th</sup> September 2020 on the issue of release of the securities which she had given the 3<sup>rd</sup> petitioner to secure credit facilities. This too was dismissed by the court. The petitioners on this premise argue that regardless of this fact the respondents still pursued them, which to them is discriminatory.

10. Sometime in October 2018, the petitioners discovered fraudulent changes in the 3<sup>rd</sup> petitioner's directorship, shareholding and share capital. This was exposed by the Board's resolutions dated 28<sup>th</sup> April 2017. As indicated in the background of this case the petitioners reported this discovery to the Registrar of Companies on 18<sup>th</sup> October 2018.

11. Soon after they learnt of Account Number 0900xxxx under the Gulf African Bank Limited that was opened in the 3<sup>rd</sup> petitioner's name following a Board resolution passed on 16<sup>th</sup> March 2018. This information was brought to light following the filing of Nairobi HCC No.E086 of 2019; Gulf African Bank Limited v Attion Limited and 4 others. The alleged directors took out a loan facility of Ksh.20, 000,000 which was secured by a tender, the transaction having been authorized by a letter dated 11<sup>th</sup> April 2018. According to the petitioners this amount and other monies from various businesses totaling Ksh.22, 000,000 was then channeled to the Gulf Bank Limited Account.

12. The 7<sup>th</sup> interested party who is purported to have signed the letter dated 11<sup>th</sup> April 2018 distanced himself from the signature

through a letter addressed to the Gulf Bank Limited party dated 25<sup>th</sup> October 2018. Following this unearthing the 2<sup>nd</sup> petitioner reported the matter to the 2<sup>nd</sup> Respondent's Banking Fraud Investigations Department. This was done vide a letter dated 23<sup>rd</sup> May 2019.

13. On 23<sup>rd</sup> October 2019, the 2<sup>nd</sup> respondent's Director of Banking Fraud Investigations Department inquired about the petitioners complaint from the firm of Musyoki Mogaka & Company Advocates. They appear for the 4<sup>th</sup> respondent, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> interested parties in this matter. The petitioners state vide a letter dated 14<sup>th</sup> October 2019 that the firm informed the department that the matter had been investigated by its sister department. The department found that the issue was the fraudulent use of the titles of the land belonging to its clients. These had been used as security for credit facilities advanced by the 9<sup>th</sup> interested party to the 3<sup>rd</sup> petitioner. In addition the advocates noted that the matter also dealt with the facility that was advanced to the 3<sup>rd</sup> petitioner by Gulf African Bank Limited.

14. The 1<sup>st</sup> respondent who had been copied in the communication clarified that the 2<sup>nd</sup> respondent's inquiry file with reference to matters raised by the firm related to investigations concerning forgery of bank documents used to obtain credit facilities from the 9<sup>th</sup> interested party. Further the fraudulent removal of directors of the 3<sup>rd</sup> petitioner while the Banking Fraud Investigations File touched on opening and operation of the 3<sup>rd</sup> petitioner's account at Gulf African Bank was suspicious. In essence he noted that the two matters could not be consolidated as misunderstood by the firm.

15. Against this backdrop the petitioners complain that the 1<sup>st</sup> respondent did not cancel its advisory to the 2<sup>nd</sup> respondent in the letter dated 13<sup>th</sup> February 2020. Based on this advisory the 2<sup>nd</sup> respondent Serious Crimes Department went on to take over the matter from the Bank Fraud Department. The petitioners state that the matter has not been actioned this far. Further they note that the draft charge sheet merged the issues and as a result they are the subject of arrest and prosecution.

16. The petitioners state that despite the 2<sup>nd</sup> respondent being made aware of the long-standing wrangles as between the 1<sup>st</sup> petitioner and the 4<sup>th</sup> respondent and by extension the 3<sup>rd</sup> petitioner and 5<sup>th</sup> interested party in various suits, he proceeded to convert the same into criminal matters with an intention of embarrassing him. This is because the 2<sup>nd</sup> respondent was notified that the 2<sup>nd</sup> interested party's advocates had confirmed that their clients had willingly given their titles to act as securities for facilities advanced to the 3<sup>rd</sup> petitioner and around July 2020 wrote to the bank requesting, they lift the encumbrances registered against the titles. The petitioners state that this discloses that there was no fraud on their part.

17. The petitioners vide a letter dated 25<sup>th</sup> February 2021 by their advocates wrote to the 2<sup>nd</sup> Respondent complaining of his biased conduct towards them by acting at the beckoning call of the 4<sup>th</sup> respondent and ignoring and concealing their documents.

18. The petitioners further note that the 4<sup>th</sup> respondent in her sworn affidavit in High Court Originating Summons No.37 of 2018: MJ v ML(In matter of Matrimonial Properties Act) alluded that the 2<sup>nd</sup> Interested party as willingly gave its securities to the 3<sup>rd</sup> petitioner for consideration. It is their contention that there is nothing to indicate the commission of a criminal offence regarding utilization of the securities belonging to the 2<sup>nd</sup> interested party. The petitioners also inform that their specimen signatures have been obtained from them as regards the alleged forgery of the documentation as indicated in the charge sheet. In addition, that the 2<sup>nd</sup> interested party's letter dated 2<sup>nd</sup> October 2018 to the 9<sup>th</sup> interested party clearly indicates that the issue was commercial in nature.

19. The 1<sup>st</sup> petitioner states that he is also being victimized due to his political affiliations. That he is perceived as a member of the 'tangatanga' wing of the Jubilee Party, whose members are deemed to be allied to the deputy president and as a result face the government's rage. He states that the 4<sup>th</sup> respondent being aware of all this has sought to take advantage of the present case adding that it is for this reason that the Kenya Revenue Authority has started its investigations into the 3<sup>rd</sup> petitioner's operations.

20. The petitioners believe that the 1<sup>st</sup> petitioner's arrest, charge, and prosecution is based on misuse of the 1<sup>st</sup> and 2<sup>nd</sup> respondent's powers and incorrect underpinnings, which threatens to violate the 1<sup>st</sup> petitioner's fundamental rights.

21. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed grounds of opposition dated 3<sup>rd</sup> May 2021 in response to the petitioner's petition dated 9<sup>th</sup> March 2021. The grounds are as follows:

***i. The prayers sought are unconstitutional as they seek to curtail their constitutional mandate which is against public interest and the administration of criminal justice.***

ii. *The petitioners have not adduced evidence to show that the criminal proceedings were commenced with an ulterior motive and how they acted in excess of the powers conferred to them.*

iii. *The petitioners have failed to demonstrate how substantial injustice will be occasioned if the criminal proceedings continue.*

iv. *The veracity of the facts raised by the petitioners can only be ascertained at the trial court which tests the facts and evidence. Accordingly the trial court is best suited to make a determination on the matter.*

v. *By virtue of Article 157 of the Constitution, the 2<sup>nd</sup> respondent can only institute criminal proceedings once an offence is committed. Moreover that a fundamental right can only be limited under Article 24(1) of the Constitution for reasonable and justifiable reasons in an open society.*

vi. *The 1<sup>st</sup> petitioner has failed to satisfy the threshold set out in the case of Anarita Karimi Njeru v Republic (1979) as he has merely stated his rights failing to demonstrate how each of his specific rights has been or will be infringed upon if the criminal proceedings proceed. It is argued that his case fails the ripeness test.*

vii. *Concurrent civil and criminal proceedings are permissible by virtue of Section 193(A) of the Criminal Procedure Code.*

viii. *This court ought not to usurp the mandate of the trial court by determining the substance of the issues in this case.*

ix. *The mere fact that there is a criminal prosecution does not negate the petitioners fundamental rights and freedoms as guaranteed by the Constitution and their presumption of innocence.*

x. *The petition is misconceived and vexatious as the petitioners have failed to demonstrate how either the 1<sup>st</sup> or 2<sup>nd</sup> respondents acted illegally, unreasonably, ultra vires contrary to natural justice and consequently should be dismissed.*

22. The 3<sup>rd</sup> respondent filed the following grounds of opposition dated 22<sup>nd</sup> April 2021:

i. *The petition seeks to limit the constitutional and statutory powers of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' mandate.*

ii. *The 1<sup>st</sup> and 2<sup>nd</sup> respondents' work as espoused in the petitioners pleadings was done in good faith based on Article 157(6) of the Constitution, Section 5 and 6 of the Office of the Director of Public Prosecutions Act and Section 35 of the National Police Service Act.*

iii. *The 1<sup>st</sup> respondent is bound by the provisions of Article 10 and 157(11) of the Constitution while carrying out his mandate.*

iv. *The 1<sup>st</sup> and 2<sup>nd</sup> respondents' constitutional mandate can only be interfered with by the Court where it is proven that they acted contrary to their mandate.*

v. *The petitioners have failed to adduce evidence to prove that the 2<sup>nd</sup> respondent in carrying out his function acted arbitrarily in conducting the investigations against them. Moreover that he violated their rights with the ongoing investigations against them.*

vi. *An allegation of violation or threatened violation of fundamental rights and freedoms does not warrant grant of the remedies sought since the petitioners must prove real danger that is imminent to warrant the court's intervention.*

vii. *This court and petitioners cannot anticipate the result of the ongoing investigation. Further that if the investigations culminate into an arrest and prosecution, both processes fall within legal processes provided by law. This in essence does not take away the petitioners rights under Articles 22, 49 and 50 of the Constitution.*

viii. *Both civil and criminal proceedings can run concurrently by dint of Section 193A of the Criminal Procedure Code.*

ix. *The Court in entertaining this matter would be assuming the role of the 1<sup>st</sup> respondent to review the case as presented by the*

*2<sup>nd</sup> respondent in making the decision to charge. This essentially would be usurping the 1<sup>st</sup> and 2<sup>nd</sup> respondents constitutional mandate. In a nutshell grant of the orders sought would be equal to making a determination of the matter.*

*x. The petitioners have failed to adduce evidence that they will suffer prejudice and their rights violated if the investigations proceed.*

*xi. The petition is based on an unsubstantiated apprehension with the sole purpose to frustrate the investigations against them and so without merit. It should then be dismissed.*

23. The 4<sup>th</sup> respondent, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> interested parties filed their response to the petition through their preliminary objection (P.O.) dated 10<sup>th</sup> May 2021. The grounds raised for the P.O. are:

*i. The petitioners petition dated 4<sup>th</sup> March, 2021 is a non-starter, misguided, misconceived and frivolous as they both run afoul and contravene Section 193A of the Criminal Procedure Code cap 75 Laws of Kenya.*

*ii. The petitioners petition dated 4<sup>th</sup> March, 2021 is bad in law as it seeks to improperly interfere with the constitutional powers of the office of the Director of Public Prosecution as enshrined under Article 157 of the Constitution.*

24. The 5<sup>th</sup> and 6<sup>th</sup> interested parties filed their response to the amended petition dated 9<sup>th</sup> March 2021 vide a sworn replying affidavit by the former dated 12<sup>th</sup> April 2021. It is averred that a complaint was lodged by the directors of the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties with the 2<sup>nd</sup> respondent, who summoned them with regards to this complaint. They were interrogated and their statements recorded.

25. The 5<sup>th</sup> interested party depones that owing to the petitioners' suit, she stands to suffer great prejudice that cannot be compensated by way of damages. She urges the court to dismiss the amended petition with costs to them.

26. The 7<sup>th</sup> interested party did not file any documents, but indicated to the court on 15<sup>th</sup> March, 2021 that he supported the petitioners' case. The 9<sup>th</sup> and 11<sup>th</sup> interested parties did not file any documents. They sought not to take a stand in the matter as per the court record dated 11<sup>th</sup> May 2021.

27. The petitioners filed written submissions and a list of authorities dated 13<sup>th</sup> April 2021 and further supplementary submissions and a list of authorities dated 10<sup>th</sup> May 2021 all by C. B. Mwangela advocate. Counsel states that the petitioners state that the issues for determination are whether the petitioners' fundamental rights and freedoms were violated or likely to be violated, whether an order of prohibition should issue, whether the petitioners are entitled to compensation and general damages and whether exemplary and punitive damages should be granted.

28. On the first issue, counsel submits that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' intentions are premised on improper factual grounds. This threatens the 1<sup>st</sup> and 2<sup>nd</sup> petitioners' right to human dignity as envisaged under Article 28 of the Constitution. To buttress this point reliance was placed on the case of **Samuel Rukenya Mbura & Others v Castle Brewing Kenya Limited & Another (2006) eKLR** where it was observed that inhuman treatment is an action that is barbarous, brutal and cruel while degrading punishment is that which brings a person in dishonor or contempt. Addition dependence was placed on the cases of **Ahmed Issack Hassan v Auditor General (2015) eKLR** and **Dawood and another v Minister of Home Affairs and others (CCT 35/99)(2000) ZACC 8**

29. Discussing the right to fair administrative action under Article 47 of the Constitution, the petitioners submit that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents were unfair and done in bad faith, since they commenced their investigations based on issues spinning from the credit facilities, securities and fraudulent change of directorship of the 3<sup>rd</sup> petitioner which emanate from a contractual commercial relationship. Moreover it is submitted that the 2<sup>nd</sup> respondent's failure to investigate the petitioners complaint while prioritizing the 4<sup>th</sup> respondent's complaint is unfair and biased. In support counsel relied on the case of **Commissioner of Police and Director of Criminal Investigations Department v Kenya Commercial Bank and Others (2013) eKLR** where the court observed that:

*"...the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings" It is not in the public interest or in the interest of administration of justice to use*

*criminal justice process as a pawn in civil disputes.”*

Counsel also relied on the cases of **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR**, **Associated Provincial Picture Houses v Wednesbury Corporation (1948)1 KB** and **Philip K. Tunoi & Another vs. Judicial Service Commission & another(2016) eKLR**

30. According to the counsel the respondents' actions are selective and discriminatory with the effect of violating their rights to equality and freedom from discrimination under Article 27 of the Constitution. To emphasize this point reliance was placed on the English case of **“Willis v the United Kingdom Application no. 36042/97”** where the European Court of Human Rights noted that discrimination means treating differently without any objective and reasonable justification for persons in similar situations.

31. It is further submitted that the 1<sup>st</sup> petitioner is a victim of political intolerance which in essence violates his political rights as provided for under Article 38 of the Constitution. To buttress this argument counsel cited the case of **Republic v Director of Public Prosecutions & another Ex parte Kamani & Others (2015) eKLR** where it was held that:

*“...where the respondent is shown not to be acting independently but just reading a script prepared by someone else or that he has been pressured to go through the motions. The courts will not hesitate to terminate the proceedings in such circumstances.”*

32. Counsel has submitted that the intended criminal proceedings by the 1<sup>st</sup> and 2<sup>nd</sup> respondents amount to abuse of power, because the 1<sup>st</sup> respondent has recommended arrest of the petitioners based on the 4<sup>th</sup> respondent's complaint despite the ongoing court cases. While it is acknowledged that both civil and criminal proceedings can run concurrently the petitioners submit that it is the respondents intention that is in issue and which they deem to be a total disregard of Article 157(11) of the Constitution.

33. To support this argument counsel relies on the case of **Republic v the Judicial Commission into the Goldenberg Affair and 2 Others ex parte Saitoti HC Misc. Application 102 of 2006** where it was held that:

*“it is not good for the DPP to argue that the Applicant should be arrested and charged so that he can raise whatever defense he has in a trial court. The Court has a constitutional duty to ensure that a flawed threatened trial is stopped in its tracks if it is likely to violate any of the applicants fundamental rights.”*

34. Other decisions relied on include: **Republic v Chief Magistrate's Court at Mombasa Ex parte Ganijee & Another [2002] 2 KLR 703**; **Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No.25 of 2002 [2009] KLR 229**; **Stephen Oyugi Okero v Chief Magistrate's Court at Milimani Law Courts & Another, Commissioner of Police and Director of Criminal Investigations Department v Kenya Commercial Bank and others (Supra)**, **Republic vs. Minister for Home Affairs and others Ex parte Sitamze Nairobi HCCC No.1652 of 2004 [2008] 2 EA 323**, **Kuria & 3 others v Attorney General [2002] 2 KLR 69**.

35. On the issue of oppressive nature of the respondents actions, it is submitted that the intended criminal charges are planned to harass and oppress the petitioners as they revolve around issues already in various courts. To support this assertion counsel cited the case of **G. B. M. Kariuki v Attorney General [2016] eKLR** where the court opined that:

*“the law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words, the police or any prosecution arm of the government is not a mere conduit for complainants. The police must act impartially and independently in respect if a complaint...”*

They further relied on the cases of **Kuria & 3 others v Attorney General (Supra)**, **Gulam & another v Chief Magistrate's Court and another [2006] eKLR** and **Joram Mwenda Guantai v the Chief Magistrate [2007] 2 E.A. 170**.

36. On the third issue, it is their submission that having established that their fundamental rights have been violated, it their prayer that this court grants them general damages. Reliance was placed on the case of **Senator Johnstone Muthama v Director of Public Prosecutions & 2 Others; Japheth Muriira Muroko (Interested Party) [2020] eKLR** where it was held that:

*“...it is now well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental rights under the Constitution.”*

He further relied on the case of: **Edward Akong'o Oyugi & 2 Others v Attorney General [2019] eKLR**.

37. It is the petitioners' contention that the grant of exemplary and punitive damages by the court will deter repetition of such violations. Further that enjoyment of these rights must be respected. To buttress this argument counsel relied on the case of **Miguna Miguna v Fred Okengo Matiang'I Cabinet Secretary, Ministry of Interior and Coordination of National Government & 6 others; Kenya National Commission on Human Rights (Interested Party) [2018] eKLR** where it was held that:

*"...an award ought in proper cases to be made with a view to deterring a repetition of breach or punishing those responsible for it or even securing effective policing of the constitutionally enshrined rights by rewarding those who expose breach of them with substantial damages."*

38. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed written submissions dated 5<sup>th</sup> May 2021 by prosecution counsel Berryl Marinda. Counsel submitted that the 1<sup>st</sup> respondent is a constitutional office established under Article 157(6) of the Constitution and Section 4 of the Office of the Director of Public Prosecutions Act. That the 1<sup>st</sup> respondent is required to pay attention to Article 157(11) of the Constitution while carrying out his mandate. This was emphasized by the court in the case of **Yunus Abdul Rubi & 2 Others v Director of Public Prosecution & 2 others [2016] eKLR** where it was stated that:

*"...it must not be lost to this Court and the parties that the powers to institute any criminal proceedings are vested in the office of the Director of Public Prosecutions by dint of Article 157(6) of the Constitution....additionally by dint of Article 157(11) of the Constitution, in exercising the powers conferred on him, the Director of Public Prosecutions is required to have regard for the public interest, the interests of the administration of justice and the need to prevent and avoid abuse. The foregoing makes it clear therefore that the Office of the Director of Public Prosecutions is an independent office with the mandate to independently institute criminal prosecutions."*

39. It is submitted that the 2<sup>nd</sup> respondent is a constitutional office under Article 245(1) of the Constitution. The mandate to investigate crime is vested in the police under Section 24 of the National Police Service Act and once done he/she recommends prosecution to the 1<sup>st</sup> respondent who then makes the decision on whether to charge the person or not.

40. Considering this, the respondents argue that the petitioners are inviting the court to examine the evidence which is a preserve of the trial court. To support this argument counsel cited the case of **Justus Mwenda Kathenge v Director of Public Prosecutions and 2 others, petition No.372 of 2013** where it was held that:

*"it is now trite that Courts cannot interfere with the exercise of the above mandate unless it can be shown that under Article 157(11) of the Constitution he acted without due regard to public interest and interests of administration of justice and not taken account of the need to prevent and avoid abuse of Court process...this court will be usurping the mandate of the trial court by evaluating the sufficiency of the evidence and to make a finding on whether the same can sustain a conviction."*

41. Counsel argues that the arrest and prosecution of the petitioners in and of itself is not unlawful as the petitioners are entitled to rights under the Constitution. Further that the two processes operate in public interest and embodiment of the rule of law. Relying on the case of **Elory Kraneveld v the Attorney General & 2 Others, Nairobi petition No.153 of 2012** counsel argues that the Constitution should be read holistically to discern its real meaning. Also referred to is the case of **Michael Monari & Another v Commissioner of Police & 3 others Miscellaneous Application No.68 of 2011**.

42. It is submitted that the petitioners have simply stated the provisions of the Constitution but have fail to demonstrate how the said provisions were violated. This they assert is the legal threshold as set out in the case of **Andrew Okoth Onanda v Inspector General Police & 2 others [2018] eKLR** which cited the case of **Anarita Karimi Njeru v Republic [1979] KLR 154** with approval.

43. To support their argument on discrimination in the investigations and prosecution, reliance was placed on the case of **Joshua Kulei and 5 others v Attorney General and 4 Others Petition No.66 of 2012** where it was held that:

*"...it is within the mandate of the DPP to elect whom to prefer charges against and this court has no jurisdiction to direct him with respect thereto. More importantly the decision to prefer charges against one person as opposed to another is not itself without more, sufficient to lead to an order of prohibition against a prosecution."*

44. On separation of powers, it is submitted that other than checking other organs of the government, any interference must be guarded against and justified. In the case of **Dr. Alfred N. Mutua v. The Ethics and Anti-Corruption Commission & Others, Misc. Application No.31 of 2016** it was noted that, interference should only be where it is shown that there was violation of the Constitution. Counsel supported this with the case of **Director of Public Prosecutions V Humphrey [1976] 2 ALL ER 497 at 511 and Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission (EACC) & 3 others [2018] eKLR.**

45. Counsel submitting on Section 193(A) of the Criminal Procedure Code placed reliance on the case of **Ashish Kampani v Director of Public Prosecution & 3 others [2016] eKLR** where it was held that the fact that a dispute has both civil and criminal elements is not per se a ground for terminating on-going criminal proceedings. The Court essentially intervenes where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law. The Court noted that this was what the drafters of Section 193 A of the Criminal Procedure Code anticipated. It is Counsel's submission that the petition is an abuse of the court process, since it is focused on circumventing the criminal justice system and curtailing the 1<sup>st</sup> and 2<sup>nd</sup> respondents' constitutional mandate.

46. The 3<sup>rd</sup> respondent filed written submissions dated 3<sup>rd</sup> June 2021 through Grace Mutindi Senior State Counsel. She submits that the issues for determination are whether the investigations, the intended arrest and prosecution violate the petitioners' rights and whether the petitioners are entitled to the reliefs sought. On the first issue, counsel submits that the petition is bent on interfering with the 1<sup>st</sup> and 2<sup>nd</sup> respondents' constitutional mandate as espoused under Article 157 and 245 of the Constitution. That their mandate is spelt out in the Office of the Director of Public Prosecutions Act No.2 of 2013 and National Police Service Act Cap 84. It is emphasized that both offices are guided by the fundamental principles promoted in the Constitution.

47. He contends that the 2<sup>nd</sup> respondent's authority to investigate has so far been recognized by the courts. To underscore this argument, reliance is placed on the cases of **Thuita Mwangi & 2 others v Ethics & Anti-corruption Commission and 3 others [2013] eKLR**, **David Ndulo Ngali & 2 others v DPP & 4 others [2015] eKLR**, **Erick Kibiwott & 2 others v Director of Public Prosecutions & 2 others (JR No.89 of 2010)** and **Republic v Commissioner of Police and another ex parte Michael Monari & another [2012] eKLR**. The courts commonly observed that the police have a duty to investigate on any complaint once it is made. Otherwise they would be failing in their mandate to detect and prevent crime. Additionally reliance was placed on the case of **Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] eKLR**.

48. Borrowing from the law and authorities relied upon it is submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' undertakings were legal actions and can only be challenged if it is proven that they acted ultra vires or contrary to constitutional values and principles. This is the position in the numerous cases cited in support. The authorities are: **Koinange v Attorney General and others [(2007) 2 EA 256, Justus Mwenda Kathenege v. Director of Public Prosecutions & 2 others [2014] eKLR** and **Daniel Ogwoka Manduku v Director of Public Prosecutions & 2 others [2019] eKLR**.

49. Counsel while dismissing the petitioners selective discriminations claims submits that under Article 157(10) and Section 6 of the ODPP Act the 1<sup>st</sup> respondent cannot be directed by any person on whether or not to prosecute while the 2<sup>nd</sup> respondent under Article 245(4) (a) (b) of the Constitution is granted independence to investigate. To buttress this argument reliance is placed on the case of **Stephen Ndambuki Muli & 3 others v Director of Public Prosecutions & another [2016] eKLR** where it was held that:

*"...it is within the mandate of the DPP to elect whom to prefer cases against and this Court has no jurisdiction to direct him with respect thereto."*

Also referred to is the case of **Godfrey Mutahi Mgunyi v. Director of Public Prosecutions and 4 others, Petition No.428 of 2015**.

50. The A.G. filed submissions dated 3<sup>rd</sup> June, 2021. Counsel submits that at this point the petition is merely speculative as the 1<sup>st</sup> respondent is yet to charge and as for now cannot determine whether the 1<sup>st</sup> respondent will abuse his mandate as outlined under Article 157(11) of the Constitution and Section 4 of the ODPP Act. It is their case accordingly that the petitioners have failed to demonstrate how their fundamental rights were violated to merit this court's intervention.

51. On Section 193A of the Criminal Procedure Code counsel submits that the prohibition relief sought ought not to be granted as the law dictates that both can run concurrently. Further that the matters can only be determined during the trial. To support this point he relied on the case of **Republic v Director of Public Prosecutions & 2 others ex parte Joseph Gathuku Kamuiru & another [2014] eKLR** where it was held that:

*“...the existence of civil proceedings arising out of the same set of facts is however not in itself a bar to commencement or continuation of criminal proceedings. Section 193 A of the Criminal Procedure Code is clear on this.”*

Further reliance is placed on the cases of **Republic v Director of Public Prosecutions & 3 others ex parte Bedan Mwangi Nduati & another [2015] eKLR** and **Michael Monari case (supra)**.

52. Counsel further submits that although the petitioners aver that their rights under Articles 27, 28, 38 and 47 of the Constitution have been violated, they fail to demonstrate how this was done. To support this he cites the cases of **Anarita Karimi Njeru v. Republic (No.1) [1979] 1 KLR 154** and later **Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR**. He adds that the alleged rights are not absolute as can be limited by the Constitution and the law. Furthermore, that while the 1<sup>st</sup> petitioner claims his political rights have been violated he did not produce evidence to that effect. He argued that if there is a dispute between the 1<sup>st</sup> Petitioner and his political party the same should be determined by the Political Parties Disputes Tribunal as provided under the Political Parties Act, 2011.

53. Counsel finally submits that the petitioners have failed to present a case that merits this court’s intervention. Further that an arrest and prosecution do not negate the petitioners’ rights under Articles 22, 49 and 50 of the Constitution. It is on this premise that they conclude that the case is unmerited and an abuse of the court process.

54. The 4<sup>th</sup> respondent in conjunction with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> interested parties filed written submissions dated 24<sup>th</sup> May 2021 through Musyoki Mogaka & Co. Advocates. They submit that the issues for determination are whether the amended petition is arguable, whether grant of the orders sought in the petition are in the public interest and interest of justice and lastly, who is to bear the costs of the petition.

Counsel reiterated that the 1<sup>st</sup> respondent’s mandate is provided for in the Constitution under Article 157. In addition, he submits that the petitioners’ case fails to reveal a cognizable constitutional controversy as pronounced by the Supreme Court in the case of **George Mike Wanjohi v Steven Kariuki [2014] eKLR**, which they relied on in support.

55. On the effect of Section 193 A of the Criminal Procedure Code, counsel sought to rely on the cases of **Republic v. Chief Magistrates Kilgoris, ex parte Johana Kipngeno Langat [2021]** and **Director of Public Prosecutions V Kuldip Madan & another [2009] eKLR**. It is argued that the investigations and intended prosecution of the petitioners is as a result of forgery of documents and their unjust enrichment through the illegal abuse of the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties’ property. They contend that granting the reliefs sought would be against public interest. Either way they state that the petitioners are entitled to their constitutional rights hence their apprehension is uncalled for.

56. Finally it is submitted that grant of the orders sought would be in direct violation to Section 193A of the Criminal Procedure Code and their rights under the Victim Protections Act, 2015. Counsel contends that the mentioned statutes enjoy legitimacy and protection from the Constitution so granting them would be against public interest.

57. The 5<sup>th</sup> and 6<sup>th</sup> interested parties filed submissions dated 12<sup>th</sup> April 2021 through Anyango & Opiyo Advocates. Counsel submitted the issues for determination to be whether there is a bar and prohibition in law to instituting proceedings for matters in issue in any pending civil proceedings and whether under the doctrine of judicial restraint this court lacks jurisdiction to interfere with the powers of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. He submitted that while the parties reiterated and aligned themselves with the dictates of Section 193A of the Criminal Procedure Code it is their position that the petitioners have not argued that the charges are not *coherent charges* as provided under sections 134 to 137 of the Criminal Procedure Code. As such the matter should be subjected to trial. Counsel in addition argues that the other courts in this matter are not the suitable forums considering the ingredients of the charges preferred against the petitioners.

58. It is his contention that it is a mockery of justice for the petitioners to seek prohibition orders. Counsel relied on the case of **William v. Spautz [1992] 66 NWS LR 585** where it was held that:

*“The purpose of criminal proceedings generally speaking is to hear and determine finally whether the accused engaged in conduct which amounts to an offence and on that account is deserving of punishment.”*

59. According to counsel grant of the orders sought is not merited as no evidence has been adduced to prove illegality, irrationality,

and impropriety on the part of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. To buttress this point reliance was placed on the case of **Kuria & 3 Others -V- Attorney General (2002] 2KLR** where it was held thus:

*“It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts.”*

60. Counsel submits that justice must be done to both the complainant and the accused and so where there is evidence upon which the 1<sup>st</sup> respondent can make the decision to charge, it is not for the court to inquire into the sufficiency of the evidence since it ought not to usurp the role of the trial court in determining the merits of the criminal case as esteemed in the **Michael Monari case (supra)** which they cited in support. As such it is submitted that a prohibition order in the circumstances of this case must be used sparingly and exceptionally as appreciated in the case of **Goddy Mwakio & Another V R [2011] 2KLR**. Counsel contends that the petitioners have not demonstrated any exceptional circumstances to merit grant of the prohibition orders.

61. It is counsel’s submission that this court by virtue of Article 165 ought to exercise restraint on exercising jurisdiction over matters within the purview of the 1<sup>st</sup> and 2<sup>nd</sup> respondent as mandated by the Constitution. He argues that owing to the principle of separation of powers the court cannot usurp the power of the 1<sup>st</sup> and 2<sup>nd</sup> respondents by determining the issues raised in this petition. On that note it is submitted that the petitioners have not demonstrated that the 1<sup>st</sup> and 2<sup>nd</sup> respondents exercised their mandate outside the ambit of the law to warrant this court’s intervention. He relied on the case of **Justus Kariuki Mate and Another vs Martin Nyaga Wambora and Another [2017] eKLR**, to support this argument.

62. The 10<sup>th</sup> interested party filed submissions and a list of authorities dated 28<sup>th</sup> September 2021 through Kipkenda & Co. Advocates opposing the amended petition. Counsel identified the issues for determination to be whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted within their mandate and whether the concurrent civil and intended criminal proceedings were merited.

63. He reiterates the mandate of the 1<sup>st</sup> and 2<sup>nd</sup> respondents as established in the Constitution and the law. He contends while relying on the **Michael Monari case (supra)** that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not act in a manner to permit this court’s intervention. Additionally he argues that while the 2<sup>nd</sup> respondent can recommend charges the 1<sup>st</sup> respondent is first required to review and weigh the evidence before making the decision to prosecute someone. To buttress this point he placed reliance on the case of **Raymond Kipchirchir & another v. Republic [2021] eKLR** where it was held that:

*“...In exercising this mandate the Director of Public Prosecutions (DPP) is required to review and determine the prosecutability of any matters forwarded for their actions...The decision must however be made judiciously in all cases.”*

He further relied on the case of **Douglas Maina Mwangi v. KRA & Another, Constitutional Petition No.528 of 2013**.

64. Counsel echoes similar sentiments as those of the respondents with regards to Section 193A of the Criminal Procedure Act. He referred to the following cases:

(i) **Commissioner of Police & Director of Criminal Investigation Department & another v Kenya Commercial Bank LTD(supra)**;

(ii) **Republic v. Director of Public Prosecutions & 2 others ex parte Francis Njakwe Maina & another [2015] eKLR**.

65. Counsel further submits that it is the petitioners’ burden to prove that the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ actions in the face of existing civil proceedings were erroneous and as a result an abuse of the court process. It is argued that the petitioners have failed to submit any evidence to support the claim that the proceedings were initiated with an ulterior motive, malice, intimidation, bias, double standards, improper influence and unfairness.

**Analysis and Determination**

66. I have duly considered the parties' pleadings, submissions, authorities cited and the law. It is my view that the issues that stand out for determination are as follows:

- i. *Whether civil and criminal proceedings can run concurrently;*
- ii. *Whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted within their mandate considering the 1<sup>st</sup> issue;*
- iii. *Whether the petitioners' fundamental rights and freedoms were threatened or violated specifically under Articles 27, 28, 29, 38, 47 and 50 of the Constitution; and*
- iv. *Whether the petitioners are entitled to general, exemplary, and punitive damages.*

**Issue No. (i) Whether civil and criminal proceedings can run concurrently**

67. The respondents, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 10<sup>th</sup> interested parties in this matter have submitted that the law permits that both civil and criminal proceedings can run concurrently.

68. The law on this issue is provided under Section 193A of the Criminal Procedure Code Cap 75. This Section reads as follows:  
**Concurrent criminal and civil proceedings**

*Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.*

69. The parties to buttress their arguments in this issue relied on a plethora of authorities that are well known and affirm the position as espoused under Section 193A of the Criminal Procedure Code. The authorities are namely: *Ashish Kampani v Director of Public Prosecution & 3 others [2016] eKLR; Republic v Director of Public Prosecutions & 2 others ex parte Joseph Gathuku Kamuiru & another [2014] eKLR; Republic v Director of Public Prosecutions & 3 others ex parte Bedan Mwangi Nduati & another [2015]; Republic v Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR; Republic v. Chief Magistrates, Kilgoris; ex parte Johana Kipngeno Langat [2021]; Director of Public Prosecutions V Kuldip Madan & another [2009] eKLR; Kuria & 3 Others-V- Attorney General [2002] 2KLR; Commissioner of Police & Director of Criminal Investigation Department & another v Kenya Commercial Bank LTD [2013] eKLR and Republic v. Director of Public Prosecutions & 2 others ex parte Francis Njakwe Maina & another [2015] eKLR.*

70. This is the position correspondingly held in foreign jurisdictions. A case in point is that of the Supreme Court of India in *P. Swaroopa Rani vs. M. Hari Narayana (AIR 2008 SC 1884)*. The Court while discussing this issue noted as follows:

*"13. It is, however, well-settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the fact and circumstances of each case. [See M.S. Sheriff v. State of Madras AIR 1954 SC 397, Iqbal Singh Marwah v. Meenakshi Marwah (2005) 4 SCC 370 and Institute of Chartered Accountants of India v. Assn. of Chartered Certified Accountants (2005) 12 SCC 226]."*

71. I do not find it necessary to rehash the authorities which were ably cited by the parties save to say I find no distinguishing circumstance in this matter. This is the position in law. The obvious question to be determined next is whether the circumstances of this case bar this court from intervening or whether they necessitate this court's intervention.

**Issue No.(ii) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondent acted within their mandate in light of the 1<sup>st</sup> issue**

72. Stemming from the first issue the petitioners state that although it is correct that civil and criminal proceedings can run concurrently, this court is permitted by virtue of Article 165(6) of the Constitution to exercise supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.

73. The Director of Public Prosecutions derives his powers from Article 157(6) of the Constitution which is recapped in the Office

of the Director of Public Prosecutions Act, 2013(ODPP Act) under Section 5. Article 157(6) provides:

*The Director of Public Prosecutions shall exercise State powers of prosecution and may--*

- a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;*
- b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and*
- c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).*

74. To exercise this power objectively and independently the 1<sup>st</sup> respondent is under sub – Article 10 granted the following scope which is also echoed in the ODPP Act under Section 5 It provides:

*(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.*

75. The 2<sup>nd</sup> respondent on the other hand obtains his power from Article 245 of the Constitution which establishes the National Police Service Act, 2011 (NPS Act) creates his office. To guarantee independence of this organ, Article 245(4) provides:

*The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to--*

- a. the investigation of any particular offence or offences;*
- b. the enforcement of the law against any particular person or persons; or*
- c. ....*

76. Section 28 of the (NPS Act) establishes the office of the 2<sup>nd</sup> respondent as follows:

*There is established the Directorate of Criminal Investigations which shall be under the direction, command and control of the Inspector-General.*

77. The functions of the 2<sup>nd</sup> respondent are accordingly provided under Section 35 of the (NPS Act) as follows:

- a. collect and provide criminal intelligence;*
- b. undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others;*
- c. maintain law and order;*
- d. detect and prevent crime;*
- e. apprehend offenders;*
- f. maintain criminal records;*

g. *conduct forensic analysis;*

h. *execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution;*

i. *co-ordinate country Interpol Affairs;*

j. *investigate any matter that may be referred to it by the Independent Police Oversight Authority; and*

k. *perform any other function conferred on it by any other written law.*

78. It is certain from a reading of the Constitution and enabling statutes that both the 1<sup>st</sup> and 2<sup>nd</sup> respondents' mandate is grounded in the Constitution. Supplementary to this is their enjoyment of absolute independence as they carry out their role. This is a factor that has been appreciated by the courts, which as a result are generally reluctant to interfere with the stated mandate.

79. Lenaola J. (*as he then was*) in the widely cited case of **Justus Mwenda Kathenge** (*supra*) with regards to the constitutional mandate of the 1<sup>st</sup> respondent held at paragraph 8 of the determination as follows:

***"It is now trite that Courts cannot interfere with the exercise of the above mandate unless it can be shown that under Article 157(1):***

***(i) he has acted without due regard to public interest,***

***(ii) he has acted against the interests of the administration of justice,***

***(iii) he has not taken account of the need to prevent and avoid abuse of Court process.***

***These considerations are not new and have over time been taken as the only bar to the exercise of discretion on the part of the 1st Respondent. I say so taking into account the following decisions where the issue has been addressed;"***

80. Ogola J. in the case of **Daniel Ogwoka Manduku** (*supra*) as cited by the 3<sup>rd</sup> respondent appreciated the 2<sup>nd</sup> respondent's mandate while citing other authorities as seen below:

***"The powers of the police to investigate a crime cannot be challenged because the police is there principally to combat crime. It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an abuse of power.***

***51. Odunga J. in Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] eKLR, said with regard to the power of the police to investigate:***

***"42. It is however my view that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police are being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."***

***In Pauline Adhiambo Raget v. DPP & 5 Ors., [2016] eKLR, a case where breach of right to equality was alleged to have been violated by investigations of an offence, Onguto J. held, and I agree, that-***

*“I have also been unable to see how in investigating an alleged criminal conduct or activity there could be discrimination or a practice of inequality before the law. The respondents are enjoined to investigate any allegations of criminal activity or conduct both by statute as well as by the Constitution. The investigations may take them to anyone including the petitioner. They could investigate on their own prompting or upon being prompted by any member of the public as did the interested party in this case. In so doing, it is a legal mandate they would be undertaking.”*

81. From the foregoing it is clear that the courts will generally not interfere with the mandate of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. However, where the circumstances of a case justify an intervention, the court will not hesitate to do so in the interest of justice. The Constitution itself anticipated these situations as can be seen under Article 165 (3)(d) (ii) of the Constitution, which states as follows:

*(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—*

*(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.*

82. Further the 1<sup>st</sup> respondent while exercising his constitutional power is mandated under Article 157(11) of the Constitution to act as follows:

*In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse.*

83. Likewise, Section 4 of the ODPP Act outlines the following as the 1<sup>st</sup> respondent’s guiding principles:

- a. *The diversity of the people of Kenya;*
- b. *impartiality and gender equity;*
- c. *the rules of natural justice;*
- d. *promotion of public confidence in the integrity of the Office;*
- e. *the need to discharge the functions of the Office on behalf of the people of Kenya;*
- f. *the need to serve the cause of justice, prevent abuse of the legal process and public interest;*
- g. *protection of the sovereignty of the people;*
- h. *secure the observance of democratic values and principles; and*
- i. *promotion of constitutionalism.*

84. Odunga J. while discussing the delicate balance between instigation of criminal proceedings by the 1<sup>st</sup> respondent and this court’s intervention in the case of *Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecution & another [2019] eKLR* stated as follows:

*“42. It bears repeating that in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. In a petition such as this the court ought not to transform itself into the trial court. In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial Court.*

43. *The general rule in these kinds of proceedings is that the Court ought not to usurp the Constitutional mandate of the*

*Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. Therefore, mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not, on its own and without more, a ground for halting such proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who contends that he has a good defence in the criminal trial ought to be advised to raise the same in his defence before the criminal trial instead of invoking this Court's jurisdiction with a view to having this Court determine such an issue as long as the criminal process is being conducted bona fides and in a fair and lawful manner. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings."*

85. The court went further to state that:

*"50. It is therefore clear that whereas the discretion given to the Respondents to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. However, it must be emphasised that a constitutional petition challenging prosecution does not deal with the merits of the case but only with the process. The Court in such proceedings is mainly concerned with the question of fairness to the petitioner in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution."*

86. Perusal of the material presented before this Court is necessary to ascertain whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents adhered to the dictates of the law. What is clear is that the petitioners case revolves around their complaint that the 3<sup>rd</sup> petitioner's particulars were fraudulently charged and soon thereafter learnt of the existence of Account no. xxxx held at the Gulf Bank Limited. They say this account was used to take out credit facilities by the alleged directors. On the other hand, the 2<sup>nd</sup> interested party's criminal claim constituted the fraudulent use of its titles of land as security for credit facilities advanced by the Family Bank to the 3<sup>rd</sup> petitioner and the credit facility advanced to the 3<sup>rd</sup> petitioner by Gulf African Bank. The 1<sup>st</sup> respondent in their communication to the 2<sup>nd</sup> interested party's advocate did indeed acknowledge that the two matters were different and could not be merged.

87. What emerges from the petitioners documents in support is that first, the parties relationship was contractual in nature based on their commercial relations with each other which was well noted by Okwany J in her determination in **Barons Estate Limited v Atticon Limited & 5 others [2019] eKLR and Barons Estate Limited v Atticon Limited & 5 others [2020] eKLR** which is a public document for this Court's reference. Okwany J notes in both rulings under paragraph 10 and 39 of the rulings that the supposed titles were given voluntarily. This was affirmed by the 2<sup>nd</sup> interested party's letter dated 2<sup>nd</sup> October 2018 to the 9<sup>th</sup> interested party that indicated they had pledged their land and surrendered its titles.

88. As has been found severally, this court cannot ascertain the veracity of the claims of the parties in this matter as this is the preserve of the trial court. What however this court takes note of is the material placed before it. The preceding account reveals pertinent information concerning this case which as it was well within the knowledge of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

89. It's against this backdrop that I question whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents actions were founded in good faith taking into consideration the prerequisites of Article 157(11) of the Constitution and Section 4 of the ODPP Act. Lenaola J in the case of **Justus Mwenda Kathenge (supra)** after summarizing a plethora of cases speaking to this topic came to the following conclusion:

*"The reasoning in all the above cases would lead to only one conclusion; whereas the DPP has the ultimate discretion in determining which complaint should lead to a criminal prosecution, where that power is seen to have been manifestly abused, the High Court can intervene by powers conferred by Articles 165(3)(d)(ii) of the Constitution and stop that abuse, including where the Court system is being used to settle scores and to put an accused person to great expense in a case which is clearly not otherwise prosecutable."*

90. The Court of Appeal in the case of **Commissioner of Police & The Director of Criminal Investigation Department &**

another v Kenya Commercial Bank Limited (*Supra*) while upholding the High Court's decision pronounced as follows:

*"...in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain above of power that may lead to harassment or persecution. See Githunguri V. Republic [1985] LLR 3090.*

*It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua V. R. [2002] IEA 205. See also Kuria & 3 Others V. Attorney General [2002] 2KLR 69.*

91. The Court went ahead to express itself as follows:

*"While the law (Section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith...It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court....."*

**(iii) Whether the Petitioners' fundamental rights and freedoms were threatened or violated specifically under Articles 27, 28, 29, 38, 47 and 50 of the Constitution**

92. From the above analysis it is clear that the petitioner, 4<sup>th</sup> respondent, 2<sup>nd</sup> – 4<sup>th</sup> interested parties raised complaints with the 2<sup>nd</sup> respondent. The same needed to be investigated by the 2<sup>nd</sup> respondent and a decision made by the 1<sup>st</sup> respondent on whether to charge anyone or not. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are under no obligation to disclose every step taken in the investigation to the complainants or this court. Any challenges and/or shortfalls should be raised with the trial court. On the other hand the 2<sup>nd</sup> respondent has a duty to properly investigate the complaints raised by the petitioners, and balance the evidence against that which they have in respect of the complaints by the other parties. Thereafter they can decide on the way forward on the advice of the 1<sup>st</sup> respondent.

93. I base this opinion on the fact that there are already numerous cases of a civil nature between the parties, stemming from family and contractual relationships. The court has however not been presented with sufficient material to make it stop the investigations and/or the arrest or charging of any party. To do so would be to usurp the powers of the 2<sup>nd</sup> respondent.

94. It is the petitioners contention that the 1<sup>st</sup> and 2<sup>nd</sup> respondents intended arrest and prosecution with relation to the ongoing civil, commercial and family suits is a contravention of their rights as provided under Articles 27, 28, 29, 38, 47 and 50 of the Constitution. The respondents on the other hand in their grounds of opposition assert that the process of arrest and prosecution are processes provided by law and in essence do not take away the petitioners rights under Articles 22, 49 and 50 of the Constitution. Secondly, they contend that the petitioners have failed to satisfy the threshold set out in the case of Anarita Karimi Njeru v Republic (1979). This is because they have merely stated their rights failing to demonstrate how each of the specific rights have been or will be infringed upon if the criminal proceedings proceed. It is accordingly argued that their case fails the ripeness test.

95. To satisfy the threshold set out in **Anarita Karimi's case** as submitted by the respondents, the petitioners are required to detail the facts that led up to the violation of the mentioned rights. For the claim of the right to fair hearing, they should show that the dispute was not resolved by the application of the law, and neither was it decided in a fair and public hearing before a court or impartial tribunal. If it is discrimination to show that their treatment in the process was not equal to what persons in a similar position receive. If it is human dignity to show for instance degrading treatment. If it is the right to fair administrative action they should show they were not accorded an opportunity to be heard, nor given reasons for actions taken out against them that would have adverse effects on them.

Article 27 of the Constitution on equality and freedom from discrimination provides that:

1. *Every person is equal before the law and has the right to equal protection and equal benefit of the law.*

2. *Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*

(3).....

96. In the case of **John Harun Mwau v Independent Electoral And Boundaries Commission & another [2013] eKLR** the scope of this right was expounded upon as follows at paragraph 33:

*“...It must be clear that a person alleging a violation of Article 27 of the Constitution must establish that because of the distinction made between the claimant and others, the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of Article 27 of the Constitution. It is my view that the regulation is justified and reasonable. I am therefore in agreement with the sentiments of Khanna J in the case of State of Kesata & Anor v N. M. Thomas & others 1976 AIR 490, 1976 SCR(17906 where he stated as follows;*

*“The principle of equality does not mean that every Law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The Legislature understands and appreciates the need of its own people, that its Laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category.”*

97. The next right on dignity which is found in Article 28 of the Constitution provides that:

*Every person has inherent dignity and the right to have that dignity respected and protected.*

This right was well pronounced and analyzed in the case of **Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited [2021] eKLR** where various opines were expressed as follows:

*“50. As regards the right to dignity, in Ahmed Issack Hassan vs. Auditor General [2015] the Court held that:*

*“...the right to human dignity is the foundation of all other rights and together with the right to life, forms the basis for the enjoyment of all other rights...put differently thereof, if a person enjoys the other rights in the Bill of rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated”. See Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) SCR (2) 516.*

98. The court proceeded to state at paragraph 54 that:

*“In Kennedy vs. Ireland [1987] IR 587 as cited in Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic & 10 Others [205] KLR it was held that:*

*“The dignity and freedom of an individual in a democratic society cannot be ensured if his communication of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with.”*

99. The next right in issue is the right to freedom and security in person under Article 29 of the Constitution, which states that :

*Every person has the right to freedom and security of the person, which includes the right not to be--*

- a. deprived of freedom arbitrarily or without just cause;*
- b. detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;*
- c. subjected to any form of violence from either public or private sources;*
- d. subjected to torture in any manner, whether physical or psychological;*
- e. subjected to corporal punishment; or*
- f. treated or punished in a cruel, inhuman or degrading manner.*

100. Mativo J. in the case of M W K v another v Attorney General & 3 others [2017] eKLR underscored the weight of this right as follow:

*“51. So important is the right not to be subjected to cruel, inhuman or degrading treatment or punishment that under Article 25 of the Constitution, it is one of the Rights that may not be limited.”*

101. In addressing the issue of political rights under Article 38 of the Constitution, the relevant sub-article for purposes of the present matter is as follows:

- 1. Every citizen is free to make political choices, which includes the right--*
  - a. to form, or participate in forming, a political party;*
  - b. to participate in the activities of, or recruit members for, a political party; or*
  - c. to campaign for a political party or cause.*

102. With reference to Articles 27, 28, 29 and 38 of the Constitution, the petitioners in their pleadings have not in any way demonstrated precisely how these rights have been infringed. The rights are stated without any material to support their existence. This is because the facts relied upon do not bear nor satisfy the elements alluded to in these Articles. There is no evidence of malice, unlawful actions, want of authority, harassment or intimidation by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. There is also no evidence of manipulation by the 4<sup>th</sup> respondent, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> interested parties. Moreover, there is no evidence of influence of his political stand used against the 1<sup>st</sup> petitioner.

103. This as a consequence renders their arguments of violations of these rights unsustainable. Furthermore, their argument fails the threshold set out for constitutional petitions. Regarding this matter, I associate myself with the insight provided by Lenaola J (as he then was) in the case of Eliud Nyauma Omwoyo & 2 others v Kenyatta University [2014] eKLR at paragraph 50 where he cited several authorities with approval:

*“...in Mathew Okwanda v Minister of Health and Medical Services and 3 Others Pet No. 94 of 2012 Majanja J in agreement with the decision in Anarita Karimi Njeru v Attorney General 19790 KLR 154 stated;*

*“The fact that the case was one that involved enforcement of economic and social rights did not however relieve the petitioner of the responsibility to plead a case that disclosed a violation of fundamental rights and freedoms with due particularity, as in such matters a petitioner had to plead with particularity that of which he complained, the provision said to be infringed and the manner in which the particular right was violated.”*

*In Trusted Society of Human Rights Alliance v Attorney General and Others Pet No. 229 of 2012 (unreported) the Court noted that;*

*“It was not necessary to set out the violations with mathematical precision but in a manner that will enable the respondent have notice of the allegations and defend himself or herself and to enable the court adjudicate the violation.”*

*In Daniel Chacha Muriri v Attorney General Petition No.41 of 2011 eKLR the Court stated;*

*“Availability of other available avenues for redress of grievances does not however prevent the petitioner from approaching this court alleging breach of his fundamental right and freedom. Such claim must however be precisely stated and the particular provision infringed to enable this court, sitting as a constitutional court to address the grievances and frame appropriate reliefs.”*

104. Moving over to the other rights, the petitioners claim that their rights under Articles 47 and 50 of the Constitution were violated. Article 47 of the Constitution of Kenya provides as follows:

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

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

105. Further under the Fair Administrative Actions Act, No. 4 of 2015 which gives effect to this Article provides redress to aggrieved parties as follows:

#### *Section 7*

*(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to—*

*a. a court in accordance with section 8; or*

*b. a tribunal in exercise of its jurisdiction conferred in that regard under any written law.*

Section 7(2) sets out the grounds under which an administrative action may be reviewed.

106. The prominence of fair administrative action as a constitutional right was appreciated in the South African case of **President of the Republic of South Africa and Others vs. South African Rugby Football Union and others (CCT16/98) 2000 (1) SA 1** at paragraphs 135 -136 where it was held as follows:

*“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”*

107. Closely related although different to the right to fair administrative action is the right to fair hearing as set out under Article 50(1) of the Constitution. This Article provides that:

*Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.*

108. The Court of Appeal in the case of **Mbalu Mutava (supra)** discussing and differentiating the two principles opined as follows:

*“22. ...Although on the surface, the three principles appear to refer to the same thing, on deeper examination they are of different legal character and their application may not be necessarily the same. Without attempting to lay an exhaustive distinction, the right to fair administrative action under article 47 is a distinct right from the right to fair hearing under article 50(1). Fair administrative action on the other hand refers broadly to administrative justice in public administration. It is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. The right to fair administrative action, though a fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law. “Fair hearing” in article 50(1) as the text stipulates applies where any dispute can be resolved by the application of the law and applies to proceedings before a court or, if appropriate, another independent and impartial tribunal or body.*

*It is clear that fair hearing as employed in article 50(1) is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. By article 25 that right cannot be limited by law or otherwise.”*

109. Guided by the law and cited authorities, I note from the petitioners pleadings and the annexures that they notified the 1<sup>st</sup> interested party of the change of particulars of the 3<sup>rd</sup> petitioner in a letter dated 18<sup>th</sup> October 2018. The 1<sup>st</sup> interested party acted on the complaint. They went ahead to lodge a complaint with the 2<sup>nd</sup> respondent on the alleged fraudulent change and the account held at Gulf Bank Limited on its behalf in a letter dated 23<sup>rd</sup> May 2019. The 1<sup>st</sup> respondent responding to the 4<sup>th</sup> respondent's, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> interested parties' advocates communication to the 2<sup>nd</sup> interested party, notified them in a letter dated 13<sup>th</sup> February 2020 that the complaints were separate and distinct.

110. The petitioners advocates in their further communication to the 2<sup>nd</sup> respondent dated 27<sup>th</sup> July 2020 listed the facts revolving around the case. The record does not reflect any response from the 1<sup>st</sup> or 2<sup>nd</sup> respondent. The petitioners advocates in their letter dated 25<sup>th</sup> February 2021 addressed to the 2<sup>nd</sup> respondent highlighted the petitioners grievance that their complaint had not been actioned. Moreover, their light of the turn of events in the matter. No evidence was adduced by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to the contrary.

111. From the foregoing discussion it is clear that there is an unresolved issue bothering the petitioners. It is however not this court's duty to determine whether the petitioners are guilty or not as already emphasized. This mandate belongs to the trial court as presented by the 1<sup>st</sup> respondent. It is however, the duty of this court to determine whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents employed the laid down constitutional principles and values as is necessary when carrying out their mandate. The 1<sup>st</sup> and 2<sup>nd</sup> respondents as espoused in the first issue turned a blind eye to relevant facts which is one of the elements that should be considered if the right to fair administrative action is to be intact.

112. The result of this oversight would reasonably in turn affect and threaten the right to a fair trial as would be premised on inopportune facts. The respondents moreover overlooked the petitioners concerns through their various communication even in light of the fact that their decision would have adverse effects on the petitioners. In addition to this the 2<sup>nd</sup> respondent failed to respond to the petitioners communication as per the court record.

113. It is appreciated that the mandate of the 1<sup>st</sup> and 2<sup>nd</sup> respondents is empowered by the Constitution and this court would be quite hesitant to interfere. This however can only occur where there was no violation of fundamental rights and freedoms as safeguarded by the Constitution. I find that the 2<sup>nd</sup> respondent ought to have fully investigated the petitioners' complaint before even considering charging them. There was therefore a violation of the petitioners' rights to fair administrative action.

#### **Issue No. iv. Whether the petitioners are entitled to general, exemplary, and punitive damages**

114. Among the reliefs sought the petitioners pray that they be awarded general, punitive, and exemplary damages. Are they entitled to these damages?"

The Court of Appeal while addressing the question of damages in the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR pronounced as follows:

*“...the South African Case of Dendy v University of Witwatersrand, Johannesburg & Others - [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:*

*“...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.*

*“...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”.....The Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is “just and appropriate” in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 to include, a remedy that will :*

- i. Meaningfully vindicate the rights and freedoms of the claimants;*
- ii. employ means that are legitimate within the framework of our constitutional democracy;*
- iii. be a judicial remedy which vindicates the right while invoking the function and powers of a court; and*
- iv. be fair to the party against whom the order is made.*

*Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is “appropriate and just” according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”*

115. Similarly, the court in the case of **Irene Donna Shamala v NIC Bank Limited [2021] eKLR** opined as follows:

*“56...In awarding general damages, the Court is required to provide a justification for the figure arrived at. Support for this statement is found in the decision of *Peter Mauki Kaijenja & 9 others v Chief of the Defence Forces & another [2019] eKLR* where it was held that:*

*“96. Award of damages entails exercise of judicial discretion, which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion. The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of this public law remedy evolved by the Courts. The following principles clearly emerge from decided cases;*

- i. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;*
- ii. Such claim is distinct from, and in addition to remedy in private law for damages for tort;*
- iii. This remedy would be available when it is the only practicable mode of redress available;*
- iv. Against claim for compensation for violation of a fundamental right under the constitution, the defence of Sovereign immunity would be inapplicable.*

116. I am guided by the above decisions and see no reason to depart from them. I am of the view that an award of general damages is not merited in light of the foregoing analysis and circumstances of this case. What is apparent from the material placed before this

court is that this suit's intention is geared towards ensuring that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are estopped from violating the petitioners' rights which they have partially succeeded in. They have however failed to justify why they should be granted these damages.

117. As to punitive and exemplary damages, it is important to state that these are damages which are normally awarded where the respondents' conduct aggravated the violation of the petitioner's rights. They are normally awarded to punish the respondent, primarily where the conduct was motivated by malice. I find that in the instant case the respondents actions did not amount to such as no evidence was adduced as earlier stated to prove this exacerbation.

118. In the circumstances of this case, I am guided by the decision of the Court of Appeal in the case of **Bank of Baroda (Kenya) Limited v Timwood Products Ltd [2008] eKLR** which sets out the principles for awarding exemplary damages as follows:

*"...in Kenya such damages are awardable only under two circumstances, namely:-*

*"(i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and*

*(ii) where the defendant's action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff – see OBONGO & ANOTHER V. MUNICIPAL COUNCIL OF KISUMU [1971] EA 91 which approved and applied the principles of the English case of ROOKES V. BANARD & OTHERS [1964] AC 1129."*

Also see **Abdulhamid Ebrahim Ahmed Vs. Municipal Council of Mombasa [2004] eKLR**.

119. Having found that the 2<sup>nd</sup> respondent did not fully act or investigate the petitioners' complaint lodged with him, I direct him to act on the same and forward his findings to the 1<sup>st</sup> respondent within 90 days. During the 90 days the 1<sup>st</sup> and 2<sup>nd</sup> respondents shall not charge or arrest the petitioners. Save for the above, I find no merit in the petition which I hereby dismiss with costs.

Orders accordingly.

**DELIVERED ONLINE, SIGNED AND DATED THIS 30TH DAY OF NOVEMBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.**

**H. I. ONG'UDI**

**JUDGE OF THE HIGH COURT**



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# NATIONAL POLICE SERVICE

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NAIROBI.

## DIRECTORATE OF CRIMINAL INVESTIGATIONS

DCI/IB/SCU/SEC/2/1/11/VOL.XI/59

31<sup>st</sup> May, 2023

Hon. Franklin Mithika Linturi  
P.O. Box 2694-00100  
**NAIROBI**

This is the Exhibit marked FML-10  
referred to in the annexed affidavit of  
Franklin Mithika Linturi  
Sworn before me this 6th  
Declared May 20 day of 24 at Nairobi  
In the Republic of Kenya  
J. M. LIMBIENE  
Commissioner for Oaths  
DATE 06/05/2024

**RE: DCI INQUIRY FILE NO. 48/2019  
INQUIRY INTO THE CRIMINAL COMPLAINT BY THE  
DIRECTORS OF BARONS ESTATE LIMITED & FAMILY BANK  
LIMITED (RELATED TO THE PROCEEDINGS IN HIGH COURT  
CIVIL CASE NO. 138 OF 2018 BARONS ESTATE LIMITED VS  
ATTICON LIMITED & 5 OTHERS AND HCC NO. 029 OF 2019  
NONIKO HOLDINGS LIMITED & 6 OTHERS**

The above matter refers.

Investigations on the above matter were conducted by this Directorate and the resultant file forwarded to the Office of the Director of Public Prosecutions (ODPP) for perusal and advise.

The ODPP vide his letter Ref. ODPP/CAM/1 dated 11<sup>th</sup> May, 2023 advised that the file be closed with No Further Police Action.

The purpose of this letter therefore is to advise you accordingly.

  
**PAUL WACHIRA  
FOR: DIRECTOR OF CRIMINAL INVESTIGATIONS**



# THE JUDICIARY



REPUBLIC OF KENYA  
 IN THE HIGH COURT OF KENYA AT NAIROBI CITY  
 COURT NAME: MILIMANI HIGH COURT  
 CASE NUMBER: HC.COMM/E086/2019

This is the Exhibit marked FML-1:1  
 referred to in the annexed affidavit of  
Franklin Mithika Linturi  
 Sworn before me this 6th  
 Declared May 24 Nairobi  
 day of May 2024  
 in the Republic of Kenya

**GLTONGA J. M' LIMBINE**  
 ADVOCATE & Commissioner for Oaths  
 P. O. BOX 12678 NAIROBI  
 MOB 0722 240091  
 DATE 06/05/2024 SIGN

CITATION: GULF AFRICAN BANK LTD VS ATTICON LIMITED AND DOUGLAS KAILANYA AND 3 OTHERS

## JUDGMENT

### Introduction and Background

1. By a plaint dated 2nd April 2019, the Plaintiff ("the Bank") filed suit against the Defendants claiming that the 1st Defendant ("the Company") applied for a credit facility from it through a Credit Facility Application Form dated 23rd March 2018 and that after the Bank considered the application, it offered a Tawarruq Local Purchase Order Finance Facility of Kshs. 20,000,000.00 on the terms and conditions contained in the Letter of Offer dated 11th April 2018 ("the Letter of Offer").
2. The Plaintiff further claimed that the Letter of Offer was accepted by the Company as the Borrower and signed by 2nd, 3rd and 4th Defendants as guarantors. The credit facility was to be used to finance the part performance of a construction contract dated 21st December 2016 between the Company and the 5th Defendant ("EPZA"). The Bank also averred that the facility was secured by, inter-alia, a directors' joint and several guarantee for Kshs. 20,000,000.00 each and that the 2nd, 3rd and 4th Defendants executed a joint and several guarantee dated 12th April 2018 as the directors of the Company. The Bank added that it was also a condition of the lending contract that the Company would procure an irrevocable undertaking from EPZA undertaking to channel all the proceeds of the construction contract through the Company's account held with the Bank and that EPZA issued an irrevocable undertaking dated 3rd April 2018.
3. The Bank went on to state that upon signing the Letter of Offer and complying with the conditions precedent, the Bank disbursed Kshs. 20,000,000.00 to the Company's account on 13th April 2018 and that the sum was repayable within six (6) months from the date of disbursement. The Bank now claims that that on 27th December 2018, EPZA paid a sum of Kshs. 28,813,554.00, being part of the proceeds of the construction contract, to the Company's account held at Family Bank Limited and that this act of channelling the Kshs. 28,813,554.00 was and remains a breach of an irrevocable undertaking dated 3rd April 2018 issued by EPZA to the Bank.



4. The Bank states that the Company has, in breach of the contract, failed to repay the loan within the six (6) months as agreed or at all thus leaving a balance of Kshs. 21,991,649.53 as at 19th February 2019 and that the outstanding amount continues to accrue contractual default damages at the rate of 14% per annum. The Bank further accuses the Company of being in breach of the lending contract and colluding with and causing EPZA to divert the funds from the construction contract and paying them to the Company's account at Family Bank Limited. The Bank also states that under the terms of the joint and several guarantees dated 12th April 2018, the 2nd, 3rd and 4th Defendants would pay all monies due to the Bank in the event of default by the Company and that they have failed, refused and neglected to pay all monies due thus breaching the contract of guarantee. The Bank thus avers that its cause of action against the Company and the 2nd to 4th Defendants is for breach of the respective borrowing and guarantee contracts whereas that of EPZA is for breach of the terms of the undertaking issued on 3rd April 2018.

5. The Bank prays for judgment jointly and severally against the Defendants for Kshs. 21,991,649.53 being the total outstanding amount as at 19th February 2019, Contractual default damages on this amount at the rate of 14% per annum from 19th February 2019 until payment in full and Costs of the suit without interest.

6. The Company and EPZA responded to the suit by filing statements of defence. The Company also filed a counterclaim. The 2nd to 4th Defendants neither entered appearance nor filed defence despite being served with the pleadings in the suit.

7. The Company denied that the 2nd to 4th Defendants were its directors and stated that there it has never had any contractual, business or banking relationship with the Bank. It states that the Bank's claim is a sham as it is based on documents that were authored and attested to by persons who were neither directors nor representatives of the Company. The Company further states that if the Bank advanced any money, it did so negligently as the 2nd to 4th Defendants did not have any authority to transact any business on behalf of the Company and that their appointment as directors of the Company was procured through fraud.

8. The Company states that at all material times its lawful directors have been Emily Nkirote and Franklin Mithika Linturi. That it has never resolved to open a bank account or take a credit facility from the Bank. It asserts that the documents relied on by the Bank to make its case are forgeries hence it was not obliged to comply with the terms of the Letter of Offer and that the Bank's action, if any, lies against the 2nd to 4th Defendants. The Company accuses the Bank of negligence in the manner it opened the subject bank account at the behest of fraudsters purporting to be directors of the Company and accepting the credit facility application made by them and disbursing Kshs. 20,000,000.00 to the illegal account. The Company states that the Bank has attempted to cover up its negligence by conveniently omitting one Joseph Gitonga M'Limbiine from the suit and yet he had also been one of the people who fraudulently procured his directorship into the Company.

9. The Company claims that it has lost Kshs. 21,846,607.25 as a result of the Bank's negligence and that the fraudulent acts of the 2nd to 4th Defendants' who used the illegal account as a conduit to deprive the Company of revenue amounting to Kshs. 21,846,607.25 paid to it in respect of various services rendered by it to various bodies. The Company claims this amount from the Bank and the 2nd to 4th Defendants and urges the court to dismiss the suit with costs.

10. EPZA denies issuing an irrevocable undertaking dated 3rd April, 2018 to the Bank. It states that



it advertised for tender number 03/2016/2017 for the Construction of Precast Concrete Perimeter Wall (Fencing) at Athi River and which tender was awarded to the Company. Following the award, the parties entered into a contract of works on 21st December 2016 for the price of Kshs. 165,281 886.60 but that from the Bank's supporting documents, the Company applied for a credit facility on 27th March 2018 which was approved and a loan of Kshs. 20,000,000.00 disbursed on 11th April 2018. That the Bank requested for a letter of undertaking from EPZA on 20th March 2018 and which EPZA responded to the said letter on 3rd April 2018. EPZA points out that the Bank requested for a letter of undertaking seven days before the Company applied for the loan of Kshs. 20,000,000.00 from the Bank and that on 27th March 2018 the Company, through one 'Belinda Shitsama' issued a power of attorney purporting to appoint the said 'Belinda Shitsama' as the Company's attorney with authority to execute on its behalf any deed or agreement. EPZA states that upon perusal of the Bank's documents, there is no board resolution appointing the aforesaid individual to act on behalf of the Company.

11. EPZA further avers that by the letter dated 3rd April 2018, it advised the Bank that as soon as development funds is received from treasury, it would process the payment. That in a letter dated 2nd November 2018, the Company wrote a letter to EPZA advising that the authorized representative of the Company was one Emily Nkirote Buntai and who had signed the Contract that was duly entered between EPZA and Company, that all payments in relation to the aforesaid contract be paid to the Company's account held at Family Bank, Kilimani Branch Account Number 046\*\*\*\*\*79. It also advised that Lilian Muge was a fraudster who was attempting to take control of the Company. EPZA adds that the Company also forwarded a CR12 dated 29th October 2018 indicating Ms. Emily Nkirote Buntai and Mr. Franklin Mithika Linturi as the directors of the Company.

12. EPZA avers that following instructions from the Company and in compliance with the terms of the service contract dated 21st December 2016, it made payment through the Company's account held at Family Bank, Kilimani Branch. EPZA denies colluding with the Company to divert the funds from the construction contract to its account at Family Bank. It states that it acted on instructions of its client and not any other person and that it does not have any no contractual relationship with the Bank. EPZA further states that the purported letter of undertaking dated 3rd April 2018 was revoked as soon EPZA received the letter dated 2nd November 2018 from the Company. It adds that the Bank should pursue the individuals who guaranteed the credit facility and not EPZA and urges the suit against it be dismissed with costs.

13. The matter was set down for hearing. The Bank called one witness, Lawi Sato, its Senior Legal Officer. The Company called two witnesses, Emily Nkirote Guantai (DW 1) and Joseph Gitonga M'Limbiine (DW 2). EPZA also called one witness, Dennis Kinyua (DW 3), its General Manager, Finance, HR and Administration. In addition to their pleadings, testimony and documents, the parties filed written submissions.

14. Since the witnesses testified along the lines I have highlighted above, I do not wish to rehash the same but I will make relevant references in my analysis and as per the agreed issues for determination below.

### **Analysis and Determination**

15. In making this determination, I am guided by the fact that the standard of proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a



fact which he wants the Court to believe. This is anchored in section 107(1) and (2) of the Evidence Act (Chapter 80 of the Laws of Kenya) which provides that, "*whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist*" and that "*When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person*".

16. As regards the standard of proof, it is well established the in order to succeed, a party must prove its case on a preponderance or balance of probabilities. In *Miller v Minister of Pensions* [1947] ALL ER 372, Lord Denning aptly summarised the application of the standard in the following terms: *That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.*

The Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Ltd* CA Civil Appeal No 365 of 2017 [2019] eKLR simply put it that, "*Courts will make a finding based on which party's version of the story is more believable.*"

17. From the facts I have outlined, there is no dispute that the Bank advanced Kshs. 20,000,000.00 to the Company. The substantial issue is whether the Defendants should pay this amount. The parties have however framed the following issues for determination:

- 1) Whether the Bank acted negligently in opening and operating account number 090\*\*\*\*01 in the name of the Company.
- 2) Whether the Bank acted negligently in advancing a loan through account number 090\*\*\*\*01 in the name of the Company.
- 3) Whether, in any event, the Bank is entitled to recover Kshs. 21,991,649.53, plus default damages, from the Company.
- 4) Whether, in any event, the Company is entitled to recover Kshs. 21,846,607.25 from the Bank and 2nd to 4th Defendants jointly and severally.
- 5) Whether EPZA issued an irrevocable undertaking to the Bank.
- 6) If the answer to 5 above is in the affirmative, whether EPZA is liable to the Bank for Kshs. 21,991,649.53, plus default damages, based on its undertaking.
- 7) Who should bear the costs of the suit and counterclaim.

#### **Whether the Bank was negligent in opening the subject account**

18. It is not in dispute that the Bank opened an account number 090\*\*\*\*01 in the name of the Company. However, the Company claims that the Bank was negligent in opening this account as the application form was completed by people who had no authority to transact on behalf the Company. According to the Bank's evidence and testimony, it avers that it conducted proper due diligence and was satisfied that the people who presented themselves as directors of the Company were in fact its directors and that they had the authority to open the account on behalf of the Company.

19. PW 1 confirmed that the subject account was opened on 21st March 2018 and that the 2nd to 4th Defendants presented to it a duly filled account opening form, a board resolution, memos, copies of Identity Cards (IDs) and PIN Certificates. However, PW 1 admitted that the Bank failed to produce the said account opening forms and the supporting documents as part of its evidence.



20. PW 1 also stated that the Bank conducted a physical search at the Companies Registry to confirm that the 2nd to 4th Defendants together with DW 2 were directors of the Company before opening the account. He however admitted that it did not obtain a CR 12 from the registry to confirm the directorship of the Company. PW 1 further admitted that the Bank did not file, as part of its evidence, any information of the account opening information or the account information showing the signatories and the directors captured by the Bank system. PW 1 also stated that the Bank never obtained any information from Family Bank to confirm that the Company was operating an account there despite the fact that the Credit Facility form states the Company had an account there. He also admitted that according to the board resolution presented to the Bank, the members present at the meeting of 16th March 2018 were 2nd and 3rd Defendants, DW 2 and Hillary Kiplagat but that the account signatories were Maryanne Jebet Langat, Kananu Felista Iruku and Margaret Muthoni Kania. PW 1 admitted that neither of these signatories were directors of the Company.

21. PW 1 recalled that DW 2 had informed the Bank that he never signed any of the documents in the Bank's possession and that in his letter dated 25th October 2018, he asked the Bank for, inter alia, account opening documents and that the Bank, in its response dated 29th October 2018 asked for time to investigate the matter. PW 1 further stated that the account was frozen, pending investigations but then on 31st December 2018, Kshs. 804,470.00 was credited into the account and then Kshs. 800,000.00 was debited therefrom. PW 1 also stated that once the Bank received the letter from DW 2, it did not communicate to the Company the contents as it was investigating who the directors of the Company were.

22. From a consideration of the testimony of PW 1 which I have outlined, I am not satisfied that the Bank conducted proper due diligence on the directorship of the Company. The Bank, as represented by the testimony of PW 1, was still not sure of the Company's directors. PW 1's testimony revealed that the Company never carried out a proper search at the company's registry to confirm the directors of the Company. PW 1's averment that it carried out a physical search by perusing the company register was a mere assertion and was not supported by any other evidence for example, payment of perusal fees. Further, the only way to conduct an official search is to obtain a CR-12 which set out the particulars of the Company, its directors and shareholders. It is well established that an official search being an official document gives the prima facie evidence of the status of a company. I accept what the court stated in *China Young Engineering Company v L. G. Mwacharo T/A Mwacharo Associates and Another ML HCCC No. 81 of 2011 [2012] eKLR*, that:  
*[W]hen there is a dispute as to directorship and shareholding of a company, the best evidence to be relied on is the updated records from the Registrar of Companies. The registry is meant to keep records of all Companies and for the purposes of the public to rely on the same as reflecting the true record of any particular company.*

23. While the Bank's position is that a customer must avail certain documents before the account is opened, PW 1 did not produce these documents in court. In the absence of these documents, the court can only conclude that none of the required documents for the account opening were presented to the Bank thus manifesting its lack of proper due diligence. This is consistent with section 112 of the Evidence Act which provides that where specific facts are within the knowledge of a person, the burden of proving or disproving the same lies on that person. Where the person fails to produce the documents, then the court is entitled to make a negative or adverse inference (*Kenya Akiba Micro Financing Limited v Ezekiel Chebii and 14 Others [2012] eKLR* and *Kimotho v Kenya Commercial Bank [2003] 1 EA 108*).



24. In support of its claim for negligence, the Company cited the Bank for violating the Central Bank of Kenya Prudential Guidelines, 2013 ("the Prudential Guidelines"). In *Equity Bank (Kenya) Limited v Don Ogalloh Riario and Another NRB CA Civil Appeal No. 153 of 2017 [2019] eKLR*, the Court of Appeal held that the Prudential Guidelines issued by the Central Bank of Kenya under its statutory mandate have legal force in accordance with the Statutory Instruments Act, 2013. I therefore hold that these Prudential Guidelines provide a standard upon which the Bank's conduct must be judged.

25. As regards customer identification, the Prudential Guidelines impose on the Bank a duty to know their customers. In particular Clause 5.6 provides, in part, as follows:

*5.6 Customer Due Diligence*

*5.6.1 Know your Customer Requirements*

*The need for institutions to know their customers is vital for the prevention of money laundering and underpins all other activities.*

*When a business relationship is being established, the nature of the business that the customer expects to conduct with the institution should be ascertained at the outset to show what might be expected as normal activity. In order to be able to judge whether a transaction is or is not suspicious, institutions need to have a clear understanding of the legitimate business of their customers.*

*5.6.2 Customer Identification and Verification*

*In all circumstances, any business entity operating within the financial sector requires basic information on its customers. The nature and extent of this information will vary according to the type of business. It shall also depend on whether the business is being introduced by a financial intermediary and the type of customer involved. An institution should establish to its satisfaction that it is dealing with a person that actually exists. It should identify those persons who are empowered to undertake the transactions, whether on their own behalf or on behalf of others.*

*When a business relationship is being established, the nature of business that the customer expects to conduct with the institution concerned should be ascertained, so as to determine what might be expected as the customer's normal activity levels. In order to judge whether a transaction is or is not suspicious, an institution needs to have a clear understanding of the pattern of its customer's business as its relationship.*

*5.6.3 When Identity Must Be Verified*

*An institution must identify its customer in the following circumstances:*

*(a) When establishing initial business relations.*

*(b) When undertaking occasional or one-off transactions.*

*(c) When there is cause to be suspicious.*

*(d) When there is doubt about veracity or adequacy of previously obtained customer information.*

26. The Bank failed to act in accordance with the Prudential Guidelines. It failed to conduct an official search at the Companies Registry or require the usual documents to confirm the status of the Company. This is amplified by the fact that it even allowed transactions in the subject account even after doubts about the directorship of the Company were brought to its attention. The Bank did not even notice the difference between the Company's directors and signatories and that they never questioned the same.

27. A bank has a duty to exercise reasonable diligence and take the necessary precautions by making proper inquiries to ensure that the holders of accounts are not imposters. In *Kenya Grange Vehicle Industries Ltd v Southern Credit Banking Corporation Limited [2014] eKLR*, the court found the bank guilty of negligence for failing to take proper precautions, "so as to ensure that the holders



*(signatories) to the said account were legally who they said they were.*” Likewise, in *Beyond Kenya Limited and Another v Gulf African Bank Kenya Limited ML HCCC No. 158 of 2009 [2019] eKLR*, the court held that the bank, *“failed to comply with mandatory provisions, requiring a bank to verify the identity of a customer when establishing initial business relations”*. In such instances, the onus to show the absence of negligence falls on the bank as was stated by the Court of Appeal in *Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 others NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR* that:

*The onus of establishing circumstances showing absence of negligence is on the banker. It is a matter of defence, and does not give a substantive cause of action. The extent of inquiry must be measured by what in the circumstances a fair minded banker paying due regard to the exigencies of banking business in relation to the person depositing the cheque would consider it prudent to do in order to protect the interest of the true owner and each case must depend on its own circumstances.*

28. In this case, a prudent banker, following the Prudential Guidelines, would have called for the CR-12, proper identification documents and other documents to confirm the identity of the directors of the Company. From the totality of evidence, I hold that the Bank was negligent when it failed to take proper precautions so as to ensure that the persons who claimed to have authority to open the said account were legally the directors of the Company and on this position I am in agreement with the Company.

#### **Whether the Bank was negligent in advancing a loan through the subject account**

29. The Bank stated that it advanced a loan to the Company on the strength of an application presented on behalf of the Company by the 2nd to 4th Defendants and DW 2. I have already found that the Bank failed to ascertain whether these individuals who applied for the facility were the bona fide directors of the Company when the account was opened.

30. In the credit application form, the Bank required the Company to supply several documents before the loan was advanced. These include the Memorandum and Articles of Association, the Certificate of Incorporation, the audited accounts for the preceding three years, certificate of the registration, copies of the ID of owners/directors, VAT registration certificates, PIN Certificate for the Owners, Current financial statements, statement of all bank accounts for the preceding 12 months, copy of lease, Income/Tax returns for the preceding 12 months. Although the credit application form produced in court shows that the documents were obtained, they were not produced in court. PW 1 also admitted that the Bank never obtained annual returns for the preceding two years filed with the Registrar Companies along with the filing receipts. As I stated, failure to produce these documents in court supports the inference that the 2nd to 4th Defendants did not provide them to the Bank. Had the Bank insisted on these documents, it is likely that the loan would not have been advanced. PW 1 further admitted that the Bank did not verify whether the person who signed the credit application form as the Company secretary, was actually a registered Company Secretary. He also admitted that DW 2 had informed the Bank that he did not sign the Letter of Offer.

31. PW 1 further admitted that in as much as the loan facility was to facilitate part performance of the contract between the Company and EPZA, which contract was for a period 12 months beginning 10th January 2017, the loan was disbursed after the contract had already determined. All this<sup>4</sup> evidence supports the finding that the Bank failed to conduct due diligence as on the applicants of the loan. It caused the account to be opened without sanction from the lawful and bona directors of the Company and then went ahead to disburse the loan through that account to facilitate a contract



that had already lapsed. I answer the issue framed in the affirmative. The Bank was negligent in disbursing the loan.

**Whether, in any event, the Bank is entitled to recover Kshs. 21,991,649.53, plus default damages, from the Company.**

32. Since the Bank was negligent in making unauthorised advances to the Company, it cannot recover the amount advanced to the Company. It can only recover the money from the 2nd, 3rd and 4th Defendants who purported to execute guarantees in favour of the Bank and who ultimately benefitted from the money paid to the Company. Since they neither entered appearance or filed defence, the case against them is uncontroverted.

**Whether the Company is entitled to recover Kshs. 21,846,607.25 from the Bank and the 2nd to 4th Defendants**

33. The Company seeks to recover Kshs. 21,846,607.25 from the Bank being proceeds from different entities legitimately belonging to the Company but appropriated by the 2nd to 4th Defendants who were running the account. These amounts include Kshs. 15,300,000.00 paid by Jubilee Insurance Company Limited on 17th May 2018, Kshs. 3,616,992.00 and Kshs. 2,125,145.20 paid by the Ministry of Interior Co-ordination of the National Government on 18th May 2018 and 2nd July 2018 respectively and Kshs. 804,570.00 paid by the Ministry of Defence on 31st December 2018. PW 1, in his testimony, confirmed that these sums were received by the Company through the said subject account held by the Bank and the statement of account produced by the Bank confirms as much.

34. Having found that the Bank was negligent in the manner that it allowed the subject account to be opened and the loan to be disbursed, I hold that it is liable for the loss to the Company as a result of allowing imposters to run the account. I agree with the Company that the Bank failed to take any reasonable steps to stop the fraudulent transactions even after it was notified. I also find that the 2nd to 4th Defendants fraudulently held themselves out as directors of the Company and also aided in the loss by the Company.

35. I therefore hold that the Company is entitled to recover Kshs. 21,846,607.25 from the Bank and the 2nd to 4th Defendants jointly and severally.

**Whether EPZA issued an irrevocable undertaking to the Bank**

36. The Bank's case is that EPZA issued an irrevocable undertaking dated 3rd April 2018 undertaking to channel all the proceeds of the construction contract through the Company's account held with the Bank. EPZA, does not dispute that it wrote to the Bank on 3rd April 2018 but then states that the said letter was not an undertaking but a letter acknowledging receipt of instructions. In order to give the said letter its full meaning and context, I will reproduce the same below:

*3rd April 2018*

*The Managing Director,  
Gulf African Bank Limited  
P.O. Box 43683-00100  
Nairobi*

*Dear.....*

*RE: REQUEST FOR UNDERTAKING TO GULF AFRICAN BANK*

*Your letter of 20th March 2018 on the above subject refers*

*This is to acknowledge receipt of your irrevocable instructions that all your payment be made to the*



*following account*

*Bank name: Gulf African Bank Ltd*

*Account No.....*

*We would like to confirm that the payment certificates in relation to ongoing works under the following contract between Export Processing Zone Authority and Atticon Limited will be processed as soon as we are in receipt of Development Funds from the National Treasury:*

*EPZA Tender No:.....*

*Please do not hesitate to contact the undersigned for any clarifications*

*Yours*

*Signed\**

*CHIEF EXECUTIVE OFFICER*

37. A cursory look at the letter I have reproduced above shows that there no promise by EPZA that it will channel funds to the said account as has been advanced by the Bank. EPZA only acknowledged receipt of instructions and promised that payment certificates will be processed once it is in receipt of funds from the National Treasury. Guided by the law concerning professional undertakings as explained in Arthur K. Igeria t/a Igeria & Co. Advocates v Michael Ndaiga NRB CA Civil Appeal No. 51 of 2008 [2017] eKLR I accept that an undertaking must satisfy three conditions. First, an undertaking must be clear in its terms and there must be no dubiety or ambiguity as to what has been undertaken. Second, what is undertaken must be capable of being performed and third, that if the undertaking is contingent on the happening or occurrence of an event, such event has occurred or happened. I find and hold that the letter of 3rd April 2018 was not unequivocal about channelling funds to the Company's account held by the Bank and does not meet the requirements of an undertaking which this court can enforce.

38. In any case, the Company later on followed up with a letter withdrawing its earlier instructions to EPZA. EPZA cannot be faulted for acting on these instructions. I return a negative answer to this issue and hold that EPZA is not liable to pay the Bank Kshs. 21,991,649.53, plus default damages based on this letter as the same was not an undertaking.

### **Disposition**

39. For the reasons I have set out above in respect of the issues framed for determination, I now make the following dispositive orders;

**(a) The Plaintiff's suit against the Defendants is dismissed with costs to the 1st and 5th Defendant.**

**(b) The 1st Defendant's counterclaim is allowed on terms that judgment is entered for the 1st Defendant against the Plaintiff, 2nd, 3rd and 4th Defendants jointly and severally for the sum of Kshs. 21,846,607.25 with interest at court rates from the date of filing suit until payment in full.**

**(c) The Plaintiffs and the 2nd, 3rd and 4th Defendants shall bear the costs of the 1st Defendant's counterclaim.**

**DATED and DELIVERED at NAIROBI this 26th day of MAY 2023.**

**D. S. MAJANJA**

**JUDGE**

SIGNED BY: HON. MR. JUSTICE D. S. MAJANJA





THE JUDICIARY OF KENYA.  
MILIMANI HIGH COURT  
HIGH COURT COMMERCIAL AND TAX  
DATE: 2023-05-26 19:04:05+03



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This is the Exhibit marked FML-12 referred to in the annexed affidavit of Franklin Mithika Linturi Sworn before me this 6th day of May 2024 at Nairobi in the Republic of Kenya

**GIYONGA J. M' LIMBIINE**  
ADVOCATE AND Counselor for Ombudsman  
P. O. Box 128  
MOB 0722 240091  
DATE 06/05/2024 SIGN

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**

**E.L.C CASE NO. E393 OF 2021**

**MARIANNE JEBET KITANY ..... PLAINTIFF**  
**=VERSUS=**  
**FRANKLIN MITHIKA LINTURI .....DEFENDANT**  
**AND**  
**ATTICON LIMITED .....INTERESTED PARTY**

**RULING**

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**(In respect to the Preliminary Objection dated 24<sup>th</sup> November 2021)**

**Introduction**

1. By a Plaint dated 16<sup>th</sup> November 2021, the Plaintiff brought this suit against the Defendant for prayers that:

*a) A declaration that the Defendant holds the title of all property comprising of Mae Ridge County Villas No. 16 erected on L.R No. 7785/1324 (I.R 123703) in trust for the Plaintiff and the interested party.*

*b) An order of permanent injunction be and is hereby issued restraining the Defendant from disposing, selling, alienating, occupying or in any way dealing with all that property comprising Mae Ridge County Villas No. 16 erected on L.R No. 7785/1324 (I.R 123703)*

*c) An order of permanent injunction be and is hereby issued restraining the Defendant from evicting, removing or in any*

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*other way interfering with the Applicant's occupation of all that property comprising Mae Ridge County Villas No. 16 erected on L.R No. 7785/1324 (I.R 123703)*

*d) That trust be and is hereby dissolved and an order is made that the property comprising Mae Ridge County Villas No. 16 erected on L.R No. 7785/1324 (I.R 123703) be transferred from the name of Franklin Mithika Linturi into the name of Marianne Jebet Kitany Atticon Limited as tenants in common of undivided shares in proportion of their respective contributions.* -10

*e) An order be and is hereby issued directing Franklin Mithika Linturi to within Fourteen (14) days from the date of judgment, execute the transfer of L.R No. 7785/1324 (I.R 123703)*

*f) In the event that the Defendant declines to transfer the suit property as directed, the Deputy Registrar of the Environment and Land Court, Millimani Law Courts be and is hereby ordered to sign the transfer duly presented by the Plaintiff for the said purposes.*

*g) Costs of this suit.* -20

*h) Any other relief that the Honourable Court may deem just and fit to grant in the circumstances.*

2. The Plaintiff also filed an application dated 17<sup>th</sup> November 2021 where she had sought the following orders: -

- a) Spent..*
- b) That pending the hearing and determination of the application inter parties, the Honourable Court be pleased to issue an order maintaining the status quo obtaining prior to the institution of the*

*suit and, particularly, restraining the Respondent, from evicting, removing, or in any other way interfering with the Applicant's occupation of all that property comprising Mae Ridge County Villas No. 16 erected on L.R No. 7785/1324 (I.R 123703).*

- c) *That pending the hearing and determination of the suit herein, the Honourable Court be pleased to issue an order maintaining the status quo obtaining prior to the institution of the suit and, particularly, restraining the Respondent, from evicting, removing, or in any other way interfering with the Applicant's occupation of all that property comprising Mae Ridge County Villas No. 16 erected on L.R No. 7785/1324 (I.R 123703).* -10
- d) *That pending the hearing and determination of the Application inter parties, the Honourable Court be pleased to issue an order of interim injunction restraining the Respondent from disposing, selling and alienating, occupying or in any way dealing with all that property comprising Mae Ridge County Villas No. 16 erected on L.R No. 7785/1324 (I.R 123703).*
- e) *That pending the hearing and determination of the suit herein, the Honourable Court be pleased to issue an order of interim injunction restraining the Respondent from disposing, selling and alienating, occupying or in any way dealing with all that property comprising Mae Ridge County Villas No. 16 erected on L.R No. 7785/1324 (I.R 123703).* -20
- f) *That costs of this Application be provided for.*

3. In response, the Defendant and the Interested party through **M/S Muthomi & Karanja Advocates** filed a Replying Affidavit sworn by the Defendant on 17<sup>th</sup> November 2021 and subsequently a Notice of Preliminary objection dated 26<sup>th</sup> November 2021. The gist of the

Defendant and Interested Party's replying affidavit and the preliminary objection was that the suit and the application herein was *sub judice*

4. Pursuant to the directions of this Court issued on 2<sup>nd</sup> December 2021, the Court directed the preliminary objection be canvassed through written submissions. The Plaintiff filed her written submissions dated 9<sup>th</sup> December 2021, while the Counsel for the Defendant and Interested party opted not to file but urged the Court to rely on the preliminary objection as it was and the replying affidavit on record.

Objector/Defendant's and Interested party's case

5. The Defendant and Interested party's preliminary objection delimited --10 some five grounds focusing on the suit and the application. This included the following: -

*i) The suit and the Application are sub judice the following pre-existing suits between the same parties and or their privies: -*

*a) Milimani HCCC No. 71 of 2018 (OS) [Previously Meru HCCC No. 37 of 2018]: Maryanne Jebet Kitany v Franklin Mithika Linturi.*

*b) Milimani HCCC No. E201 of 2021 (as consolidated with Milimani HCCC No. 138 of 2018 and E029 --20*

*of 2019 Arnold Kipkirui Langat & Others v Atticon Limited & Others).*

*c) Milimani HCCC (Misc) No. 031 of 2021: Franklin Mithika Linturi v Maryanne Jebet Kitany and*

*d) Milimani CMCC No. 1044 of 2018; Maryanne Jebet Kitany v Franklin Mithika Linturi.*

*ii) Various courts and tribunals have already granted the plaintiff interlocutory reliefs that are analogous to those sought in the Application in inter alia the suit alluded to above.*

*iii) The Plaintiff has deliberately refused to comply with the terms and conditions of existing interlocutory orders, relevant to the reliefs sought in the Application, issued by Hon. Agnes Ndunge Makau in Milimani CMCC No. 1044 of 2018; Maryanne Jebet Kitany v Franklin Mithika Linturi on 2<sup>nd</sup> June 2021.* -10

*iv) The suit and the Application;*

*a) offend the provisions of Section 6 of the Civil Procedure Act; and*

*b) are scandalous, frivolous and vexatious.*

*v) The reliefs sought in the suit and the Application cannot be granted without adversely affecting the rights and interests of the third parties in the suit property, including; the Defendant's wife Mercy Kaimenyi, the Defendant's children, and the chargee Family Bank Limited.* -20

6. The Replying affidavit expounded and reiterated on the contents of the Notice of the Preliminary Objection, it was deposed that various courts

- and tribunals have already granted the Plaintiff the Interlocutory reliefs analogous to those sought in the application and that they relate to the suit property. The Defendant also annexed the pleadings and or decisions made by various courts relating to the suit property.
7. It was further deposed that the Plaintiff had come to Court with unclean hands as she had deliberately failed to comply with the terms and conditions imposed by the Court (Hon. Agnes Makau) wherein she had failed, refused and neglected to settle and clear all pending land rates, utility bills during her occupation on the suit property.
  8. The Defendant also deposed that, the reliefs sought in the application—10 and the suit cannot be granted without adversely affecting the rights and interests on the suit property including the Defendants wife, Mercy Kaimenyi.
  9. In support of this position, the Defendant maintained that the instant suit was *sub judice* pursuant to the provisions of **section 6 of the Civil Procedure Act** and that the suit and the application were only filed to prolong the existence of interlocutory orders that the Plaintiff has been enjoying from the other existing suits.

Applicant/Plaintiff's submissions

10. The Plaintiff opposed the preliminary objection. She contended that the suit was properly before this Court and that the same was not *sub judice*.
11. It was her contention that the dispute before this court was in respect to ownership of the suit property which is not subject to deliberation or pending before any court of competent jurisdiction.
12. The Plaintiff further submitted that she had raised the issue of the resulting trust which had not been litigated before between the parties herein.
13. According to the Plaintiff, various suits that were listed by the Defendant and the Interested Party do not deal with the current subject matter at hand and that in some of them, the Plaintiff is not a party hence *sub judice* was not applicable herein.
14. In opposition to the objection, reference was made to a number of cited authorities which included the following: *Kenya National Commission on Human Rights v Attorney General, IEBC & 16 Others [2020] eKLR, ANN v RMK [2021] eKLR, Edward Akong'o Oyugi & 2 Others v Attorney General [2019] eKLR, among others.*

15. She concluded her submissions by urging the Court to dismiss the preliminary objection with costs and allow the matter to proceed before to its logical conclusion.

**Analysis and Determination**

16. I have considered the preliminary objection and the written submissions filed by the Plaintiff and the authorities cited. The issue for determination is whether the preliminary objection is merited.
17. The case of Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696 has been the watershed as to what constitutes preliminary objections. The Court of Appeal in Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR also pellucidly captured the legal principle when it stated as follows: — 10

*"...A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."*

18. This statement of the law has been echoed time and again by the courts: see for example, Oraro -v- Mbaja [2007] KLR 141.
19. In Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR the Supreme Court stated that — 20

".... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit".[emphasis added].

20. The *sub judice* principle is captured in Section 6 of the Civil Procedure Act, which stipulates as follows: -

*"6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title."* — 10

21. In this regard, section 6 of the Civil Procedure Act expressly provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

22. The basic purpose and the underlying objective of *sub judice* is to prevent the courts of concurrent jurisdiction from simultaneously — 20  
entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to

pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.

23. The Supreme Court of Kenya in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR*, had occasion to pronounce itself on the subject of *sub judice*. It aptly stated: -

*The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.*

24. In the case of David Ndii & others versus Attorney General & Others 2021 eKLR, a bench of five Judges inter alia stated:

*“The rationale behind this provision (Section 6 of the Civil Procedure Act) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts, and the court will....”*

25. The Plaintiff did not disclose in her pleadings the existence of the earlier suits and It is common ground that the instant suit was filed despite the —10  
existence of pending suits: Milimani HCCC No. 71 of 2018 (OS) [Previously Meru HCCC No. 37 of 2018]; Maryanne Jebet Kitany v Franklin Mithika Linturi, Milimani, HCCC No. E201 of 2021 (as consolidated with Milimani HCCC No. 138 of 2018 and E029 of 2019 Arnold Kipkirui Langat & Others v Atticon Limited & Others), Milimani HCCC (Misc) No. 031 of 2021; Franklin Mithika Linturi v Maryanne Jebet Kitany and Milimani CMCC No. 1044 of 2018; Maryanne Jebet Kitany v Franklin Mithika Linturi. I have had the occasion to peruse the ruling and or temporary orders issued in Milimani HCCC No. 71 of 2018 (OS) Maryanne Jebet Kitany v Franklin Mithika Linturi and Maryanne —20

Jebet Kitany v Franklin Mithika Linturi and Milimani CMCC No. 1044 of 2018] that are still pending before various courts.

26. In Milimani HCCC No. 71 of 2018 (OS) Maryanne Jebet Kitany v Franklin Mithika Linturi, the Applicant sought to restrain eviction and an urgent temporary injunction from wasting, damaging or alienating and/or otherwise interfering with several matrimonial properties including the suit property. The Applicant claimed that during the subsistence of their marriage, she made both direct and indirect contribution towards the acquisition of various properties listed in the summons as well as the formation of various companies. She contended — 10 that the properties were held by the respondent in trust for her and that of his benefit. The Court after hearing the parties, granted the Applicant various interim reliefs including orders that the Applicant returns to the suit premises, pending the hearing and determination of that suit.
27. In the case of Maryanne Jebet Kitany v Franklin Mithika Linturi [Milimani CMCC No. 1044 of 2018], the Court on 1<sup>st</sup> February 2019, issued several orders with regard to Mae Ridge Country Villa No 16, erected on LR No. 7785/1324 (I.R 123703) (suit property). The orders that were issued, granted the Applicant exclusive occupation of

the shared residence and use of the facilities therewith by excluding the Respondent from the suit property. The said order was to remain in force pending the determination of Divorce Cause No 26 of 2018[CMCC Meru] and Milimani HCCC No. 71 of 2018 (O. S.) /MK v FMLL.

28. Having keenly perused all the cases referred herein, the court finds that there is a nexus in that all those cases relate to Mae Ridge Country Villa No 16 erected on LR No. 7785/1324 (I.R 123703) (suit property) and they involve the Plaintiff and the Defendant herein, some of those cases already have interlocutory orders in favour of the Plaintiff. — 10
29. The Applicant while objecting to the suit being sub judice, submitted that the doctrine of sub judice is too remote to be applied in the instant suit since the instant suit challenges ownership of the suit property and had raised the issue of resulting trust which had not been litigated by the parties nor pending before any court of competent jurisdiction. I am not persuaded with this position as submitted by the Plaintiff since Milimani HCCC No. 71 of 2018 (OS) Maryanne Jebet Kitany v Franklin Mithika Linturi, currently pending for determination shows that the

Plaintiff pleaded the issue of trust which has also been pleaded and is among the prayers sought as demonstrated by the plaint filed herein.

30. In my view, whichever way we may wish to look at the issues herein, there is a high probability that the issues touching on the instant suit and the other pending suits in respect to the suit property may affect the future dealings of the said property. This Court must therefore be aware of such a possibility and be alive to the fact that proceeding with this suit may lead to different courts granting conflicting orders over the same subject property. The Plaintiff ought to await the outcome of the other pending suits before moving this court. — 10

31. In conclusion, I find merit in the preliminary objection and the same is upheld. Consequently, the interim orders issued on 18<sup>th</sup> November 2021 are hereby discharged. The Notice of Motion dated 17<sup>th</sup> November 2021, the Plaint dated 16<sup>th</sup> November 2021 and the entire proceedings are hereby struck out with no orders as to costs.

32. It is so ordered.

Dated, Signed and Delivered at Nairobi this 17<sup>th</sup> day of January 2022.


  
E. K. WABWOTO  
JUDGE

In the Virtual Presence of:-

Mr. Kibet h/b for Mr. Kurgat for the Plaintiff.

Ms. Jeruto h/b for Dr. Muthomi for the Defendant and Interested Party

Court Assistant: Caroline Nafuna.

  
E. K. WABWOTO  
JUDGE

- 10

**IN THE COURT OF APPEAL**  
**AT NAIROBI**

**(CORAM: OKWENGU, J. MOHAMMED & MBOGHOLI, J.J.A)**

**CIVIL APPEAL (APPLICATION) NO. E068 OF 2022**

**BETWEEN**

**MARIANNE JEBET KITANY ..... APPLICANT/APPELLANT**

**AND**

**FRANKLIN MITHIKA LINTURI ..... RESPONDENT**

**ATTICON LIMITED ..... INTERESTED PARTY**

*(Being an appeal from the Ruling of the Environment and Land Court at Nairobi (E. K. Wabwoto, J) delivered on 17<sup>th</sup> January, 2022*

**in**

**ELC No. E393 of 2021)**

\*\*\*\*\*

**ORDER OF THE COURT**

This notice of motion application was listed before us today. Upon hearing learned counsel **Mr. Moses Kurgat** for the applicant, and learned counsel **Dr. Muthomi Thionkolu** for the respondent, we do not find it necessary to issue any interim orders as it is apparent that there are orders in force relating to the suit property.

**Made at Nairobi this 19<sup>th</sup> day of April, 2022.**

**HANNAH OKWENGU**

.....  
**JUDGE OF APPEAL**

**J. MOHAMMED**

.....  
**JUDGE OF APPEAL**

**A. MBOGHOLI MSAGHA**

.....  
**JUDGE OF APPEAL**

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

**REGISTRAR**



**IN THE COURT OF APPEAL  
AT NAIROBI**

**(CORAM: OKWENGU, J. MOHAMMED & MBOGHOLI, JJ.A)**

**CIVIL APPLICATION NO. E068 OF 2022**

**BETWEEN**

**MARIANNE JEBET KITANY..... APPLICANT  
AND**

**FRANKLIN MITHIKA LINTURI .....RESPONDENT  
ATTICON LIMITED.....INTERESTED PARTY**

*(An application for an injunction pending hearing and determination of  
an appeal from the ruling of the Environment & Land Court at Nairobi  
(E.K.Wabwoto, J.)dated 17<sup>th</sup> January, 2021*

in

**ELC Cause No. E393 OF 2021)**

\*\*\*\*\*

**RULING OF THE COURT**

**Background**

- 1) Before us is a notice of motion dated 10<sup>th</sup> February, 2022 in which **Marianne Jebet Kitany** (the applicant) prays for a temporary injunction restraining **Franklin Mithika Linturi** (the respondent) by himself, his agents, servants or otherwise howsoever from evicting, removing or in any other way interfering with the applicant's occupation of all that property comprising of **Mae Ridge County Villa No.16 erected on L.R No.7785/1324(I.R.123703)** (the suit property) pending the hearing and determination of the intended appeal; a temporary injunction restraining the respondent from disposing, selling, occupying or in any way dealing with the suit property and costs of the application. **Atticon Limited** is the Interested Party herein.

- 2) The application is brought under **Rule 41** of the Court of Appeal Rules (this Court's Rules), **Section 3A** and **3B** of the Appellate Jurisdiction Act and **Article 159** of the Constitution. It is premised, *inter alia*, on the grounds that: the applicant filed an application in the Environment and Land Court (ELC) on 17<sup>th</sup> November, 2022 seeking various orders against the respondent, including a prayer for a declaration that she is the absolute, rightful and *bona fide* owner of the suit property and that the respondent holds the title in trust for her; that the applicant contributed Kshs.**71,419,864.09** towards the construction and furnishing of the house erected on the suit property; and that other monies that were expended towards the construction, acquisition and construction costs were met by the interested party.
- 3) A further ground is that the respondent did not contribute any monies towards the purchase of the suit property although the certificate of title is registered in his name; that the applicant was aggrieved by the ruling of the ELC (**Wabwoto, J.**) dated 17<sup>th</sup> January, 2022 upholding the notice of preliminary objection dated 24<sup>th</sup> November, 2021 filed by the respondent and has since preferred an appeal seeking to set aside the orders of the ELC; that the intended appeal raises substantial and arguable points of law as stated in the memorandum of appeal annexed to the instant application; that the intended appeal will be rendered nugatory if an injunction is not granted as the respondent will evict the applicant from the suit property; that the respondent has previously charged the suit property without seeking the applicant's consent and therefore there is a real danger that the respondent

will dispose of, alienate, sell, or further charge the suit property; and that her right of appeal will be grossly impaired and hindered thereby causing her substantial and irreparable harm.

- 4) The application was further supported by the applicant's affidavit in which she reiterated the grounds on the face of the application. The applicant contended that the learned Judge ought to have considered whether the respective courts adjudicating **Milimani HCCC No.71 of 2018 (O.S)**, **Milimani HCCC No.E201 of 2021**, **Milimani Misc. No. 138 of 2021** and **Milimani CMCC No. 1044 of 2018** had jurisdiction to determine the suit before the ELC and grant the reliefs sought; and whether the ELC misapprehended the provisions of **Section 6** of the Civil Procedure Act and acted in excess of jurisdiction by dismissing the application and the suit on the basis of an objection that the same was *sub judice*.
- 5) The respondent opposed the application and in a replying affidavit deponed *inter alia*: that he is a director of the interested party and authorized to swear the affidavit on his own behalf and on behalf of the interested party; that it is evident from the record that the applicant has filed multiple suits in various courts seeking the same or similar reliefs against the respondent and the interested party in respect of the suit property; and that the conclusion by the ELC that the applicant's suit was *sub judice* and an abuse of the court process is unassailable, and the only conclusion is that the intended appeal is not arguable and will not be rendered nugatory if the orders sought are not

granted and the appeal succeeds. The respondent urged us to dismiss the application with costs.

### **Submissions by Counsel**

- 6) The application was disposed of through written submissions with oral highlighting. Learned Counsel, **Mr. Moses Kurgat** represented the applicant. On the question whether a *prima facie* case was established, counsel faulted the trial court for abdicating its judicial responsibility by declining to determine questions of resulting trust which are uniquely within the jurisdiction of the ELC; and failing to acknowledge that respective courts adjudicating on **Milimani HCCC No. 71 of 2018 (O.S), Milimani HCCC No. E201 of 2021, Milimani Misc. No. 138 of 2021 and Milimani CMCC No.1044 of 2018** had no jurisdiction to determine the issues before the ELC and to grant the reliefs sought.
- 7) Counsel submitted that the ELC misapprehended the provisions of **Section 6** of the **Civil Procedure Act** and acted in excess of its jurisdiction by striking out the application and the suit on the ground that the same was *sub judice*. The applicant relied on **Rift Valley Machinery Services Limited v Agro Complex (K) Ltd & 14 others [2020] eKLR and Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR** in support of the proposition that an arguable appeal is not one that must succeed, but rather one that raises a serious question of law or a reasonable argument deserving consideration by the Court.

8) On the nugatory aspect, counsel maintained that since the suit property is registered in the name of the respondent there is nothing to stop him from selling, subdividing or, in any other manner, dealing with the same in a way to change the character so as to render the appeal worthless, otiose and an academic exercise. Counsel went on to state that the applicant currently occupies the suit property as her residence and since she has expended her time and resources in construction of the same to her taste, she has developed sentimental attachment to the suit property. In the circumstances, the applicant may not be reasonably compensated by way of damages if the suit property is sold, alienated, transferred or destroyed by the respondent. The applicant relied on **George Otieno Gache & another v Judith Akinyi Bonyo & 5 others [2017] eKLR** in support of this proposition.

9) **Dr. Muthomi Thionkolu**, learned counsel for the respondent and the interested party submitted that the applicant did not have an arguable appeal as she had obtained, and is still enjoying reliefs that are analogous to the reliefs she is seeking in the instant application. Counsel submitted that in the circumstances, the intended appeal is not arguable and will not be rendered nugatory if the orders sought are not granted. Counsel submitted that the applicant has through dilatory tactics frustrated the determination of **Milimani Divorce Cause No.272 of 2018** for four years because its determination would lead to the lapse of interlocutory injunctions she has enjoyed in respect of the suit property for the last four years. Counsel

submitted that the intended appeal will not be rendered nugatory and urged us to dismiss the application with costs.

### **Determination**

- 10) We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction of this Court under **Rule 5(2)(b)** of this **Court's Rules** is discretionary and guided by the interests of justice.
- 11) The principles for granting a stay of execution, injunction or stay of proceedings under **Rule 5(2)(b)** of this Court's Rules are well settled as was observed by this Court in the case of **Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR** where the Court delineated the jurisdiction of this Court in such an application as follows:

***“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”***

- 12) On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single *bona fide* arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. In **Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR** this Court described an arguable appeal in the following terms:

**“vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.**

**viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”**

13) We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view, it is arguable, *inter alia*, whether the respondent was holding the suit property in trust for the applicant. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.

14) On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought and the intended appeal succeeds, in **Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others (supra)** this Court stated that:

**“ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.**

**x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.**

15) In determining whether or not an appeal will be rendered nugatory, the Court has to consider the rival claims of both parties and each case has to

be considered on its merits. From the record and submissions made by counsel for the respondent which was not controverted by counsel for the applicant, the applicant has obtained and is still enjoying reliefs that are analogous to the reliefs sought in the instant application. The suits include **Milimani Divorce Cause No. 272 of 2019 (previously, Meru Divorce Cause No. 26 of 2018)**. The intended appeal will therefore not be rendered nugatory if we decline to grant the orders sought.

- 16) As the applicant has to establish both the arguability and the nugatory aspects, the applicant has therefore failed to establish the twin limbs for consideration in an application under **Rule 5(2)(b)** of the **Court of Appeal Rules**.
- 17) The upshot is that the application dated 10<sup>th</sup> February, 2022 is without merit and is hereby dismissed with costs.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of August, 2022.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

**A. MBOGHOLI MSAGHA**

.....

**JUDGE OF APPEAL**

*I certify that this is a  
true copy of the original*  
Signed

**DEPUTY REGISTRAR**

**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATES COURT IN NAIROBI**  
**MILIMANI COMMERCIAL COURT**  
**MCDC.NO. 272 OF 2019**

This is the Exhibit marked F.M.L-14 referred to in the annexed affidavit of Franklin Mithika Linturi  
Sworn before me this 6th day of May 2020 at Nairobi  
In the Republic of Kenya  
G.T. ONGA J. M. LIMBITIRE  
ADVOCATE AT LAW  
P. O. BOX 1200  
MOB 0722 240091  
DATE 06/05/2024 SIGN: [Signature]

**M.J.K.**.....**PLAINTIFF**

-VERSUS-

**F.M.L.**.....**DEFENDANT**

**JUDGEMENT**

By a further amended plaint dated 17<sup>th</sup> June, 2019 the plaintiff prays that this Honorable court be pleased to order that;

- a) That the Honorable court makes a declaration that there is a marriage under the Nandi Customary Law between the plaintiff and the defendant.
- b) The customary marriage between the plaintiff and the defendant under Nandi customary law herein solemnized on the 16<sup>th</sup> day of April, 2016 be and is hereby dissolved.
- c) That this Honorable court do order for production of Safaricom Limited GPRS location records of the defendant showing that on the 16<sup>th</sup> day of April, 2016 he was at Nandi County.
- d) The defendant be condemned to pay the costs and interest of the suit if any.
- e) That any other relief that this Honorable court may deem fit and just to grant.

**Plaintiff's case**

I will briefly outline the plaintiff's case.

The plaintiff stated that on or about 1<sup>st</sup> day of June, 2014, the plaintiff and defendant, then divorced cohabited with each other at Kileleshwa, K20, Gatundu road, Nairobi. That thereafter, to be specific on the 16<sup>th</sup> April, 2016, solemnized their union by way of customary marriage conducted under Nandi

Customary Law. That subsequent to the solemnization of the said marriage the plaintiff and defendant cohabited as man and wife in various estates within Nairobi and Meru namely; Eliud Mathu Road Hse No. 796; Runda, Mae Ridge Country Villas House No. 16 Runda and L.R. No. Akachiu/Auki/1338 at Maua; Meru. That at the time of cohabitation and solemnization of the customary marriage each party herein had three issues from their previous unions.

The plaintiff further avers that since the celebration of the aforementioned customary marriage, the defendant has exhibited and treated the plaintiff with extreme cruelty and willful emotional, physical and psychological neglect.

The plaintiff particularized elements of cruelty by the defendant as follows;

- I. *Threats of death by brandishing a firearm.*
- II. *Exposure to venereal diseases*
- III. *Extreme untrustworthiness and extra-marital affairs and cohabitation.*
- IV. *Abdication of family responsibilities*
- V. *Adultery resulting in siring a child out of wedlock*
- VI. *Denial of conjugal rights*
- VII. *Extreme violence and ill-temper*

Further, the plaintiff was forced to abandon their matrimonial hence desertion. The entirety of the foregoing, has thus led to the irretrievable breakdown of the marriage to the end that it is untenable and cannot be salvaged.

### **Defendant's case**

In an answer to the petition the defendant denied the allegations of cohabitation and customary marriage, and all allegations of cruelty, neglect, desertion, adultery and denial of conjugal rights and consortium.

The defendant's position is that he is and has been in a monogamous marriage with one Mercy Kaimenyi at all material times, thus he does not have and has never had legal capacity to enter into a customary marriage or any other form of marriage with the petitioner.

The defendant further avers that the petitioner was in a monogamous marriage with a Mr. Langat up to and including 3<sup>rd</sup> January, 2016 and thus lacked legal capacity to cohabit with the respondent as husband and wife between 1<sup>st</sup> June, 2014 and 16<sup>th</sup> April, 2016.

The defendant further avers that the existence of a valid marriage is a *sine qua non* for the filing of divorce proceedings as a person who is not lawfully married has no locus standi to institute the said proceedings. That as such this court lacks the jurisdiction to grant a divorce without a valid marriage.

The defendant further avers that this court cannot presume the existence of a customary marriage as the same would be to unlawfully convert a monogamous marriage into a polygamous marriage.

### **Plaintiff's Evidence**

The plaintiff called fourteen (14), each adopting their respective witness statements as evidence on record. For brevity, I will only highlight her case.

PW 1 was the plaintiff. She reiterated the averments in her pleadings.

PW4, being PW1's uncle and her stand-in father as per Kipsigis custom, narrated the happenings of the said day. He confirmed to having presided over the ceremony and specifically the dowry negotiations after having received the defendant and his entourage.

PW4 deponed on how the defendant made his intentions clear, by having their 'daughter's' (PW1) hand in marriage whereby he confirmed to be aware of PW1's status as a divorcee, asserting that he himself was also a divorcee. That dowry negotiations were conducted where the defendant paid Ksh100,000/= equivalent to a cow which has calved; 'chemwai' for Ksh40,000/=, a young bull; 'kemwai' for Ksh20,000/=, a young heifer 'kanyinyet' at Ksh30,000/= and a sheep at Ksh10,000/=, (for the mother-in-law) which qualifies the defendant as an in-law. That white smoke was thereafter signaled as confirmation of the successful discussions and the congregants were served 'mursik'; a traditionally fermented milk symbolizing the union.

The evidence of PW 4 was bolstered by the testimonies of PW6 who was the plaintiff's neighbor, together with PW2 and PW5 who were the plaintiff's biological and maternal uncles respectively. They stated that they were all present during the ceremony and specifically the dowry negotiations where both the plaintiff and the defendant confirmed their statuses as divorcees whilst the defendant confirming his interest to wed the plaintiff and thereafter paying the Ksh100,000/= dowry price equivalent to the domestic animals aforementioned.

In addition, PW14, a village elder of the Kapsoo Village, PW3 the plaintiff's in-law and PW13, a Kokwet elder, stated that they were present during the said ceremony, but were not involved in the dowry negotiations. However they confirmed the partaking of the 'mursik', witnessed the white smoke and the tokening of the plaintiff's mother, PW2, with a grey Nissan X-trail, Reg. No. KCG580N coupled with gifts in bulk foods in the form of *bananas, yams, millet, arrowroots, sorghum, black-eyed peas and other dry food stuffs*.

Similarly, PW7 the plaintiff's sister, deponed how the parties customary wedding was characterized music, dance and the drinking of 'mursik' and culminated by the defendant offering a bunch of 'miraa' (*khat*) to his now in-laws as gratitude for the gift of a wife.

Further, in aid of the same, the plaintiff furnished photographs in confirmation of the chain of events and presence of the parties thereto.

As evidence of the said union the plaintiff called on the testimonies of PW8, PW9, PW10, PW11 and PW12 who were hirings of the plaintiff/defendant for the construction of the parties' properties, who similarly and summarily stated that the parties were often met together where they carried themselves as husband and wife and would introduce themselves as such.

### **Defendant's Evidence**

On his part the defendant called three (3) witnesses. Likewise I will only highlight what they stated.

The defendant, in his oral testimony referred to the plaintiff as a guest who overstayed her welcome. He denied neither being a party to any customary wedding with the plaintiff nor attending one at Kapsabet as alleged.

During his cross examination he deponed to having visited the plaintiff's mother once, which event was not a wedding, whereby he neither met her nor gifted her a grey Nissan X-trail, Reg. No. KCG580N. He instead averred that it was plaintiff who took the said vehicle, which was registered to the defendant's company, and gifted her mother.

In addition, that the defendant, being an elder of the Njuri Ncheke, averred that according to the Meru culture as payment for dowry, one has to give a heifer, a goat, ram and drum honey and a blanket to the mother which he never did.

### **Submissions by the Parties**

The parties further argued their individual positions by filing written submissions which I have considered and I summarize as follows.

The plaintiff recapitulated the backdrop of the instant suit and submitted that the issues for determination are as follows;

- a) *Whether the plaintiff is lawfully married to the defendant?*
- b) *Whether the defendant has proved his alleged lack of capacity to marry?*
- c) *Whether the prayers sought in the plaint should be granted?*
- d) *Who should bear the costs of this suit?*

On the 1<sup>st</sup> issue the plaintiff argued in the affirmative with reference to the parties' customary marriage held on 26<sup>th</sup> March, 2016 through Nandi Customary Law.

The plaintiff argues that the customary rights were duly conducted whereby the defendant paid dowry of Ksh100,000/=. That the ceremony culminated with the attendees partaking in "mursik", signifying the exchange of vows under Nandi Customary law. Further, that the defendant gifted the plaintiff's mother one, Rhodda Kittany a motor vehicle reg. no. KCG 850N where the ceremony was witnessed by various persons representing both parties including a Mr. Rufus Miriti and his wife, a Mr. Ntongai Mitu and his wife and a Mr. Silas Kithinji and his wife representing the defendant, and a Mr. Andrew Chepkwony(plaintiff's uncle), Rhodda Kittany (plaintiff's mother), John Kibii Arap Langat (plaintiff's uncle) representing the plaintiff. The plaintiff supported the aforementioned through photographic evidence of the said event.

The plaintiff relied on the provisions of **Section 43** of the **Marriage Act** to buttress the point that proof of a marriage under customary law is by conducting the essential rights and components of the said customary law of one or both parties. The plaintiff's counsel cited the following authorities;

1. *Re Estate of Kipkoech Arap Maindi (Deceased) (2020) eKLR para. 36-42, ASA v NA & another (2020) eKLR,*
2. *Eliud Maina Mwangi vs Margaret Wanjiru Gachangi (2013) eKLR*

It is argued that the requisite and essential ingredients of a customary marriage under Nandi Customary Law was met.

Further, the plaintiff submitted that that the failure to register the marriage does not render it void, not forgetting that the customary marriage was conducted in 2016, one year before the Marriage (Customary Marriage) Rules, 2017 came into force. On this point the plaintiff relied on the case of *Binita Niraj Dhanani vs Niraj Chandulal Dhanani (2005) eKLRr.*

On the 2<sup>nd</sup> issue, the plaintiff relied on Section 35 and Section 80 of the Evidence Act, submitting that the defendant had not satisfied his lack of capacity to contract in a marriage, in that the defendant's copy of marriage certificate and certified copy thereof between himself and one Mercy Kaimenyi was not genuine by virtue that the original was not produced and

neither was there an accompanying certificate of authenticity from the officer in charge to certify the copies. In support of the assertions the plaintiff cited Okwany J in the cases of;

1. ***Mugo Mungai & 4 others vs Official Receiver & Provisional Liquidator (Capital Finance Limited and Pioneer) & 2 others (2019) eKLR*** at para. 13 and 14,
2. ***John Elego & 103 others vs Pressmaster Limited (2018) eKLR*** para. 51. And
3. ***Midroc Water Drilling Co. Ltd vs National Water and Conservation & Pipeline Corporation (2020) eKLR*** para. 37-41.

It was further submitted that the defendant had presented a forged divorce petition of himself and the said Mercy Kaimenyi to the plaintiff, her mother and relatives, alluding to his capacity to get married and as such is bound by the said pleadings. She cited;

1. ***IEBC & another vs Stephen Mutinda Mule & 3 others (2014) eKLR*** and
2. ***RAila Odinga & another vs Independent Electoral and Boundaries Commission & 2 others (2017) eKLR***.

On the 3<sup>rd</sup> issue the plaintiff pegged her petition on the grounds of cruelty as particularized herein thereto seeking aid from the case of ***K.A.S vs M.M.K (2016)eKLR*** and ***A.L.M. vs P.M.M (2018)eKLR*** para 18 where it was held that the marriage was founded on falsehood and should not stand.

In his written submissions, the defendant similarly reiterated his account of events herein and his position in the suit, and submitted that the issues for determination summarily were;

- a) *Whether the respondent had the capacity to marry the Petitioner on the date(s) pleaded.?*
- b) *Whether a party to monogamous marriage (the respondent) has the capacity to contract a Nandi customary marriage with a third party?*

- c) Whether the respondent contracted a Nandi customary marriage with the petitioner and what was the legal consequence of the said ceremony, if any?
- d) Whether a decree of divorce can issue in the absence of a legally valid marriage?

The counsel for the defendant argued that the respondent has never had the capacity to marry the Petitioner or to cohabit "as husband and wife" with her, because as pleaded, and which can be confirmed from the original and certified copies of the certificate of marriage, his monogamous marriage to one Mercy Kaimenyi was and is still in existence. He relied on the provisions of **section 11 (1) (c)** and **section 50 (2), 53-59 and 96 (2) and 3** of the **Marriage Act, 2014**.

It is the defendant's counsel's submission that the Respondent lacked the legal capacity to enter into any form of a subsequent marriage and that neither was the alleged customary registered as required.

Further, the defendant argues that the English common law doctrine of presumption of marriage no longer applies to Kenya, given the aforementioned provisions of the Marriage Act.

In addition, the defendant argues that the alleged customary marriage ceremony as per the Nandi customs was not duly effected, being that the 'ratet'; which takes place at the groom's home did not transpire. That this is a notable part of a Nandi marriage, as held in **Benjamin Kibiwot Chesulut vs Mary Chaelangat & another (2015) eKLR**.

Thus, it is argued, a decree of divorce cannot issue in respect of a non-existent marriage. The defendant relied on the following authorities ;

1. **High Court of Kenya (Nyeri) CWN vs DK, Civil Cause No. 17 of 2017**
2. **High Court of Kenya (Mombasa) POC vs JB & another Civil Suit No. 60 of 2010.**

In conclusion the defendant asserted that the fourteen (14) plaintiff's witnesses were either her close relatives or hirelings and as such had an interest in the outcome of the petition, thus adversely affecting their credibility.

### **Determination**

I have considered the entire evidence and the submissions by the parties. I must commend the advocates for the effort they put in to buttress their respective clients' positions.

The issues in dispute for the determination by this court are primarily;

1. *Whether or not the plaintiff and the defendant contracted a Nandi customary union/marriage.*
2. *Whether or not the defendant had the legal capacity to contract a marriage with the Plaintiff..*
3. *Whether the plaintiff is entitled to the relief sought or not.*

I will now proceed to deal with each issue.

#### **1. *Whether the petitioner and respondent contracted a Nandi customary union/marriage?***

The plaintiff's case is that she was married under Nandi Customary Law to the defendant solemnized on the 16<sup>th</sup> April, 2016 having cohabited since the 1<sup>st</sup> June, 2014.

Judicial precedents are replete in espousing that the onus of proving a customary marriage rest on the party claiming it.

In the case of **Hortensiah Wanjiku Yawe vs The Public Trustee**, Civil Appeal No. 13 of 1976, the court held: -

***"The onus of proving customary law marriage is generally on the party who claims it. The standard of proof is the one usually for a civil action namely "on the balance of probabilities." Evidence as to the formalities required for a customary law marriage must be proved to that standard. Long cohabitation as a man and wife gives rise to a***

presumption of marriage in favour of the party asserting it. Only cogent evidence to the contrary can rebut the presumption. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage".

Further, as to the satisfaction of the ingredients and components necessary as evidence the said marriage, in Mary Wanjiru Githatu vs Esther Wanjiru Kiarie (Court of Appeal at Eldoret in Civil Appeal No. 20 of 2009) the court stated:

"It is important to observe that customary law marriages have some important ingredients without which they cannot possibly qualify as such. The ingredients are essentials in the making of a customary law marriage. A customary law marriage is a covenant of marriage sealed by the necessary customary ingredients and for the Kikuyu these ingredients are well known and documented. If the courts were to fail to take this into account, they would be giving recognition to the 'come we stay' marriages which are neither customary nor statutory" [Emphasis mine]

The plaintiff urged this court to be guided by the Court of Appeal's decision in Eliud Maina Mwangi v Margaret Wanjiru Gachangi [2013] eKLR, where Nambuye, Karanja and M'noti JJ. A took note of the evolutionary nature of customary law and stated;

"Customary law is certainly not static. Like all other human inventions, it is dynamic and keeps evolving from generation to generation. Customary ceremonies cannot therefore be expected to be conducted in 2013 in exactly the same way that they were conducted in, say, 1930. To insist on rigid customary ceremonies at all times is the surest way of rendering customary law obsolete. For example, essential steps like payment of dowry may be satisfied by payment of the monetary equivalent of such items as goats and cows instead of delivery to the prospective in-laws every item in kind, such as beer, honey, live goats and cows. The bottom line appears to be that the essential steps and

ceremonies must be performed, irrespective of the form in which they are performed." [Emphasis mine]

On his part, the defendant implored this court to seek reference to the case of Benjamin Kibiwoť Chesulut v Mary Chelangat & another [2015] eKLR in establishing the conduct and components of the Nandi Customary marriage, Munyao Sila J. opined thus;

"It is sad that neither party deemed fit to call an expert witness on the conduct of marriage ceremonies and of the customs of the Kipsigis tribe. I have been forced to seek recourse to Cotran, Restatement of African Law, Volume 1, The Law of Marriage and Divorce, Sweet & Maxwell, (1968). Chapter 11 of the text covers the Nandi and Kipsigis traditions. At pages 115 and 116 thereof, the text explains that first when a boy selects his bride, he informs his parents. The parents of the boy then visit the girl's family to ascertain their assent and dowry negotiations (Koito) take place. If the discussion is successful, the agreement reached is sealed by a ceremony at which the girl, hands butter to her father, and her father anoints the parents of the boy. A day is then fixed for the girl's family to visit the boy's family to view the cattle to be paid as dowry. After inspection of the cattle, a day is fixed for the 'ratet' ceremony, the most important of ceremonies, which takes place at the boy's home. In the ceremony, the bride and groom, tie a special grass, 'segutiet', around each other's wrist." [Emphasis mine]

The Court of Appeal in Gituanja vs Gituanja (1983) KLR 575 and in Kimani vs Gikanga [1965] EA 735 held that the existence of a customary marriage is a matter of fact, to be proved through evidence.

Section 107 of the Evidence Act provides that: -

*"(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist."*

To prove customary marriage the plaintiff relied on the witnesses who testified on the account of events that transpired pre-, on, and post- the said ceremonial day of 16<sup>th</sup> April, 2016.

The defendant in his submissions further decried that the plaintiff's witness testimonies were not credible by virtue that they were either her close relatives or hirelings and as such had an interest in the outcome of the petition. Further, that not all customary rites and ceremonies were conducted specifically; that the '*ratet*' which requires the groom's family to ceremonially host the bride's family did not take place.

In my view, as a matter of public notoriety and societal norm, it is apparent and natural that parties intending to solemnize their union in matrimony, would invite witnesses such as family, friends, neighbors or confidants to the parties to the union. It is very unlikely that antagonists to the union in the form of strangers and foes would be accorded a seat in any such ceremony. To this end, I am of the view, that in the instant circumstances, the plaintiff would not be faulted over her witness line-up.

Further, I seek guidance from *Eliud Maina Mwangi v Margaret Wanjiru Gachangi (supra)* to the end that the dynamics of customary practices keep evolving from generation to generation, and that they are neither rigid nor static.

In my view, PW4, PW13 and PW14 in their capacities as elders of the *Kokwet* are well versed with rites and practices that satisfactorily uphold a Nandi Customary marriage. It was their testimony that some of the practices are distinct from family to family, however the customary union was satisfactory as per their customs.

**Section 43** of the **Marriage Act, No.4 of 2014** provides that;

***(1) a marriage under this Part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage.***

**(2) Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.**

In elaborating the above statutory provision, in Hellen Omwoyo v David Ouma Gor [2017] eKLR H.A Omondi J. opined that;

**The above provision is clear that both or any customary marriage requirement of either culture is applicable. It further provides that token amount of dowry shall suffice to prove customary marriage.**

In view of the foregoing, taking into account the evidence on record, it is manifest and clear that indeed there was a customary ceremony between the plaintiff and the defendant on the 16<sup>th</sup> April, 2016.

Curiously, the defendant denied his very presence in the ceremony, despite ample evidence of a man bearing his distinctive features in the photographs taken thereat. I would not even for a moment, think that these photos were engineered by the plaintiff. It is very certain that some form of occasion took place. Whether the same meets the threshold of being interpreted to be a marriage ceremony is a different issue altogether.

It is to be noted that no "independent" expert was called to substantiate the details and any intricacies of such a marriage. It was thus left upon the court to rely on the evidence of those who attended the ceremony.

Having stated this, I was not told if that ceremony itself, with no earlier one, or subsequent one was enough to satisfy the threshold of a marriage under Nandi customary law.

In my opinion the ceremony did take place, but in the absence of further evidence, I do not think that it is enough to lead to a conclusion of marriage. While the plaintiff (pardon me if I seem to profile a certain gender), as is common in all relationships, would have interpreted this occasion as the beginning of a death till do us part union, the defendant seems to have had a

very different view. In fact, he even denied his own presence, a fact that has been proven by several witnesses.

It is clear from the pleadings that the plaintiff is not seeking a declaration of a presumption of marriage under the common law. If that was the case, then the defendant is correct in citing **Sections 50(2), Sections 53 to 59 and Section 96 (2) and (3)** of the **Marriage Act**.

It seems like this common law doctrine was shunned by the lawmakers when enacting the Act. It would thus be improper to apply that doctrine to any relationship not recognized by the Act.

If I get the plaintiff correctly, her position is that the ceremony that took place was tantamount to an acknowledgement that the two (2) parties were now husband and wife.

In my view, a customary law marriage is not a one occasion moment. There is usually a process that leads to that marriage.

As I stated earlier, apart from that happy moment in 2016 (or unhappy if you are the defendant) there is nothing to show that any other ceremony took place. The defendant states that the absence of the subsequent event known as 'ratet' left the alleged customary law union incomplete.

Having looked at the evidence, I find there is insufficient evidence to enable me hold that the ceremony in question did amount to a marriage enforceable in law. There was no consensus even from the plaintiff's own witnesses as what the occasion really meant.

In other forms of marriage, like the most common one being a 'religious marriage', the intention of the parties therein is manifested in the ceremony itself, which culminates in the signing of a marriage certificate. There can be no questions as to what that act symbolizes.

When it comes to a customary marriage, it would not be right to juxtapose it against that other statutory marriage. If parties choose the course of a

customary law marriage, then they ought to complete the same or at least cover the most crucial parts.

In this case, there is a disconnect as to what the parties envisaged that one occasion meant. In such circumstances, then it would be risky to hold that a marriage did take place.

Things are further complicated by the requirements of the Marriage Act, which now also recognizes customary law marriages but require it to be registered.

There is no averment by any of the parties that the union was subsequently registered.

In conclusion, I am not certain that the ceremony, even coupled by the parties living arrangements, could amount to an enforceable marriage.

**2. Whether the respondent had the legal capacity to contract a marriage with the Petitioner?**

The defendant stated that he is and has been in a monogamous marriage with one Mercy Kaimenyi at all material times, thus he does not have and has never had legal capacity to enter into a customary marriage or any other form of marriage with the petitioner. This he evidenced by producing the the Marriage Certificate, Church Marriage Records from the Catholic Church Tigania parish, and video evidence of the said union in court.

In support of the defendant, the catholic priest who presided over the Christian/monogamous marriage Kaimenyi on 8<sup>th</sup> of April, 2000 testified that the marriage has never been dissolved.

Further, DW2, testified that he was the best man and witness in the said monogamous union and confirmed the details of the groom and bride as indicated and evidenced by the marriage certificate under the African Christian Marriage and Divorce Act (Cap 151).

The plaintiff in her arguments did not deny that indeed the defendant was currently in a marriage. Her primary averment was that the defendant through

fraud and forgery convinced her that he had long filed a divorce petition and the same was on course for determination. That she contracted the customary marriage on the presumption that the defendant was a divorcee. Her averments were seconded by PW2, PW4, PW5 and PW6 to the end that the defendant confirmed to them during the ceremony that he was a divorcee, and had the capacity to contract another marriage.

**Section 37** of the **Marriage Act CAP 150** (Repealed) states thus;

***Marriages under native law or custom***

***Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom, but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted.***

Further, **Section 11 (1) (c)** of the **Marriage Act, 2014** depicts void unions under law to include;

***Void marriages***

***(1) A union is not a marriage if at the time of the making of the union—***

***(c) either party is incompetent to marry by reason of a subsisting marriage;***

In re **ESTATE OF LIHASI BIDALI (DECEASED) (2019) eKLR**, the court stated as follows:

***“Under the marriage statutes a man who had contracted a previous statutory monogamous marriage, such as a Christian marriage, has no capacity to contract another marriage, under any system of marriage, during the pendency of the previous statutory monogamous marriage. If he does contract any other marriage despite pendency of the statutory***

monogamous marriage, that other marriage would not be valid or recognized in law so long as the man is alive.

I have weighed the statutory provisions above and the above precedent against the facts of the instant case. The societal realities as acknowledged by the above precedent, as a matter of fact, is that time and again a party may contract any other marriage despite pendency of a statutory monogamous marriage, however the legal implication would be that the same would not be valid or recognized in law .

**Section 59** of the **Marriage Act 2014** is states that a marriage may be evidentially proven by *inter alia*;

**(a) a certificate of marriage issued under this Act or any other written law;**

**(b) a certified copy of a certificate of marriage issued under this Act or any other written law;**

**(c) an entry in a register of marriages maintained under this Act or any other written law**

From, the documentary evidence before me in the form of a copy of certificate of marriage between the defendant and one Mercy Kaimenyi, copy of the letter of from the Tigania Catholic Parish to the Registrar of Marriages dated 27<sup>th</sup> December, 2018, copies of marriage certification form and record forms from the Tigania Catholic Parish coupled with the testimonies of DW1, DW2 and DW3 it is without a doubt that the respondent was in a subsisting marriage at the time of contracting the customary union with the plaintiff.

Further, there is no evidence on record that the said Christian marriage was dissolved. The copy of the impugned **Divorce Petition HCDC 128 of 2005 Franklin Mithika vs Mercy Kaimenyi** carries no probative value having been clarified and settled by the copy of the letter from the Deputy Registrar, High Court Family Division dated 10<sup>th</sup> January, 2019 on record, that the said divorce petition was non-existent as cited, being that the same had totally different parties from the instant.

As a factual reality it is evidently clear as held hereinabove that the parties did contract a customary union under the Nandi/Kipsigis customary law. The subsequent question would therefore be on whether the same has crystallized to the extent of a marriage as per the ***African Christian Marriage and Divorce Act (Repealed)/Marriage Act CAP 150 (Repealed) / Marriage Act, 2014?***

I believe not. By virtue of the statutory provisions cited herein **Section 37** of the **Marriage Act CAP 150 (Repealed)** and **Section 11 (1) (c)** of the **Marriage Act, 2014**, the defendant is precluded from contracting any other marriage in the subsistence of his Christian/monogamous marriage to the said Mercy Kaimenyi and if he does, as he did, the same is not valid or recognized in law.

The requisite mandatory prerogative for the validity of a marriage under statutory law is that *inter alia* parties must have the legal right or capacity to marry. It is clear that the defendant herein lacked that capacity to union in marriage of whatever nature to the plaintiff by virtue of he being in a subsisting monogamous/Christian marriage.

Similarly, I needlessly add, that no presumption of marriage could as well be tenable by virtue of the defendant having been in a subsisting monogamous/Christian marriage.

This position was viewed by **Mary Wanjiku Githatu v Esther Wanjiru Kiarie [2010] eKLR**, Bosire JA., summarized the position thus:

***The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except whereby reason of a written law it is excluded. For instance, a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. (Emphasis mine)***

Thus, it is my view that the customary union alluded to by the plaintiff does not stand as a marriage under the law and thus is emphatically void.

c) *Whether the prayers sought in the plaint should be granted?*

Having settled that the customary union between the parties in dispute herein is not a marriage and neither can it be presumed as such under the laws of Kenya, the consequence is that, the prayers sought, specifically for the declaration of the existence of a marriage and the dissolution of the same between the parties herein must fail.

Specifically, a decree of divorce cannot issue in respect of an invalid marriage by law. Any attempt to issue the same would be essentially upholding an invalidity. Simply put, the court cannot aid an illegality.

As I conclude, I must express my sympathy for the plaintiff. From the evidence, she appeared to think that she had found a partner for a 'til death do as part' union. She even hastened her divorce from her previous marriage, in preparation for the next one.

As it turned out, it would all be in vain as the defendant had not taken any step to dissolve his own subsisting marriage. Whether this was inadvertence or shrewdness on the part of the defendant, it is a tale for another day. Digressing to that topic would require another full judgement of its own. Therefore, for now, I will not state anything more.

From the entirety of the foregoing, I find that the amended plaint dated 17<sup>th</sup> June, 2019 is wanting of merit, and the same is accordingly dismissed.

On costs I order that each party meets his/her own costs.

Dated and Delivered in Open Court this .....<sup>27<sup>th</sup></sup> Day of SEPTEMBER, 2022.

I certify that this is a true copy  
of the original

.....  
Chief Snr. P. R. Magistrate  
MILIMANI COMMERCIAL COURTS  
NAIROBI. **H.M. NYAGA**

**CHIEF MAGISTRATE**



This is the Exhibit marked FML-15 referred to in the annexed affidavit of Franklin Mithika Linturi. Sworn before me this 6th day of May 2019 at Nairobi in the presence of GEORGE J. M. LINDHOLM, Commissioner for Oaths. P. O. BOX 0722 24009. DATE 06/05/2019

Case Number:	Civil Suit E138 of 2018
Date Delivered:	20 Jun 2019
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Ruling
Judge:	Wilfrida Adhiambo Okwany
Citation:	Barons Estate Limited v Atticon Limited & 5 others [2019] eKLR
Advocates:	Miss Okeija for Mogaka for the plaintiff Mr. Karanja for the 1st, 2nd, 3rd and 4th respondents Mr. Wena for the 6th respondent
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
<p>The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.</p>	

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. E138 OF 2018**

**BARONS ESTATE LIMITED.....PLAINTIFF**

**VERSUS**

**ATTICON LIMITED.....1<sup>ST</sup> DEFENDANT**

**FRANKLIN MITHIKA LINTURI.....2<sup>ND</sup> DEFENDANT**

**EMILY NKIROTE BUANTAI.....3<sup>RD</sup> DEFENDANT**

**LITANY INVESTMENTS LIMITED.....4<sup>TH</sup> DEFENDANT**

**REGISTRAR OF COMPANIES.....5<sup>TH</sup> DEFENDANT**

**FAMILY BANK LIMITED.....6<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect to the application dated 13<sup>th</sup> November 2018 which application is expressed to have been brought under Order 40 Rules 1 and Order 51 Rule 1 of the Civil Procedure Rules. The applicant seeks for the following orders:

***1. Spent***

***2. That pending the hearing and determination of the suit herein, a temporary injunction be issued to restrain the respondents/defendants, or by their servants, or agents or otherwise howsoever from selling, transferring, or in any manner further reconstruction or allowing the reconstruction of Atticon Company Limited, the 1<sup>st</sup> respondent herein.***

***3. That pending the hearing and determination of the application and suit herein, a temporary injunction be issued to restrain the respondents/defendants, or by their servants, or agents from in any way dealing in the 1<sup>st</sup> defendant company to negatively affect the plaintiff/applicant's and its affiliates interest and assets herein.***

***4. That pending the hearing and determination of the application and suit herein, the 6<sup>th</sup> respondent/defendant herein be restrained whether by its servants, agents or advocate or otherwise howsoever from removing, transferring, disposing transferring, or in any manner holding and interfering with any of the plaintiff/applicant or its affiliate's assets and held in all land any banks operating in Kenya.***

***5. That the 6<sup>th</sup> defendant/respondent herein immediately release the plaintiff/applicant and its affiliates from liability under since lapsed or illegally obtained corporate guarantees and immediately return to the plaintiff/applicants and its affiliate's or release to its advocates on record or to the custody of this Honourable court all the title documents to the assets illegally being held by the bank as security on account of the 1<sup>st</sup> defendant/respondent herein.***

***6. That pending the hearing and determination of the suit herein, the 6<sup>th</sup> respondent herein whether by itself, its servants or***

*agents be restrained from making or allowing any payments out of the 1<sup>st</sup> defendant/respondent accounts herein.*

*7. That pending the hearing and determination of the suit herein assets currently belonging to the 1<sup>st</sup> defendant/respondent be secured until settlement to the plaintiff is reached.*

*8. That any other relief that the court deems fit in the interest of justice.*

*9. That the costs of this application and of the suit be borne by the defendants/respondents.*

2. The application is supported by the affidavit of the applicants director, one **COLLINS KIPCHUMBA N'GETICH**, and is premised on the grounds that sometimes in mid August 2015, the applicant's directors was approached by an emissary to aid in the 1<sup>st</sup> respondent's liquidity and that the applicant agreed to be a guarantor to the 1<sup>st</sup> respondent who was seeking and 12 month overdraft facility and charged its properties to wit, title Nos. Nairobi/Block 93/1564 and 1565 to the 6<sup>th</sup> respondent herein for that purpose, for valuable consideration for a 50% stake by acquisition of 11,000 shares in the 1<sup>st</sup> defendant. A copy of the 2 title deeds, legal charge and corporate guarantee were attached to the said supporting affidavit and marked as annexures "CKN1", "CKN2" and "CKN3" respectively.

3. The plaintiffs deponent avers that in return to the guarantee agreement and as a sign of good faith, the 1<sup>st</sup> respondent agreed to cede 50% of its shareholding to the applicant and to allow the applicant an equal share in the management of the 1<sup>st</sup> respondent's previously owned by the 2<sup>nd</sup> defendant and that the then directors of the 1<sup>st</sup> respondent resigned and transferred their shares in the company to the 4<sup>th</sup> defendant, solely owned by the 2<sup>nd</sup> defendant, in order to pave way for the applicant.

4. He further avers that in breach of the agreement, the 4<sup>th</sup> defendant refused and hold the first Board of Directors meeting so as to ratify the applicants appointments and that the 2<sup>nd</sup> defendant has single handedly operated the activities of the 1<sup>st</sup> defendant thereby leaving out the plaintiff and resulting in the resignation of the newly appointed directors. He states that on or about 29<sup>th</sup> October 2018 the 3<sup>rd</sup> defendant was allotted shares without notification of a fully constituted board of directors as required by the law. He contends that the change in directorship of the 1<sup>st</sup> defendant and removal of the plaintiff was obtained fraudulently and unprocedurally. He also states that the matter was reported to the 5<sup>th</sup> respondent to have the plaintiff's name reinstated as a shareholder in the 1<sup>st</sup> respondent but that the 5<sup>th</sup> respondent did not act on their report.

5. He further states that a further inquiry into the 1<sup>st</sup> respondents affairs has revealed that the 2<sup>nd</sup> respondent in collaboration with the 3<sup>rd</sup>, 4<sup>th</sup> and the respondents have colluded to utilize the securities availed by the applicant to secure an unauthorized credit facility which currently stands at kshs 335,000,000 by way of overdrafts, bank guarantee, enhanced trade facility and temporary excess funding without any input from the plaintiff on the strength of unscrupulous board resolutions, fraudulent execution and registration of charges on the applicants properties. He attached a copy of the alleged unauthorized minutes as annexure "CKN 11" to the supporting affidavit.

6. He avers that the fraud was consequently reported to the Department of Criminal Investigation as shown in annexure "CKN13". He states that as a result of the respondents actions complained about, the applicant now stands to lose the security currently valued at over kshs 465,000,000 on account of willful neglect of duty or lack of care by the 6<sup>th</sup> respondent's fraudulent dealing and conspiracy to defraud the applicant of its share in the 1<sup>st</sup> defendant company.

7. He also states that the applicant is at a real risk if losing the charged assets and shares in the 1<sup>st</sup> respondent should the same be removed, lost misappropriated or otherwise dissipated thereby necessitating the granting of the orders sought in the application.

8. At hearing of the application, Mr. Mokua, learned counsel for the applicant submitted that the application satisfies the conditions set for the granting of orders of injunction and that the application was therefore extremely meritorious.

9. It was submitted that the applicant had established a prima facie case as it had annexed its title deed to show that it was the owner of the charged property and further, that there was a legal charge of kshs 50,000,000 of the said property.

10. On irreparable loss, counsel submitted that the applicant stands to suffer loss if the 1<sup>st</sup> respondent continues to obtain loans over the charged property from the 6<sup>th</sup> respondent without the applicant's consent. It was the applicant's case that the balance of

convenience tilts in favour of granting the orders sought so as to preserve the substratum of the case.

**1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> and 4<sup>th</sup> respondents response**

11. The 1<sup>st</sup>-4<sup>th</sup> respondents opposed the application through the replying affidavit of the 2<sup>nd</sup> respondent sworn on 15<sup>th</sup> January 2019 wherein he avers that the application does not meet the threshold set for the grant of temporary reliefs for the reasons that:

*a) The plaintiff has not disclosed a prima facie case (with probability of success) for the following reasons:*

*i. The 1<sup>st</sup> defendant has never defaulted in its repayment obligations under the overdraft facilities availed by the defendant.*

*ii. The plaintiff is neither a director nor a shareholder of the 1<sup>st</sup> defendant and therefore, lacks the locus to questions any of the 1<sup>st</sup> defendant's internal dealings.*

*iii. The plaintiff has failed to adduce any or any credible evidence to show the alleged equity stake it obtained in the 1<sup>st</sup> defendant.*

*iv. The securities held by the 6<sup>th</sup> defendant are not at any risk of misappropriation or dissipation. This fact has been confirmed in paragraph 27 of the 6<sup>th</sup> defendant's replying affidavit.*

*v. The plaintiff has by passed the termination options available to it under the Deed of Guarantee.*

*b) The plaintiff has not shown that it would suffer irreparable damage should the Honourable court decline to grant the application. Put differently, the plaintiff has not established either that damaged would not be an adequate remedy and that the 1<sup>st</sup> defendant would be incapable of paying damages. Apart from certain declaratory orders, the plaintiff mainly seeks to have its alleged shares in the 1<sup>st</sup> defendant reinstated or reimbursed on terms and conditions set forth by the plaintiff. The plaintiff's alleged claim of shares in the 1<sup>st</sup> defendant can be ascertained by an arithmetical calculation, and a reimbursement made if proved at trial.*

*c) The balance of convenience does not favour a grant of the application for the following reasons:*

*i. The plaintiff is neither a director nor a shareholder of the 1<sup>st</sup> defendant.*

*ii. The 1<sup>st</sup> defendant has not defaulted in its repayment obligations under the overdraft facilities availed to it by the 6<sup>th</sup> defendant.*

*iii. The proceedings disclose no reasonable cause of action against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.*

*iv. A grant of the reliefs sought in the application will substantially hamper the operations of the 1<sup>st</sup> defendant, to the detriment of all parties. In fact, even the plaintiff's alleged stake in the 1<sup>st</sup> defendant would be diminished by a grant of the reliefs sought in the application.*

*v. As discussed in the ensuing paragraphs of this affidavit, granting the application will fall into a perverse scheme orchestrated by the plaintiff and the emissary alluded to at paragraph 2 of the supporting affidavit of Collins Kipchumba Ngetich one Ms Marianne Kitany (hereinafter, 'Ms. Kitany') to deprive me of my rights and interests in my lawfully acquired properties.*

12. The 2<sup>nd</sup> respondent also narrates a detailed background of the dispute setting out the circumstances under which he acquired the 1<sup>st</sup> defendant company and incorporated the 4<sup>th</sup> defendant as a vehicle for conducting various businesses.

13. The 2<sup>nd</sup> defendant avers that sometime in 2015, the 1<sup>st</sup> defendant applied for an overdraft facility from the 6<sup>th</sup> defendant so to enable it have access to a steady cash flow and that one of the 6<sup>th</sup> defendant's requirements was that the overdraft facility be secured by a third party guarantor whereupon he approached a close friend one M/S Kitany who agreed to give some securities through the

plaintiff, a company she owns and controls through close relatives and proxies.

14. He concedes that by a Deed of Guarantee and Indemnity dated 18<sup>th</sup> August 2015, (hereinafter “the Guarantee”) the plaintiff guaranteed to the 6<sup>th</sup> defendant that the 1<sup>st</sup> defendant’s repayment obligations under the overdraft facilities would be met and that by way of legal charge dated 24<sup>th</sup> August 2015, the plaintiff charged the suit properties to the 6<sup>th</sup> defendant as security for the repayment of the overdraft facilities to be availed to the 1<sup>st</sup> defendant.

15. He adds that the principle sum secured by the charge was kshs 262,500,000 and refers to the exhibits **SK1, SK4 and SK5** attached to the 6<sup>th</sup> respondents replying affidavit. He further avers that Clause 14 of the Guarantee and charge permitted the 6<sup>th</sup> defendant to make further advances and enlarge credit to the 1<sup>st</sup> defendant.

16. He denies that the 1<sup>st</sup> defendant agreed to allot the plaintiff any shareholding in the 1<sup>st</sup> defendant in exchange for the securities and guarantee of the overdraft facility and further denied that there is no intention to sell or dispose of the 1<sup>st</sup> defendant.

17. At the hearing of the application Mr. Karanja, learned counsel for the 1<sup>st</sup> to 4<sup>th</sup> defendants submitted that the plaintiff’s case does not meet the threshold of the conditions set for the grant of orders of interim injunction. Counsel relied on the decisions in the cases of **Mrao –Vs- American Bank of Kenya Ltd and 2 Others [2003] e KLR and Nguruman Ltd – Vs- Jan Bonde Nielsen & 2 Others [2014] e KLR.**

#### **6<sup>th</sup> respondents case**

18. The 6<sup>th</sup> respondent opposed the application through the replying affidavit sworn by its Senior Corporate Relationship Manager one Sarah Kabucho who avers that prayers 4 and 5 of the instant notice of motion are incapable of being granted as they are ambiguous and do not disclose the particulars of the specific assets, shares and titles held by the 6<sup>th</sup> defendant. She further states that the defendant does not have custody, care or possession of all the plaintiff’s assets including land and title documents.

19. She confirms that in the year 2015, the 6<sup>th</sup> defendant advanced a loan facility in the sum of Kshs 262,500/- to the 1<sup>st</sup> defendant which facility was secured by a legal charge over the plaintiffs suit properties and that the plaintiffs directors duly executed the Guarantee as security for the advances to the 1<sup>st</sup> defendant. She further avers that as exhibited through annexures “**SK4**” and “**SK5**”. It is the 6<sup>th</sup> respondent’s position that the legal charges registered in its favour on the plaintiff’s properties constitute valid and legally binding contracts which the parties have a duty to fully perform before the same are discharged.

20. At the hearing of the application Mr. Wena, learned counsel for the 6<sup>th</sup> respondent, submitted that the application does not meet the test for the granting of orders of mandatory injunction as what is before the court are validly executed charges and that under the Indoor Management Rule, the 6<sup>th</sup> respondent was not required to read all the public documents relating to the 1<sup>st</sup> defendant before transacting with it. For this argument counsel relied on the decision in the case of **East African Safari Air Limited – Vs- Anthony Mbaka Kegode & Another [2011] eKLR** where it was held;

*“ It is our view that an Advocate need not go beyond the search carried out at the Registrar of Companies to ascertain whether the direction giving him or her instructions had the authority to do so, unless he had, or ought to have had knowledge to the contrary of any mischief of fraud on the part of such director.”*

21. It was submitted that the orders sought against the 6<sup>th</sup> respondents are couched in very general terms and that the particulars of fraud are not spelt out. Counsel argued that there no proof of any intention to sell the charged property and that the application was therefore based on mere speculation.

#### **Determination**

22. I have considered the pleadings filed herein, the submissions made by the parties respective counsel together with the authorities that they cited.

23. The application basically seeks orders of injunction to restrain the respondents from reconstructing the 1<sup>st</sup> defendant company,

dealing with the 1<sup>st</sup> defendant company to negatively affect the plaintiff's interests and interfering with the plaintiff's assets. The plaintiff also seeks orders that the 6<sup>th</sup> respondent immediately releases the plaintiff and its affiliates from liability under any illegally obtained corporate liability and titles and to restrain the 6<sup>th</sup> respondent from allowing any payments out of the 1<sup>st</sup> respondents accounts and further, that the 1<sup>st</sup> respondents assets be secured until settlement to the plaintiff is secured.

**Interlocutory injunction**

24. The conditions under which a court can issue orders of interim injunction were stated in the off cited case of **Giella – Vs- Cassman Brown & Company Ltd [1973] EA 353** as follows:

*a) The applicant must establish a prima facie case with a probability of success at the trial.*

*b) That interlocutory injunction will not normally be granted unless the applicant would suffer irreparable injury which would not adequately be compensated in damages.*

*c) That if the court is in doubt, it will decide on a balance of convenience.*

25. In the case of **Kenya Commercial Finance Company Ltd –Vs- Afraha Education Society [2001] IEA 86** it was held that all the three conditions/stages for granting orders of injunction must be applied as separate distinct and logical hurdles which the applicant must surmount sequentially. In this regard, establishing a prima facie alone is not a sufficient basis to grant an interlocutory injunction as the court must also be satisfied that the loss to be suffered before the applicant if the order is not granted will irreparable. Irreparable loss has been defined as loss that cannot be compensated for in damages. In other words, where damages is adequate remedy that the respondent can pay, interlocutory injunction will not be granted even if a prima facie case has been established.

26. Lastly, where the court is in doubt as to the adequacy or efficacy of the damages available to either party, the application is determined on a balance of convenience.

27. In the instant case, it is not disputed that the applicant signed a Deed of Guarantee in which it agreed to be a guarantor for the 1<sup>st</sup> respondent to enable the 1<sup>st</sup> respondent obtain an overdraft facility from the 6<sup>th</sup> respondent. It was also not disputed that the applicant offered its suit properties as security for the said facility.

28. The applicant's claim was that the 1<sup>st</sup> defendant/respondent extended and abused the available open line of credit facility by unlawfully continuing to secure more loan facilities from the 6<sup>th</sup> respondent which facility/outstanding debt now stands at kshs 530,000,000 from the initial agreed kshs 50,000,000 and which financing cannot be accounted for to the plaintiff's detriment.

29. The plaintiff further claims that the 1<sup>st</sup> respondent had offered it a 50% shareholding in the 1<sup>st</sup> respondents company and an equal share in the management of the affairs of the 1<sup>st</sup> defendant in exchange, as a consideration for the guarantee which offer materialized but that 2<sup>nd</sup> respondent has been single handedly operating the activities of the 1<sup>st</sup> respondent company. It is the plaintiffs case that the 1<sup>st</sup> respondent, in collusion with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents passed fraudulent board resolutions in order to register charges on the plaintiffs properties.

30. I have perused the charge document that was attached to the plaintiffs supporting affidavit as annexure "CKN3". I note that at the preamble Section of said charge document, the principle amount is stated to be kshs 262, 500,000/-. I have also perused the Deed of Guarantee and Indemnity signed between the plaintiff (guarantor) and the 6<sup>th</sup> defendant (the bank) on 18<sup>th</sup> August 2015. I note that at the very beginning of the instrument after the description of the parties it is stated in part, as follows:

**"IN CONSIDERATION of the bank at the request of the Guarantor from time to time making continuing loans or advances to a discounting bills for or otherwise giving credit or granting overdraft facilities or accommodation or granting time for as long as it may think fit to or forbearing to sue or demand immediate payment from ATTICON LIMITED a Limited Liability Company incorporated under Certificate of Incorporation C137816 and of Post Office Box 2694-00100, Nairobi in the Republic of Kenya ( the "principal") the Guarantor UNCONDITIONALLY AND IRREVOCABLY UNDERTAKES AND AGREES WITH THE BANK AS FOLLOWS:**

**1. TO PAY ON DEMAND**

*The Guarantor will pay to the bank on demand*

*II. All money that is now or shall at any time or times hereafter be due or owing to the bank from or payable to the bank by the principal in whatever currency denominated under or in respect of any dealing, transaction or engagement whatsoever, either solely or jointly with any other person, firm or company and whether as principal or guarantor, and whether upon current or other banking account or accounts or otherwise or in respect of the bills, drafts, notes or other negotiable instruments made, drawn, accepted, advised, endorsed or paid by the bank or on the bank's account for the principal, either solely or jointly as stated above or that the bank may from time to time become liable to pay in respect of any bills, drafts, notes or letters of credit or any other dealing, transaction or engagement on account of or for the benefit or accommodation of the principal either solely or jointly as stated above ( the "Indebtedness"), together with."*

31. What emerges from the plaintiffs own documents in support of the application is that contrary to its claim that the Guarantee was only in respect to an overdraft of kshs 50 million, the charge instrument attached to the affidavit indicates that the principle amount is kshs 262,500,000 and the Guarantee document is clear that the bank would from time to time grant overdraft facilities at the request of the guarantor and demand payments from the 1<sup>st</sup> defendant.

32. My finding therefore is that the plaintiff did not establish that the guarantee was limited to the sum of Kshs 50 million as alleged. I further find that even though the applicant claimed that the respondents colluded and engaged in fraudulent transactions to its detriment, no material was placed before this court to show that any such illegal dealings took place.

33. What is clear from the plaintiffs case is that there appears to be disagreements in the management of the 1<sup>st</sup> respondent company in terms of the roles to be played by the plaintiff as a co-director as against the 2<sup>nd</sup> respondent's role. In fact, the plaintiff accuses the 2<sup>nd</sup> respondent of single handedly running the affairs of the 1<sup>st</sup> respondent to its detriment and exclusion.

34. My take is that the board wrangles involving the management of the 1<sup>st</sup> respondent cannot have a bearing on the legally executed guarantee so as to affect the legally binding deed of guarantee and charges lawfully executed by the parties.

35. No material was placed before this court to show that the applicants charged property is in danger of being sold for nonpayment of the loans. The 6<sup>th</sup> respondent bank did not seem to be having any dispute with the 1<sup>st</sup> respondent/borrower in as far as the servicing of the loan facility is concerned.

36. For the above reasons, I am not satisfied that a prima facie case has been established by the applicant so as to warrant the issuance of the orders of interlocutory injunction sought.

37. Having found that no prima facie case has been established and having noted that the all 3 conditions for granting orders of injunction must be satisfied separately I find no reason to venture into determining if the remaining 2 conditions of irreparable loss and balance of inconvenience were established.

38. Turning to the rest of the prayers sought in the application regarding the release of the plaintiff's title documents and releasing the plaintiff and its affiliates from liability. I find that these are orders that cannot be issued at this interlocutory stage as they will require the hearing of the main suit before a determination can be made over them.

39. Needless to say, the plaintiff admitted that it offered its title documents as security for loans advanced to the 1<sup>st</sup> respondent by the 6<sup>th</sup> respondent. Clearly therefore, there exists a legality binding agreement between the plaintiff and the 6<sup>th</sup> respondent from which the plaintiff can only be released upon the full settlement of the 1<sup>st</sup> respondent's liability to the 6<sup>th</sup> respondent.

40. For the above reasons, I am not satisfied that the orders sought in the instant application are merited and the order that commends itself to me is the order to dismiss the application with a further order that costs shall abide the outcome of the main suit.

41. Consequently the interim orders issued herein on 22<sup>nd</sup> November 2018 are hereby vacated.

**Dated, signed and delivered in open court at Nairobi this 20<sup>th</sup> day of June 2019.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Miss Okeija for Mogaka for the plaintiff

Mr. Karanja for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents

Mr. Wena for the 6<sup>th</sup> respondent

Court Assistant - Ali



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Case Number:	Civil Case E138 of 2018
Date Delivered:	17 Dec 2020
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Wilfrida Adhiambo Okwany
Citation:	Barons Estate Limited v Atticon Limited & 5 others [2020] eKLR
Advocates:	Mr. Kurgat for the Plaintiff Mr. Mukua for Mogaka for the Plaintiff Mr. Odhiambo for Karanja for the 1st-4th Defendants Miss Kilonzi for Wena for the 6th Defendant
Case Summary:	-
Court Division:	Commercial Tax & Admiralty
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. E138 OF 2018**

**BARONS ESTATE LIMITED.....PLAINTIFF**

**VERSUS**

**ATTICON LIMITED.....1<sup>ST</sup> DEFENDANT**

**FRANKLIN MITHIKA LINTURI.....2<sup>ND</sup> DEFENDANT**

**EMILY NKIROTE BUANTAI.....3<sup>RD</sup> DEFENDANT**

**LITANY INVESTMENTS LIMITED.....4<sup>TH</sup> DEFENDANT**

**REGISTRAR OF COMPANIES.....5<sup>TH</sup> DEFENDANT**

**FAMILY BANK LIMITED.....6<sup>TH</sup> DEFENDANT**

**RULING**

1. Through the application dated 29<sup>th</sup> September 2020, the plaintiff applicant seeks orders that: -

***1. Spent.***

***2. That the Honourable court be pleased to grant leave to the plaintiff to sell, alienate, dispose of, or transfer the suit properties i.e. LR. Nos. NAIROBI/BLOCK 93/1563, NAIROBI/BLOCK 93/1564, NAIROBI/BLOCK 93/1565 to an identified buyer for value.***

***3. That upon such sale, alienation, disposal and or transfer as alluded to in prayer 2 above, a sum equivalent to the disputed amount in the legal charges i.e. the sum Kshs 326,250,000 (THREE HUNDRED AND TWENTY-SIX MILLION, TWO HUNDRED AND FIFTY THOUSAND SHILLINGS ONLY) or such other sum as the honourable court may direct be placed in a joint interest earning account in the name of the advocate for the vendor and 6<sup>th</sup> defendant, that is H & K Law Advocates and PW Wena & Company Advocates pending the hearing and determination of this suit.***

***4. That upon the purchaser making full payment of the purchase price, and the sum of sum Kshs 326,250,000 (THREE HUNDRED AND TWENTY-SIX MILLION, TWO HUNDRED AND FIFTY THOUSAND SHILLINGS ONLY) being deposited in the joint interest earning account in the name of the Advocates for the Vendor and 6<sup>th</sup> Defendant, that is H & K Law Advocates and PW Wena & Company Advocates, the 6<sup>th</sup> defendant to release the titles for the suit properties i.e Nos. NAIROBI/BLOCK 93/1563, NAIROBI/BLOCK 93/1564, NAIROBI/BLOCK 93/1565 to H & K Law Advocates.***

***5. That the honourable court be pleased to give such further and or other orders as it may deem fit in furtherance of the best interests of justice.***

***6. That the costs of this application be in the cause.***

2. The application is supported by the affidavit of the plaintiff's Director **Mr. Collins Ngetich** and is premised on the grounds that: -

1. *That the Plaintiff/Applicant is the bona fide registered owner of the properties that are currently subject to this suit.*
2. *That the suit properties have a third party legal charge in favour of the 6<sup>th</sup> defendant registered in the encumbrance section of the Register of Lands.*
3. *That the said encumbrances are and or were meant to secure the borrowings of the 1<sup>st</sup> Defendant/Respondent.*
4. *That the said legal charge and or encumbrances are disputed by the plaintiffs.*
5. *That the validity and or enforceability of the said disputed legal charge instruments, entries in the encumbrance register and or their enforceability as against the plaintiffs is at the core of the dispute herein.*
6. *That the plaintiff is desirous to sell and have found a purchaser of the suit properties.*
7. *That the proposed sale is free of any encumbrances.*
8. *That as the Honourable court is yet to determine the dispute as to the validity and or enforceability of the encumbrances, the proposed sale cannot be successfully concluded unless the prayers sought herein are granted.*
9. *That no party will be prejudiced if the prayers and or orders sought herein are granted.*
10. *That the plaintiff made a formal request to the parties herein to be facilitative of the sale.*
11. *That the interest of justice will best be served if the orders sought herein are granted.*

3. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants opposed the application through the Grounds of Opposition dated 22<sup>nd</sup> October 2020 wherein they list the following grounds: -

1. *The application is a scheme for the plaintiff to secure a discharge of the charges registered in favour of the 1<sup>st</sup> defendant through the back door (i.e. without complying with the stipulations contained in the charge instruments and the Deed of Guarantee).*
2. *Allowing the application will be tantamount to rewriting the contracts between the plaintiff, the defendant and the 6<sup>th</sup> defendant regarding the 1<sup>st</sup> defendant's borrowing against the suit properties.*
3. *The sale of the suit properties will not only amount to breach of contract but also be highly prejudicial to the 1<sup>st</sup>-4<sup>th</sup> defendants. This is because the 1<sup>st</sup> defendant already gave sufficient and adequate consideration in exchange for the plaintiff offering the suit properties as securities to the 6<sup>th</sup> defendant.*
4. *The securities offered by the plaintiff to the 6<sup>th</sup> defendant were intended to act as continuing securities for the payment of the credit facilities advanced to the 1<sup>st</sup> defendant. The sale of the securities will prejudice the further advancement of credit facilities to the 1<sup>st</sup> defendant as contemplated under the charge instruments and the Deed of Guarantee.*
5. *The plaintiff has not demonstrated that the alleged intended sale is valid for genuine. To illustrate:*
  - a) *The Offer Letter and the Sale Agreement annexed to the application are void and defective for lack of notice and consent. The plaintiff purported to invite a purchase of the suit properties and proceeded to sign a sale agreement without notifying the 1<sup>st</sup> defendant or obtaining the relevant consents from the 6<sup>th</sup> defendant. As evident from the application, the plaintiff sought the 6<sup>th</sup>*

*defendant's consent on 16<sup>th</sup> July 2020, 2 days after the alleged Purchaser, Noble Ventures Company Limited, had accepted the plaintiff's offer to purchase the suit properties (c.f. Annexures CN-4 and CN-5).*

*b) The plaintiff has not provided any evidence that the alleged Purchaser has paid the purchase price as required by its (i.e. the plaintiff's) own Offer Letter (c.f. the last paragraph of the offer letter).*

*6. Allowing the application will render the plaintiff's suit unnecessary. Put differently, sanctioning the sale of the suit properties will render a mere academic exercise, an investigation of the plaintiff's claim that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> defendants created and registered legal charges over the suit properties through forgery and personation (c.f. paragraph 15 of the Amended Plaintiff).*

*7. Such other, further, alternative, additional and/or incidental grounds as may emerge and/or be canvassed at the hearing of the Application.*

4. The 5<sup>th</sup> and 6<sup>th</sup> defendants opposed the application through replying affidavits wherein they reiterate the grounds of opposition raised by the 1<sup>st</sup> to 4<sup>th</sup> defendants.

5. Parties canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether leave should be granted to the plaintiff to sell the suit parcels of land.

6. It was not disputed that the suit properties in question were charged to the 6<sup>th</sup> defendant as securities for the repayment of advances made to the 1<sup>st</sup> defendant. The plaintiff challenges the legality of the charges registered over the suit properties and alleges fraud and forgeries on the part of the defendants. The plaintiff however concedes that the court cannot, at this interlocutory stage, make any conclusive findings on the issues of alleged illegalities, fraud and forgeries as the same can only be dealt with at the main hearing of the suit.

7. The plaintiff argues that it has obtained a suitable buyer for the parcels of land at the price of Kshs 400,000,000 as against the amount in dispute which is Kshs 326,250,000. The plaintiff maintains that the 6<sup>th</sup> defendant will not be prejudiced in any manner by the proposed sale as the disputed amount will be deposited in a joint interest earning account in the name of the advocates for the vendor and the 6<sup>th</sup> defendant pending the hearing and determination of the suit.

8. On their part, the defendants argued that allowing the instant application will be akin to this court re-writing the agreement between the parties. The plaintiff however held a contrary opinion and argued that it merely seeks to substitute the titles held by the bank with cash in a joint interest earning account in the name of the advocates for the plaintiff and the 6<sup>th</sup> defendant.

9. It is a well- hackneyed principle of law that courts cannot rewrite the contract between the parties. This is the position that was adopted in *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Ltd* [2014] eKLR.

10. Applying the principles advanced in the above cited case to the present application, I find that the parties herein having voluntarily entered into an agreement to charge the suit properties to the 6<sup>th</sup> defendant as security for advances made to the 1<sup>st</sup> defendant, the court cannot interfere with the terms of the said agreement except where it has been established that there was coercion, fraud or undue influence. In the present case, as I have already noted in this ruling, the applicant concedes that the issue of whether there was forgery or fraud by the respondents in executing the charges is an issue that can only be determined after the hearing of the main suit. I therefore find that the applicant has not made out a case for the granting of orders sought in the application which orders, if allowed, will tantamount to rewriting the contract between the parties.

11. In a nutshell, I am not persuaded that the instant application is merited and the same is hereby dismissed with orders that costs shall abide the outcome of the main suit.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 17<sup>th</sup> day of December 2020 in view of the declaration of measures restricting court operations due to Covid - 19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Kurgat for Plaintiff.

Mr. Mukua for Mogaka for Plaintiff.

Mr. Odhiambo for Karanja for 1<sup>st</sup>-4<sup>th</sup> Defendants

Miss Kilonzi for Wena for 6<sup>th</sup> Defendant

Court Assistant: Sylvia



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This is the Exhibit marked **FML-17**  
 referred to in the annexed affidavit of  
**Franklin Mithika Linturi**  
 Sworn before me this **6th**  
 day of **May** **2024** at **Nairobi**  
 in the Republic of Kenya

**MILIMANI COMMERCIAL COURTS**  
 P. O. Box 72157, NAIROBI  
 MUR 0722 240031  
 DATE 06/05/2024

**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATES COURT AT NAIROBI**  
**MILIMANI COMMERCIAL COURT**  
**DIVORCE CAUSE NO. 272 OF 2019**

**JOHN MUTWIRI MBIJIWE**  
**T/A BEALINE AUCTIONEERS.....1<sup>ST</sup> APPLICANT**  
**FRANKLIN MITHIKA LINTURI.....2<sup>ND</sup> APPLICANT**  
**VERSUS**  
**MARYANNE JEBET KEITANY.....RESPONDENT**

**COURT ORDER**

**WHEREAS** this matter coming up on **7<sup>th</sup> February 2023** under Notice of Motion dated **7<sup>th</sup> February 2023** before **Hon. W.K. Micheni (Mrs.) Chief Magistrate;**  
**AND UPON READING** the said Notice of Motion and the supporting affidavit by **John M. Mbiyiwe** Applicant herein sworn on the same date;  
**AND UPON** seeing the orders dated **27<sup>th</sup> September 2022** by **Hon. H.M. Nyaga C.M.** (then) now **Judge of the High Court** as well as the ruling by **Judge Maureen A. Odero** dated **20<sup>th</sup> January 2023.**

**IT IS HEREBY ORDERED;**

1. **THAT** the application is certified as urgent.
2. **THAT** the Officer Commanding Station (OCS) **Runda Police Station, Nairobi** or any other officer from the said stations of the rank above an Assistant Inspector of police be and is hereby ordered to provide security and police assistance in execution of the instructions contained in the letter dated **23<sup>rd</sup> January 2023.**

**GIVEN** under my hand and seal of this court on this **7<sup>th</sup> day of February, 2023** *certified that this is a true copy of the original*

*WKM*  
**HON. W.K. MICHENI (MRS.)**  
**CHIEF MAGISTRATE**

*7/2/23*  
*Chief Magistrate*  
**MILIMANI COMMERCIAL COURTS**  
**NAIROBI.**

**ISSUED** at Nairobi this **7<sup>TH</sup>** day of February, 2023.

*WKM*  
**CHIEF MAGISTRATE**

**PENAL NOTICE**

**TAKE NOTICE** that any disobedience or non-observance of the order of the court given on the **7<sup>th</sup> day of February 2023** served herewith will result in penal consequences to you and any other person(s) so disobeying and not observing the same. **AND FURTHER** that if this order is not obeyed, an application shall be made citing you and any other person (s) so disobeying for contempt of court seeking therein your detention and other punishment for you and such person (s) together with any remedy available in law.

This is the Exhibit marked FML-18  
referred to in the annexed affidavit of  
Franklin Mithika Linturi  
Sworn before me this 6th  
Declared day of May 24 at Nairobi  
in the Republic of Kenya

**GIFONGA J. M' LIMBIINE**  
ADVOCATE AND COMMISSIONER FOR OATHS  
P. O. Box 12613 - NAIROBI  
MOB 0722 240091  
DATE 06/05/2024

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION**  
**CIVIL APPEAL NO. E022 OF 2023**

**MARYANNE JEBET KEITANY.....APPLICANT/APELLANT**

**VERSUS**

**JOHN MUTWIRI MBIJIWE**  
**T/A BEALINE AUCTIONEERS..... 1<sup>ST</sup> RESPONDENT**  
**FRANKLIN MITHIKA LINTURI..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before this Court is the Notice of Preliminary Objection dated **21st March 2023** filed by the 2<sup>nd</sup> Respondent **FRANKLIN MITHIKA LINTURI**. The matter was canvassed by way of written submissions. The Respondent filed the written submissions dated **23<sup>rd</sup> March 2023** whilst the Applicant relied upon her written submission dated **27<sup>th</sup> March 2023**.

## **BACKGROUND**

2. The Applicant herein **MARYANNE JEBET KEITANY** filed the Notice of Motion Application dated **14<sup>th</sup> March 2023** seeking the following orders:-
  - "1. **Spent.**
  2. **Pending the hearing and determination of the instant application, the Honourable court be pleased to issue an order of stay of execution of the orders issued by the Subordinate Court on 13<sup>th</sup> March, 2023.**
  3. **The Honourable Court be pleased to issue an order of stay of execution of the orders issued by the subordinate court on 13<sup>th</sup> March, 2023 pending the hearing and determination of the Appeal filed herewith.**
  4. **Any such order/orders that this Honourable court may deem fit to grant."**
3. In response to this application the 2<sup>nd</sup> Respondent filed the Notice of Preliminary Objection dated **21<sup>st</sup> March 2023** which was premised upon the following grounds:-

**“(1) The Application is *res judicata* to the extent that:**

**“(a) the Court of Appeal (Okwengu, Jamilla and Mbogholi JJA.) resolved the issue of eviction in favour of the 2<sup>nd</sup> Respondent vide a Ruling delivered on 19<sup>th</sup> August 2022 (in Civil Appeal (Application) No. E068 OF 2022: Maryanne Jebet Kitany v Franklin Mithika Linturi);**

**(b) this Honourable Court (Maureen Odero J.) similarly resolved the issue of eviction infavour of the 2<sup>nd</sup> Respondent vide a ruling delivered on 20<sup>th</sup> January 2023 (in Civil Appeal (Application) No. E096 of 2022: Maryanne Jebet Kitany v Franklin Mithika Linturi: (c.f. paragrapha 26 of the High Court’s Ruling);**

**(c) the interlocutory orders that previously granted the Appellant/Applicant possession and user of the suit property were predicated on the outcome of Milimani Commercial Courts Divorce Cause No. 272**

**of 2019 ('the divorce cause") on the existence or nonexistence of a marriage between the Applicant and the 2<sup>nd</sup> Respondent;**

**(d) the trial court then (Nyaga CM) now Justice of the High Court delivered a judgement in the Divorce Cause on 27<sup>th</sup> September 2022 holding that there was no marriage between the Applicant and the 2<sup>nd</sup> Respondent;**

**(e) this Honourable court (Maureen Odero J.) refused to stay the final judgement of the Divorce Cause on 20<sup>th</sup> January 2023 vide a Ruling alluded to in subparagraph (b) above;**

**(f) The Appellant/Applicant's unsuccessful Applications were predicated on the fact that the interlocutory orders that previously granted the Applicant possession and user of the property automatically lapsed/abated upon delivery of the Judgement in the Divorce Cause to the effect that**

there was no marriage between the Applicant and 2<sup>nd</sup> Respondent (c.f. paragraph 17 of the High Court's Ruling alluded to in subparagraph (b) above;

- (2) Given the matters raised in paragraph (1) subparagraph (a) above and the hierarchical nature of Kenya's judicial system, this Honourable Court lacks jurisdiction to entertain the Application to the extent that the Court of Appeal (Okwengu, Jamilla and Mbogholi JJA.) resolved the issue of eviction in favour of the 2<sup>nd</sup> Respondent.
- (3) The Applicant is an abuse of the process of this Honourable Court to the extent that:
  - (a) it seeks to secure the Applicant's continued enjoyment-for the sixth year- of interlocutory orders relating to the Respondent's private property despite the outcome of Milimani Commercial Courts Divorce Cause No. 272 of 2019 ("the divorce cause") yet the trial court found that

there is no marriage between the Applicant and the 2<sup>nd</sup> Respondent;

(b) as the record confirms ex-facie the Appellant has unsuccessfully filed multiple suits in various courts seeking the same similar relief(s) against the 2<sup>nd</sup> Respondent. Litigation must come to an end.

(c) the Applicant's appeal is not arguable to the extent that the interlocutory orders that the Application seeks to extend under the guise of pursuing the appeal were predicated on the possibility of the existence of a valid marriage between her and the 2<sup>nd</sup> Respondent.

(4) the Applicant's deliberate dilatory tactics of unfairly prolonging her enjoyment of interlocutory orders militate against the exercise of this Honourable Court's discretion in favour of the Applicant."

### **Analysis and Determination**

4. I have carefully considered the Preliminary Objection filed in the court as well as the written submissions filed by both parties.
5. The definition of what constitutes a Preliminary Objection was provided in the celebrated case of **MUKISA BISCUIT MANUFACTURING CO. LTD – VS – WEST END DISTRIBUTORS LTD [1969] E.A 696** where it was held as follows:-

**“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a Preliminary point may dispose of the suit”.**

6. Similarly in the case of **ORARO – VS – MBAJA [2005] KLR Hon Justice Ojwang** (as he then was) stated as follow:-

**“A preliminary objection is in nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The**

**improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop. The principle is abundantly clear. The "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence." [own emphasis]**

7. The issues which have been raised by this Preliminary Objection being issues of jurisdiction and *Res Judicata* are in my view issues which upon determination may dispose of the application. I therefore find that the Preliminary Objection dated **17<sup>th</sup> September 2020** raises pure points of law and is a proper Preliminary Objection.

(i) **JURISDICTION**

8. Jurisdiction it is said is everything. Without the requisite jurisdiction a court must immediately down its tools. In **THE MOTOR VESSEL "LILLIAN S" -VS- VALTEX MOTOR OIL (K) LTD (1989) eKLR** the court held that :-

**"Jurisdiction is everything, without it the court has no power to make one more step. A court lays down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"**

9. The Respondent states that this court has no jurisdiction to entertain the application dated **14<sup>th</sup> March 2023** filed by the Applicant since the High Court has already made a determination on the issue of eviction.

10. The Applicant has filed numerous applications/suits in respect of the property known as **Mae Ridge Country Villas House No. 16** erected on **L.R. No. 7785/1324 (I.R. NO.123703)** (hereinafter '**the suit property**'). In those suits/Applications the applicant sought to restrain the 2<sup>nd</sup> Respondent from evicting her from the suit property. Various courts dismissed this prayer.
11. On **13<sup>th</sup> March 2023** **Hon. W.K. Micheni Chief Magistrate** made orders directing the **OCS Runda Police Station** to supervise the eviction of the Applicant from the suit property. The Applicant moved to this court seeking to stay those orders of eviction issued on **13<sup>th</sup> March 2023**. Therefore what is now before this court is an application seeking to stay execution of **new** orders of eviction issued by the lower court.
12. In light of the above facts I find that this court has requisite jurisdiction to hear and determine the matter.

(ii) **RES JUDICATA**

13. The Respondent has submitted that the matters being raised by the Applicant in this Notice of Motion dated **14<sup>th</sup> March 2022** are '**Res**

***Judicata***. That the Applicant has challenged the issue of her eviction before several courts and this the same issue cannot be raised again in this court.

14. The principle of ***Res Judicata*** is provided for by **Section 7 of the Civil Procedure Act. Cap Laws of Kenya** as follows:-

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

15. **Black Law Dictionary 10<sup>th</sup> Edition** defines ***Res Judicata*** in the following terms:-

**"An issue that has been definitely settled by judicial decision.... the three essentials are:-**

- (i) an earlier decision on the issue;**

- (ii) a final judgement on the merits; and
- (iii) the involvement of the same parties, or parties in privity with the original parties;

16. The **Court of Appeal** in **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, [2017] eKLR** stated as follows:-

**"That rule or doctrine of res judicata serves the salutary aim of bring finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus**

**rest in the public interest for swift, sure and certain justice”.**

**[own emphasis]**

17. Therefore party seeking to rely on the doctrine of res judicata to bar a suit from being heard must prove each of the following elements:-
- a) **The suit or issue raised was directly and substantially in issue in the former suit;**
  - b) **The former suit was between the same parties or between the same parties under whom they or any of them claim;**
  - c) **The parties were litigating under the same title in the former; and**
  - d) **The court that formerly heard and determined the issue was competent to try and the subsequent suit or the suit in which the issue is raised.**
18. The purpose of the doctrine of ***Res Judicata*** is to avoid a scenario where the courts are engaged in endless rounds of litigation over the same issue. A litigant may not commence more than one action in

respect of the same or a substantially similar cause of action so as to avoid a multiplicity of suits.

19. This whole circus began when the lower court declared that there existed no marriage between the Applicant and the 2<sup>nd</sup> Respondent. The Applicant lodged an appeal against that decision and also sought orders to stay execution of the judgement of the lower court citing an apprehension that the 2<sup>nd</sup> Respondent would move to evict her from the suit property. That application for stay was heard by this court which in a Ruling delivered on **20<sup>th</sup> January 2023** declined to grant the stay orders sought.
20. The Applicant has also filed an appeal against decision of the **ELC Court** in **Nairobi ELC Case No. 6393 of 2021**. The Applicant again sought to stay the decision of the **ELC Court** fearing that she would be evicted from the suit property. She also sought an injunction to restrain the Respondent from evicting her from the property in question.
21. That matter was heard by the **Court Appeal** in **Civil Application No. 068 of 2022**. The Honourable Judges of Appeal dismissed the

Application and declined to issue orders restraining the Respondent from evicting the Applicant.

22. Yet again the Applicant is before this court seeking the very same orders i.e. orders to restrain the 2<sup>nd</sup> Respondent from evicting her. It is enough! Litigation it is said must come to an end. The Applicant is becoming a vexatious litigant. Her numerous applications over the same issue amounts to an abuse of the court process.

23. I find that the issues raised in the Notice of Motion Application dated **14<sup>th</sup> March 2023** have been litigated to death. The Applicant has sought similar orders in various different courts with no success. She cannot bring up the same issue again. In the case of **NJANGU -VS- WAMBUGU AND ANOTHER NAIROBI NO. 2340 OF 1991** (Unreported) **Hon. Justice Richard Kuloba** (as he then was) succinctly put it as follows:-

**"If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some**

cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*..."

24. Similarly **UHURU HIGHWAY DEVELOPMENT LTD – VS- CENTRAL BANK OF KENYA, EXCHANGE BANK (INVOLUNTARY LIQUIDATION & KAMLESH & MANSUKHLAL PATTNI [1995]** eKLR THE COURT OF Appeal stated as follows:-

"...This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of *res judicata* apply to application within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory application as much as there ought to be an end to litigation. It is this precise problem that Section 89 of our Civil Procedure Act caters for ..." [own emphasis]

25. Indeed no less than the Court of Appeal has rendered a decision dismissing a similar application. This court being inferior to the court of Appeal cannot purport to decide an issue upon which the superior court has already rendered a decision. I find that the matter is indeed *Res Judicata*.
26. Finally and in conclusion I find merit in the Preliminary Objection dated **21<sup>st</sup> March 2023**. I Find that the application dated **14<sup>th</sup> March 2023** is vexatious and amounts to clear abuse of court process. The same is hereby struck out. For avoidance of doubt the orders of status quo issue on **22<sup>nd</sup> March 2023** are hereby set aside. Costs are awarded to the 2<sup>nd</sup> Respondent.

Dated in **Nairobi** this **24<sup>th</sup>** day of **April, 2023**.



.....  
**MAUREEN A. ODERO**  
**JUDGE**

This is the Exhibit marked FML-19  
referred to in the annexed affidavit  
of Franklin Mithika Linturi  
Sworn before me this 6th  
day of May 24 Nairobi  
in the Republic of Kenya

**GILONGA J. M' LIMBITINE**  
ADVOCATE & CONSULTING FOR OATHS  
P. O. BOX 12670 NAIROBI  
MOR: 0722 240091  
DATE 06/05/2024 SIGN

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**CIVIL APPEAL NO. E022 OF 2023**

**MARY ANNE JEBET KEITANY..... APPELLANT/ APPLICANT**

**VERSUS**

**JOHN MUTWIRI MBIJIWE**

**T/A BEALINE AUCTIONEERS.....1<sup>ST</sup> CONTEMNOR/  
RESPONDENT**

**FRANKLIN MITHIKA**

**LINTURI..... 2<sup>ND</sup> CONTEMNOR RESPONDENT**

**RULING**

1. The Applicant herein **MARY ANNE JEBET KEITANY** filed in court the Notice of Motion dated **12<sup>th</sup> April 2023** seeking the following orders:-

**"1. Spent.**

**2. THAT this Honourable court be pleased to order  
FRANKLIN MITHIKA LINTURI the 2<sup>nd</sup> Contemnor herein**

**presented in court to show cause why he should not be cited and/or adjudged guilty for contempt of court orders issued on 22/03/2023 and extended on 29<sup>th</sup> March, 2023,**

- 3. THAT this Honourable court be pleased to commit FRANKLIN MITHIKA LINTURI, the Contemnor herein to imprisonment for a period of six months for disobeying and being in contempt of the orders of this Honourable Court issued on 29<sup>th</sup> March, 2023;**
- 4. THAT this Honourable court be pleased to order JOHN MUTWIRI T/A BEALINE AUCTIONEERS, the 1<sup>st</sup> Contemnor herein be presented in court to show cause why he should not be cited and/or adjudged guilty for contempt of court orders issued on 29<sup>th</sup> March 2023;**
- 5. THAT this Honourable court be pleased to commit JOHN MUTWIRI T/A BEALINE AUCTIONEERS; the 1<sup>st</sup> Contemnor herein to imprisonment for a period of six months for disobeying and being in contempt of the**

orders of this Honourable Court issued on 29<sup>th</sup> March, 2023;

6. THAT both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Contemnors be denied audience of court until they purge the contempt.
  7. The costs of the Application be borne by the 2<sup>nd</sup> Respondent.
  8. Any other order that the court may deem fit and just to grant.
2. The application which was premised upon **Section 5** of the **Judicature Act Cap 8, Laws of Kenya Sections 1A, 1B, 3A** and **63 (e)** of the **Civil Procedure Act** and all other enabling provisions of the law was supported by the Affidavit of even date sworn by the Applicant.
  3. The 2<sup>nd</sup> Respondent **FRANKLIN MITHIKA LINTURI** opposed the application through he Replying Affidavit dated **5<sup>th</sup> May 2023**. The 2<sup>nd</sup> Respondent also filed a Notice of Preliminary objection dated **21<sup>st</sup> March 2023** seeking to have the application dated **12<sup>th</sup> April 2023** struck out.

4. On **9<sup>th</sup> May 2023** the court directed that the application and the Preliminary Objection be heard together by way of written submissions. The Applicant filed the written submissions dated **12<sup>th</sup> April 2023** and **20<sup>th</sup> June 2023**. The 2<sup>nd</sup> Respondent relied upon the written submissions dated **9<sup>th</sup> June 2023**.
5. The 1<sup>st</sup> Respondent **JOHN MUTWIRI MBIJIWE T/A BEALINE AUCTIONEERS** did not file any documents at all in this matter.

### **BACKGROUND**

6. This dispute has had a very long and convoluted history in the corridors of justice. The Applicant **Mary Anne Jebet Keitany** had filed in the **High Court** a Notice of Motion dated **14<sup>th</sup> March 2023** seeking stay orders in respect of orders issued by the subordinate court on **13<sup>th</sup> March 2023**.
7. In response the 2<sup>nd</sup> Respondent filed a Notice of Preliminary Objection dated **21<sup>st</sup> March 2023**. The **High Court** on **22<sup>nd</sup> March 2023** directed that the '**status quo**' be maintained pending determination of the Preliminary Objection. The orders of '**status quo**' were extended on **19<sup>th</sup> March 2023**.

8. The Applicant alleges that notwithstanding the existence of the said orders for maintenance of status quo the 2<sup>nd</sup> Respondent proceeded to instruct the 1<sup>st</sup> Respondent to forcefully evict the Applicant from the property known as **MAE RIDGE COUNTY VILLA NO. 16 on LR No. 7785/1324 (I.R.123703)** (hereinafter the '*suit property*').
9. That on **5<sup>th</sup> April 2023** the 1<sup>st</sup> Respondent evicted and /or removed the Applicant's furniture and chattels from the suit property supervised by the **Officer Commanding Station (OCS) Spring Valley Police Station.**
10. The Applicant prays that this court cite the Respondents for contempt and punish them accordingly.
11. The 2<sup>nd</sup> Respondent averred that this application for contempt has been overtaken by events given that the court delivered a ruling on **24<sup>th</sup> April 2023** dismissing the Application for stay of execution and setting aside the *status quo* orders. Therefore according to the 2<sup>nd</sup> Respondent the removal of the Applicant from the suit property was lawful.

(i) **Notice of Preliminary Objection dated 21<sup>st</sup> March 2023**

In this Preliminary Objection the 2<sup>nd</sup> Respondent seeks to have the Applicants Notice of Motion dated **14<sup>th</sup> March 2023** struck out on the following grounds:-

**"1. The Application is *res judicata* to the extent that:**

- (a) the Court of Appeal (Okwengu, Jamila and Mbogholi JJA.) resolved the issue of eviction in favour of the 2<sup>nd</sup> Respondent vide a Ruling delivered on 19<sup>th</sup> August 2022 (in Civil Appeal (Application) No. E068 of 2022: Maryanne Jebet Kitany v Franklin Mithika Linturi),**
- (b) this Honourable court (Maureen Odero J.) similarly resolved the issue of eviction in favour of the 2<sup>nd</sup> Respondent vide a ruling delivered on 20<sup>th</sup> January 2023 (in Civil Appeal (Application) No. E096 of 2022: Maryanne Jebet Kitany v Franklin Mithika Linturi); (c.f. paragraph 26 of the High Court's Ruling);**
- (c) the interlocutory orders that previously granted the Appellant/Applicant possession**

and user of the suit property were predicated on the outcome of Milimani Commercial Courts Divorce Cause No. 272 of 2019 (“the divorce cause”) on the existence or nonexistence of a marriage between the Applicant and the 2<sup>nd</sup> Respondent;

- (d) the trial Court then (Nyaga CM) now Justice of the High Court delivered a judgement in the Divorce Cause on 27<sup>th</sup> September 2022 holding that there was no marriage between the Applicant and the 2<sup>nd</sup> Respondent;
- (e) this Honourable Court (Maureen Odero J.) refused to stay the final judgement of the Divorce Cause on 20<sup>th</sup> January 2023, vide a Ruling alluded to in sub paragraph (b) above;
- (f) The Appellant/Applicant’s unsuccessful Applications were predicated on the fact that the interlocutory orders that previously granted the Applicant possession and user of

**the property automatically lapsed/abated upon delivery of the judgement in the Divorce Cause to the effect that there was no marriage between he Applicant and the 2<sup>nd</sup> Respondent (c.f. paragraph 17 of the High Court's Ruling alluded to in subparagraph (b) above;"**

12. I have carefully considered the Preliminary Objection filed by the 2<sup>nd</sup> Respondent as well as the written submissions filed by both parties.

13. The definition of a Preliminary Objection was given in the case of **MUKISA BISCUITS MANUFACTURING COMPANY LTD – VS WEST END DISTRIBUTORS LTD [1969] EA** where the court stated as follows:-

**"A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submissions that the parties are bound by the contract giving rise to the suit to**

refer the dispute to arbitration.".....*A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.*"

14. In **Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others [2015] eKLR**, the **Supreme Court of Kenya** stated as follows:-

**"a preliminary objection may only be raised on a "pure question of law". To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record."**

15. Therefore in order for a preliminary objection to succeed the following tests must be satisfied.

- (i) The Preliminary Objection should raise a pure point of law.**

(ii) **The Preliminary Objection must be argued on the assumption that all the facts pleaded are correct.**

(iii) **The Preliminary Objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.**

(iv) **A valid Preliminary Objection ought if successful dispose of the entire suit.**

16. Therefore a genuine and proper Preliminary Objection can only raise points of law and must not itself derive its foundation on facts or information which stands to be tested by normal rules of evidence.

17. By this Preliminary Objection the 2<sup>nd</sup> Respondent asserts that the application dated **12<sup>th</sup> April 2023** is '**Res Judicata**' given that the matters raised therein have already been heard and determined by other courts.

18. The principle of **Res Judicata** is provided for by **Section 7 of the Civil Procedure Act. Cap Laws of Kenya** as follows:-

***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and***

*substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."*

19. **Black Law Dictionary 10<sup>th</sup> Edition** defines *Res Judicata* in the following terms:-

*"An issue that has been definitely settled by judicial decision.... the three essentials are:-*

- (i) an earlier decision on the issue;*
- (ii) a final judgement on the merits; and*
- (iii) the involvement of the same parties, or parties in privity with the original parties;"*

20. The **Court of Appeal** in **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, [2017] eKLR** stated as follows:-

**"That rule or doctrine of res judicata serves the salutary aim of bring finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice".**

***[own emphasis]***

21. Therefore party seeking to rely on the doctrine of res judicata to bar a suit from being heard must prove each of the following elements:-
  - a) **The suit or issue raised was directly and substantially in issue in the former suit;**

- b) **The former suit was between the same parties or between the same parties under whom they or any of them claim;**
  - c) **The parties were litigating under the same title in the former; and**
  - d) **The court that formerly heard and determined the issue was competent to try and the subsequent suit or the suit in which the issue is raised.**
22. The purpose of the doctrine of *Res Judicata* is to avoid a scenario where the courts are engaged in endless rounds of litigation over the same issue. A litigant may not commence more than one action in respect of the same or a substantially similar cause of action so as to avoid a multiplicity of suits.
23. In essence therefore, the doctrine implies that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merit by a court of competent jurisdiction.
26. In my view the question of *Res Judicata* does not arise as the instant Application dated **12<sup>th</sup> March 2023** seeks to have the Respondent

cited and punished for contempt. The Rulings cited by the 2<sup>nd</sup> Respondent in his Notice of Preliminary Objection all dealt with the question of the existence of a marriage between the Applicant and the 2<sup>nd</sup> Respondent, question of stay of orders allowing the removal of the Applicant from the suit property and the question of the existence of *status quo* orders.

27. It is manifest therefore that the present application does not seek the same or similar orders as the ones cited by the 2<sup>nd</sup> Respondent in his Preliminary Objection as none of those other rulings dealt the issue of the Respondents being in contempt of court orders.
28. Therefore I find no merit in the Notice of Preliminary Objection dated **21<sup>st</sup> March 2023**. The same is dismissed in its entirety.

**(ii) Notice of Motion dated 12<sup>th</sup> April 2023**

29. The Applicant in seeking to have the Respondents cited for contempt states that on **5<sup>th</sup> April 2023** the 1<sup>st</sup> Respondent supervised by the **OCS Sprint Valley Police Station** went to the suit property and removed the Applicants furniture and chattles form the said premises.

30. It is a fact that on **22<sup>nd</sup> March 2023** this court heard oral arguments from both sides where **Mr. Kurgat** acting for the Applicant sought issuance orders of '**status quo**' pending the hearing and determination of their application.
31. After hearing both parties the court stated as follows:-  
*"In order to avoid prejudicing any party I do direct that the current status quo be maintained pending the determination of the Preliminary Objection...."*
32. Further on **29<sup>th</sup> March 2023** the Court extended the interim orders of *status quo*.
33. The Ruling on the Preliminary Objection was eventually delivered virtually on **24<sup>th</sup> April 2023** in which the court formally set aside the orders of *status quo* as follows:-  
*"... For avoidance of doubt the orders of status quo issued on 22<sup>nd</sup> March 2023 are hereby set aside..."*
34. Therefore during the period from **22<sup>nd</sup> March 2023** upto **24<sup>th</sup> April 2023** both parties were under an obligation to maintain the status quo. Since the Applicant had come to court seeking to stay the orders

made in the subordinate court authorizing the 2<sup>nd</sup> Respondent to evict her from the suit property the status quo meant that there was to be no eviction/removal of Applicant pending delivery of the ruling.

35. The Applicant claims that on **5<sup>th</sup> April 2023** the Respondents willfully and deliberately violated the orders of *status quo* by forcibly and without justifiable cause removing the Applicant's furniture and chattels from the suit property. She seeks to have the Respondents cited for contempt.

36. The jurisdiction of this Court to punish for contempt is found in **Section 5** of the **Judicature Act** which provides:-

***"(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.***

***(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a***

***conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court."***

37. Thus in **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another [2005] KLR 828**, the obligation to obey court orders was well explicated thus:-

***"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void." [own emphasis]***

38. In the premises, the elements that the Applicant herein needed to prove are:-

- a) that the Order of **22<sup>nd</sup> March 2023** was clear, unambiguous and binding on the respondent;
- b) that the Respondents had proper notice or knowledge of the terms of that Order;
- c) that the Respondents has deliberately failed to obey the terms of the Order;

(see **Katsuri Limited v Kapurchand Depar Shah [2016] eKLR**)

39. The standard of proof applicable in contempt applications, is above a balance of probabilities, given the criminal connotations of contempt proceedings. In **Gatharia K. Mutikika v Baharini Farm Ltd [1985] KLR 227** the Court of Appeal stated as follows:-

***"...In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi- criminal in nature." [own emphasis]***

40. It is important that the court satisfy itself that the person being accused of disobeying courts orders had knowledge/notice of said court orders.

In **OILFIELD MOVERS LTD -VS- ZAHARA OIL & GAS LIMITED** [2020] eKLR the court stated as follows:-

*"It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or motive of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty....."*

41. In my view the orders which were made by this court on **22<sup>nd</sup> March 2023** and later extended on **29<sup>th</sup> March 2023** were both clear and unambiguous.
42. I also have no doubt that the 2<sup>nd</sup> Respondent was fully aware of the said orders as his Advocate **Dr. Thiankolu** was present in court on both occasions. The Respondents do not deny having knowledge of the *status quo* orders.

43. The Applicant's claim that her belonging were removed from the suit property on **5<sup>th</sup> April 2023** during the subsistence of the *status quo* orders has not been denied. Indeed the Applicant has annexed to her supporting Affidavit photographs of household goods and furniture littered in the compound outside the house. I have no reason to doubt the Applicant's claim that her properties were so removed.
44. The 2<sup>nd</sup> Respondent argues that the orders of *status quo* had been overtaken by events following the ruling of this court delivered on **24<sup>th</sup> April 2023** which set aside said orders. This argument is both misleading and fallacious.
45. The order setting aside the orders of status quo was made on **24<sup>th</sup> April 2023**. The removal of the Applicants property took place on **5<sup>th</sup> April 2023** a full **two (2)** weeks before the orders were set aside. Therefore the act of removal occurred during the subsistence of the orders of *status quo* and was done in contempt of court orders.
46. In order to find the Respondents '**guilty**' of contempt it must be proved that they **willfully** and **deliberately** disobeyed the orders of *status quo*. In other words it must be shown to the satisfaction of the

court that it was either the 1<sup>st</sup> or 2<sup>nd</sup> Respondent or both of them, or persons acting under their instructions who removed the Applicants properties from the house.

47. The Applicant in her supporting Affidavit averred in **Paragraph 6** that the 2<sup>nd</sup> Respondent ousted her belongings and personal appurtenances from the house
48. There is no proof that the 2<sup>nd</sup> Respondent personally removed those items. The 2<sup>nd</sup> Respondents claims that he was not even in the country when the incident occurred. The 2<sup>nd</sup> Respondent annexed to his Replying Affidavit a copy of his Passport (Annexure '**FML-1**') which bears an entry stamp into **Kigali** on **3<sup>rd</sup> April 2023**. On **5<sup>th</sup> April 2023** the 2<sup>nd</sup> Respondent exited Kigali. Unfortunately the time he left **Rwanda** is not indicated. However I do accept that the 2<sup>nd</sup> Respondent was not in the country when this incident occurred.
49. At **Paragraph 9** of her supporting Affidavit the Applicant avers as follows:-

***"THAT it is within my knowledge that the people who carried out the eviction were goons hired by the 2<sup>nd</sup> Respondent without the knowledge of the OCS Runda Police Station."***

50. It is not exactly not clear how the Applicant came to acquire this knowledge. In any event no proof has been tendered that the 2<sup>nd</sup> Respondent '**hired**' goons to carry out any eviction. This is a mere allegation which remains unproven
51. Likewise there is no evidence or proof that the 1<sup>st</sup> Respondent conducted the eviction neither is there any evidence in record to prove that the 2<sup>nd</sup> Respondent instructed or directed the 1<sup>st</sup> Respondent to carry out the eviction.
52. The eye witness account to the incident of **5<sup>th</sup> April 2023** was given by one **MR BERNARD MOGAMBI** the General Manager of **Delta Seven Security Limited** who wrote an account (Annexure '**MJK '4'**) to the Applicant's Supporting Affidavit dated **12<sup>th</sup> April 2023**). In this account it is stated that the security guard at the premises raised alarm that:-

***"police officers had forcefully entered the premises and started vandalizing the house." [own emphasis]***

53. Thus according to this eyewitness account it was ***'police officers'*** who carried out the removal not the 1<sup>st</sup> or 2<sup>nd</sup> Respondent. The witness account further states:

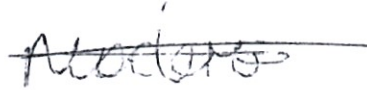
***"It was later confirmed that the operation was supervised by the police inspector from Spring Valley Police Station..."***

54. It would appear therefore that this operation was conducted by police officers. It is not clear why or at whose behest those police were acting. The Applicant may **suspect** that the police officers were acting under instructions from the 2<sup>nd</sup> Respondent. This is a court of law. Mere suspicion will not suffice. No concrete and/or tangible proof has been tendered to show that it was the 1<sup>st</sup> or 2<sup>nd</sup> Respondents who instructed the Police Officers to remove those items. The Applicant may be better advised to lodge a complaint with the **Director Criminal Services** to get those answers.

55. Finally, I find no evidence of wilful and/or deliberate disobedience of the court orders by the 1<sup>st</sup> or 2<sup>nd</sup> Respondent. Accordingly, I dismiss

in its entirety the Notice of Motion dated **12<sup>th</sup> April 2023**. Costs will be met by the Applicant.

Dated in **Nairobi** this **3<sup>rd</sup>** day of **November, 2023**.



.....  
**MAUREEN A. ODERO**  
**JUDGE**

78

DATED THIS 31st DAY OF March 2022

AGENCY CONTRACT

BETWEEN

NATIONAL CEREALS & PRODUCE BOARD

AND

51 CAPITAL, AFRICAN DIATOMITE INDUSTRIES

This is the Exhibit marked "F.M.I.-20" referred to in the annexed affidavit of declaration of Franklin Mithika Linturi

Sworn before me this 6th day of May 24 at Nairobi In the Republic of Kenya

GITONGA J. M'LIMBIINE  
 P. Commissioner for Oaths  
 MOB 0722 744 444  
 DATE 06/05/2024 SIGN

5/6

THIS CONTRACT is made this 31st day of March, 2022 Two Thousand and Twenty Two BETWEEN NATIONAL CEREALS & PRODUCE BOARD of Post Office Box Number 30586 – 00100 Nairobi – Kenya (hereinafter referred to as "the Agent") of the one part-AND 51 CAPITAL, AFRICAN DIATOMITE INDUSTRIES of (hereinafter referred to as "the Principal") of the other part.

**WHEREAS**

The Principal is desirous of selling a variety of products i.e 51 Capital Animal Supplement, GPC-Guard and Diatomaceous and the Agent has agreed to provide an outlet through designated Regions/Depots for the sale of the said products on agency basis upon the terms and conditions hereinafter contained.

NOW IT IS THEREFORE AGREED BY AND BETWEEN the parties as follows: -

1. **QUANTITY**

The quantity to be supplied shall be as per each Regions/Depots/Silos requirement as guided by its respective requisition and/or on a consignment basis only. The requisitioned products shall be delivered with a delivery note and the Agent's representative shall issue a Good Receipt while assuming the possession of the said products.

2. **QUALITY**

The principle assures the Agent that it shall deliver to the Board's designated Regions/Depots/Silos products meeting the Kenya Bureau of Standards (KEBS).

3. **PRICE**

The supply price shall be as hereunder delivered to the Agent's Regions/Depots/Silos.

ITEM	QUANTITY UNIT	INTO DEPOT PRICE (Kshs.)	SELLING PRICE (Kshs.)
51 Capital Animal Supplement	25 KG	1800	1980
GPC - Guard	25 KG	1950	2145
Diatomaceous	25 KG	1500	1700

2

The Contract price herein agreed shall be reviewed through mutual consent of both parties.

4. TERMS OF PAYMENT

The Agent shall remit sales proceeds less commissions directly to the Principal. The Agent will do this through its selling Regions/Depots/Silos. The payments shall be paid Fourteen (14) days of after the sales of the product.

The Principal's Bank Account for purposes of this agreement shall be as follows:-

Account Name: Fifty One Capital (K) Limited  
Bank Name: NCBA Bank  
Account Number: 4745630018  
Branch Name: Prestige  
SWIFT CODE: CBAFKENXXXX

5. JOINT RECONCILIATION

Each Agent's Region/Depot/Silo Manager will undertake quarterly joint reconciliation with the representatives of the Principal for purposes of ascertaining the stock holding and sales progress.

6. VALIDITY OF THE CONTRACT

This Contract shall commence on the date first herein above written and shall remain in force for a period of Two (2) Years.

A review of the products performance to be done after every Six (6) months that will inform further business engagement.

7. DELIVERY PERIOD

The Principal shall within Seven (7) days from the date of execution of this contract start delivering to the Agent's designated Regions/Depots/Silos the products in the amounts requisitioned by the Agent on a consignment basis only. The Principal will be advised by the Agent on the names of the designated Regions/Depots/Silos in writing.

3



8. MARKETING SUPPORT

That at the beginning of this Agency Contract, the Principal in consultation with the Agent will undertake an aggressive and appropriate marketing support campaign to create awareness on the availability of the various products at the Agent's designated Regions/Depots/Silos staff in advising farmers on the appropriate method of the products application. That the supplier shall offer a Ten (10) % discount on all products delivered at the Boards designated Regions/Depots/Silos to the first (200) farmers that purchase their products.

The Principal shall also undertake training and capacity building of Agent's proposed staff to create awareness and boost product marketing.

9. INDEMNITY

The Principal hereby agrees to indemnify the Agent and keep indemnified against all third party action claims, which may be suffered or incurred by the buyer arising from the quality of the fertilizer supplied to the Agent by the Principal under this contract including matters touching on intellectual Property, Tax Obligation and Statutory compliance.

10. FORCE MAJEURE

Neither party shall be liable for any loss, damage or delay caused by war, riots, civil commotion, strikes, lockouts, labor troubles, government action or any other cause or contingencies beyond its reasonable control which prevent or delay it in performing any obligations incurred under or arising out of this contract provided that either party shall be entitled to such extension of time as is required by that party to fulfil its obligations under this contract.

11. AMENDMENT

This contract may only be amended with prior written request and mutual consent of both parties duly signed by the authorized representatives of both parties.

12. TERMINATION OF THE CONTRACT

If the Principal defaults on any of the terms and conditions of this agreement, the Agent shall have the right to serve notice on the Principal requiring the Principal to remedy the default or omission specified in the notice within a period of Two (2) weeks of receipt of the notice and in event of the Principal failing to remedy the default or omissions so specified within the said



period of One (1) Month, the Agent shall terminate this agreement forthwith. Upon such termination this contract together with the bank guarantee issued by the Agent's bank herein become null and void.

13. DISPUTE RESOLUTION

Any disputes or questions which may arise at any time hereafter the parties hereto which the parties cannot be settled amicably between the parties shall be settled by reference to arbitration to be conducted by a sole arbitrator to be appointed by mutual agreement between the parties or in default of such agreement within the period of fourteen (14) days, the Agent shall terminate this agreement forthwith. Upon such termination this contract shall become null and void.

14. GOVERNING LAW

The law governing this Agreement shall be The Laws of Kenya. The parties will try to resolve any dispute relating to this Agreement by negotiation between senior managers of the parties. If the parties are unable to resolve the dispute, the dispute shall then be taken for arbitration, failure which it will then be subject to the jurisdiction of the High Court of Kenya.



IN WITNESS Whereof the parties hereto have duly affixed their respective hands to this Contract on the day and year first herein before written.

SIGNED for and on behalf of:  
NATIONAL CEREALS AND  
PRODUCE BOARD

NATIONAL CEREALS AND PRODUCE BOARD  
P O BOX 60388 - 00100,  
NAIROBI

In the presence of: -

J. K. NGETICH  
CORPORATION SECRETARY

JOSEPH M. KIMOTE (MBS)  
MANAGING DIRECTOR

Signed for and on behalf of  
51 CAPITAL, AFRICAN DIATOMITE INDUSTRIES  
By the duly authorized representatives

NAME: Abraham Gitau Wajiri  
WITNESS

NAME: JOSIAH KIMANI KARUKI  
DIRECTOR

51 CAPITAL AFRICA DIATOMITE INDUSTRIES  
P O Box 5248-00506, NAIROBI  
30 MAR 2022  
Tel: 0741 437 505  
SIGN:

This is the Exhibit marked FML-21...  
referred to in the annexed affidavit of  
Franklin Mithika Linturi  
Sworn before me this 6th  
Declared May 24, 2024 at Nairobi  
day of May 24, 2024 at Nairobi  
In the Republic of Kenya

GILONGA J. M' LIMBINE  
ADVOCATE (Specialized in Law) AND CPS  
P. O. BOX 12579 NAIROBI  
MOB 0722 240091  
DATE 06/05/2024 SIGN



REPUBLIC OF KENYA

17

**MINISTRY OF AGRICULTURE AND LIVESTOCK DEVELOPMENT  
OFFICE OF THE CABINET SECRETARY**

Telephone: 2718870/9  
Website: [www.kilimo.go.ke](http://www.kilimo.go.ke)  
Email: [cabinetsecretary@kilimo.go.ke](mailto:cabinetsecretary@kilimo.go.ke)

KILIMO HOUSE  
CATHEDRAL ROAD  
P.O. BOX 30028-00100  
NAIROBI

Ref: No. MOALF/CS/SC/7

20<sup>th</sup> December 2023

The Chief Executive Officer  
National Cereals and Produce Board  
Nafaka House, Machakos Road, Industrial Area  
P.O. Box 30586-00100  
**NAIROBI**

**SUPPLY OF PLANTING FERTILIZER FOR THE YR 2024 LONG RAINS  
SEASON**

Reference is made to above mentioned subject matter.

I am aware that the process of selection of qualified vendors to supply fertilizers for the long-rains season of 2024 is at an advanced stage. However, the specifications for the planting fertilizer was not clear from the advertisement that was done. There is therefore need to ascertain the quality and composition of fertilizers before delivery to ensure that farmers get the right fertilizer to suit their planting requirements and boost agricultural productivity.

The purpose of this letter therefore is to request you to ask the suppliers to confirm in writing the **fertilizer chemical composition** they will supply before delivery. This is a measure to ensure there is full compliance before delivery. You are required to furnish me with the details before delivery of the fertilizers.

Hon. Mithika Linturi, EGH  
**CABINET SECRETARY**

Copy to: Principal Secretary  
State Department for Agriculture

# DELIVERY NOTE

DATE	NAME	DESCRIPTION	No.	NAME OF PERSON RECEIVING	SIGNATURE
20/12/23	The Chief Executive office NCPB Nairobi	supply of planting Fertilizers MOAF/CS/SC/7	}		
21/12/23	The Chief Executive Officer National Council of Producer Board (NCPB) Nairobi House	MOAF/CS/SC/7			
24/12/23	Hon. Elizabeth Mwangi, CS Cabinet Secretary Ministry of Education	MOAF/CS/ADM/CS		Caroline	21/12





THE REPUBLIC OF KENYA

LAWS OF KENYA

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THE EVIDENCE ACT

CHAPTER 80

Revised Edition 2023 [1963]

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with the Authority of the Attorney-General

[www.kenyalaw.org](http://www.kenyalaw.org)

This is the Exhibit marked "FML-23" referred to in the annexed affidavit of declaration

Franklin Mithika Linturi

Sworn before me this 6th

day of May 20, 2024 at Nairobi

In the Republic of Kenya

**GITONGA M'LIMBINE**  
Commissioner for Oaths and CPS  
ADVOCATE AND COMMISSIONER FOR OATHS AND CPS  
P. O. Box 12618 - 00100, NAIROBI  
MOB: 0722 240091  
DATE: 06/05/2024 SIGN: [Signature]

*Evidence*

- (g) the existence, title and national flag of every State and Sovereign recognized by the Government;
- (h) natural and artificial divisions of time, and geographical divisions of the world, and public holidays;
- (i) the extent of the territories comprised in the Commonwealth;
- (j) the commencement, continuance and termination of hostilities between Kenya and any other State or body of persons;
- (k) the names of the members and officers of the court and of their deputies, subordinate officers and assistants, and of all officers acting in execution of its process, and also of all advocates and other persons authorized by law to appear or act before it;
- (l) the rule of the road on land or at sea or in the air;
- (m) the ordinary course of nature;
- (n) the meaning of English words;
- (o) all matters of general or local notoriety;
- (p) all other matters of which it is directed by any written law to take judicial notice.

(2) In all cases within subsection (1) of this section, and also on all matters of public history, literature, science or art, the court may resort for its aid to appropriate books or documents of reference.

(3) If the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it considers necessary to enable it to do so.

[L.N. 22 of 1965.]

#### **61. Facts admitted in civil proceedings.**

No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing they agree, by writing under their hands, to admit, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the court may in its discretion require the facts admitted to be proved otherwise than by such admissions.

### PART II – ORAL EVIDENCE

#### **62. Oral evidence.**

All facts, except the contents of documents, may be proved by oral evidence.

#### **63. Oral evidence must be direct.**

- (1) Oral evidence must in all cases be direct evidence.
- (2) For the purposes of subsection (1) of this section, "direct evidence" means—
  - (a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;
  - (b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;
  - (c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;

- (d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:

Provided that the opinion of an expert expressed in any treatise commonly offered for sale, and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.

(3) If oral evidence refers to the existence or condition of any material thing, other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection.

#### **63A. Teleconferencing and video conferencing**

(1) A court may receive oral evidence through teleconferencing and video conferencing.

(2) The Chief Justice may develop regulations to govern the use of teleconferencing and video conferencing.

[Act No. 19 of 2014, s. 30.]

### **PART III – DOCUMENTARY EVIDENCE**

#### **64. Proof of contents of documents.**

The contents of documents may be proved either by primary or by secondary evidence.

#### **65. Primary evidence.**

(1) Primary evidence means the document itself produced for the inspection of the court.

(2) Where a document is executed in several parts, each part is primary evidence of the document.

(3) Where a document is executed in counterpart each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

(4) Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original they are not primary evidence of the contents of the original.

(5) Notwithstanding anything contained in any other law for the time being in force—

- (a) a micro-film of a document or the reproduction of the image or images embodied in such micro-film; or
- (b) a facsimile copy of a document or an image of a document derived or captured from the original document; or
- (c) a statement contained in a document and included in printed material produced by a computer (hereinafter referred to as a "computer print-out"),

shall, if the conditions stipulated in subsection (6) of this section are satisfied, be deemed to also be a document for the purposes of this Act and shall be admissible in any proceedings without further proof of production of the original, as evidence

J. C.\*

LEJZOR TEPER . . . . . APPELLANT;

1952  
May 28;  
July 1.

AND

THE QUEEN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

*Criminal Law — Evidence — Identification — Hearsay — Admissibility—Res gestae—Principles applicable—Costs.*

At the trial of the appellant on a charge of maliciously and with intent to defraud setting fire to a shop in which he carried on the business of a dry goods store, evidence given by a police constable was admitted for the purpose of identification, and without objection, that: "I heard a woman's voice shouting 'Your ' place burning and you going away from the fire ' ; immediately " then a black car " came from the direction of the fire, and " in " the car was a fair man resembling accused. I did not observe " the number of the car. I could not see the fire from where I was " standing." In cross-examination he said that he did not know who or where the woman was. She was not a witness at the trial, and it was common ground that the incident took place at a distance of more than a furlong from the site of the fire and that it happened not less than 26 minutes after the fire was started:—

*Held*, that the words spoken by the woman did not form part of the *res gestae* and were not therefore excepted from the fundamental rule against the admission of hearsay evidence. The evidence was wrongly admitted, and there being no other evidence of identification which was of any value, and the circumstantial evidence which alone the Crown had to rely on to connect the appellant with the commission of the crime being inconclusive for the purpose, the conviction was set aside.

While it could not be said that there was no legal evidence to support a verdict of guilty, nevertheless the admission of the police constable's hearsay evidence was, having regard to the weakness of the other evidence, so prejudicial to the accused that it deprived him of the substance of a fair trial and the protection of the law, and he had discharged the burden of establishing that there had been a real miscarriage of justice.

To be admissible, it is essential that words sought to be proved by hearsay evidence should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it in time, place and circumstances, that they are part of the thing being done, and so an item or part of real evidence and not merely a reported statement. Hearsay evidence for the purpose of identification should only be allowed if it satisfies the strictest test of close association with the event in time, place and circumstance, and in a criminal trial the event with which the words sought to

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\* *Present*: LORD NORMAND, LORD OAKSEY and LORD TUCKER.

be proved must be so connected as to form part of the *res gestae* is the commission of the crime itself—here the setting fire to the building.

*Regina v. Bedingfield* (1879) 14 Cox C.C. 341; *O'Hara v. Central S.M.T. Co.* 1941 S.C. 363; *Rex v. Christie* [1914] A.C. 545; and *Regina v. Gibson* (1887) 18 Q.B.D. 537 considered.

There were no circumstances which would justify a departure from the ordinary rule of practice of the Board against giving costs to the successful appellant in a criminal appeal.

*Johnson v. The King* [1904] A.C. 817, 825 applied; *Waugh v. The King* [1950] A.C. 203 distinguished.

APPEAL (No. 47 of 1951), by special leave, against the conviction of the appellant, Lejzor Teper, in the Supreme Court of British Guiana (Hughes J. and a jury) (February 7, 1951), on the charge that he maliciously and with intent to defraud set fire on October 9, 1950, to a shop belonging to his wife in Regent Street, Georgetown, in which he carried on the business of dry goods store. He was sentenced to seven years' penal servitude. It was clearly proved that the shop had been maliciously set on fire. On the intent to defraud the Crown's case was that the appellant, having insured the building and stock for sums considerably above their real value, set fire to them with the intention of claiming against the insurance companies.

The grounds of the appeal were that hearsay and incompetent evidence was admitted for the purpose of identifying the accused as the man who set the premises on fire, that that evidence was in a high degree prejudicial to the appellant, and that the other evidence against him was such that no reasonable jury, properly directed, could have convicted him on it alone, or at least that it was so flimsy and inconclusive that it must have been outweighed by the hearsay evidence in the jury's consideration of the evidence as a whole. The contentions for the Crown were that the impugned evidence was properly admitted as part of the *res gestae*, that even if it was inadmissible the appellant suffered no real prejudice, and that the other evidence was amply sufficient to entitle a reasonable jury to convict.

The witness whose evidence was impugned was police constable Cato. He came on duty about 2 a.m. on October 9 and then went along a street named Camp Street towards Regent Street. He heard a shout of fire, and then one fire engine passed, and after it a second fire engine, both going along Regent Street. He stopped at the corner of Regent and Camp Street. His evidence continued: "There were crowds going east and west

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“ along Regent Street to and from the fire. I heard a woman’s voice shouting ‘ Your place burning and you going away from ‘ the fire ’ ; immediately then a black car which was proceeding west along Regent Street turned north into Camp Street ; in the car was a fair man resembling accused. I did not observe the number of the car. I could not see the fire from where I was standing.” In cross-examination he said that he did not know who or where the woman was. She was not a witness at the trial. It was common ground that the incident took place at a distance of more than a furlong from the site of the fire and that it happened not less than 26 minutes after the fire was started.

In British Guiana provision had now been made for a Court of Criminal Appeal, but at the date of this conviction the only means of bringing it under judicial review was by a case stated by the judge of the court before whom the cause had been tried for the opinion of the Court of Appeal (Criminal Law (Procedure) Ordinance, Title 12). The appellant applied to the judge to state a case on the admissibility of Cato’s evidence, but the application was refused. The decision of the judge refusing the application was not under appeal.

1952. May 26, 27, 28. *G. D. Roberts Q.C., Dingle Foot, C. Lloyd Luckhoo and M. P. Soloman* for the appellant. In view of the fact that no one had identified the man seen driving the car as the appellant the trial judge was wrong in holding that the words which the witness Cato heard a woman use were admissible as part of the *res gestae*. The fact that the evidence was not objected to by the appellant is, on the authorities, immaterial; no injustice, no breach of the rules of fair trial can be waived by counsel for the accused. Instead of directing the jury that the evidence in question, although not conclusive, might “ tie up ” with other evidence, the judge should have directed the jury to disregard this evidence altogether. The evidence cannot be taken as truth of the statement, but merely of the fact that the statement was made. The prosecution made out no case; they did not prove that the appellant was on the spot at the time, and it was not suggested that he was under any financial stringency— exactly the opposite was proved by the prosecution. Certainly there was a deliberate setting on fire by somebody who used petrol, but that in itself is not sufficient. The appellant was stocking his premises all the time, and that is the last thing he would do if he intended to set fire to his store; he said that to do

so would be burning his living. None of the elements of deliberate arson which one would expect to find is present here.

The trial judge refused to state a case for the consideration of the Court of Appeal in British Guiana. (A Court of Criminal Appeal in British Guiana has been created only this year, and therefore it has no jurisdiction over the present appeal.) It is submitted that the two authorities cited by the trial judge in his decision not to state a case—*The Schwalbe*<sup>1</sup> and *Mersey Docks Board v. Liverpool Gas Co.*<sup>2</sup>—are no support at all for the admission of this evidence. Its admission as part of the res gestae is carrying the rule very much further than it has ever been carried before. The prosecution, having had no evidence of identity at all, have sought to introduce evidence which cannot be cross-examined, and in respect of which all the normal safeguards are missing; that raises a question of natural justice and justifies the intervention of this Board. There appears to be no case in which this rule of the admission of hearsay evidence as part of the res gestae has ever been used in an endeavour to give evidence of identity.

With regard to the relevant authorities on the question of statements admitted as part of the res gestae, apparently the first use or application of the rule was in *Thompson v. Trevanion*.<sup>3</sup> It was said in *Rouch v. G.W. Ry.*<sup>4</sup> that "the principle of admission is, that the declarations are pars rei gestae." The rule has been laid down in later cases: *Rex v. Foster*,<sup>5</sup> and *The Schwalbe*,<sup>6</sup> on which the judge below relied. The leading case is *Regina v. Bedingfield*,<sup>7</sup> which, it is submitted, corrected the somewhat too wide decisions of the period before 1879, and it was approved later in *Rex v. Christie*<sup>8</sup> in the House of Lords. *Regina v. Gibson*<sup>9</sup> is in some respects not unlike the facts of the present case: in that case Lord Coleridge C.J. said: "I am of opinion that this conviction must be quashed. At the trial the statement of a passer-by as to where the prisoner had gone was received in evidence as tending to his identification. It is admitted that the statement was not made in the prisoner's hearing, and therefore could not legally be given in evidence against him." It seems uncertain how far any of these cases on the res gestae rule admit evidence of identification. In

<sup>1</sup> (1859) Swab. 521.

<sup>2</sup> "The Times," Aug. 23, 1875.

<sup>3</sup> (1693) Skin. 402.

<sup>4</sup> (1841) 1 Q.B. 51, 60.

<sup>5</sup> (1834) 6 C. & P. 325.

<sup>6</sup> Swab. 521, 523.

<sup>7</sup> (1879) 14 Cox C.C. 341.

<sup>8</sup> [1914] A.C. 545.

<sup>9</sup> (1887) 18 Q.B.D. 537, 540.

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*Gibson's case*<sup>9</sup> it was an anonymous woman's statement which was offered in evidence to strengthen the prosecution evidence as to identity, and neither counsel for the prosecution nor the judge ever apparently considered it possible to suggest that this statement of an unidentified bystander was part of the *res gestae*. [Reference was also made to *Rex v. Thomson*.<sup>10</sup>] *Rex v. Christie*<sup>11</sup> is a very long way from the facts of the present case, but there are some references to *res gestae*: *per* Lord Atkinson<sup>12</sup>: "The boy's statement was so separated by time and " circumstances from the actual commission of the crime that it " was not, I think, admissible as part of the *res gestae* "; and Lord Reading said<sup>13</sup>: " In my view it was not so immediately " connected with the act of assault as to form part of the *res gestae*," and *Regina v. Bedingfield*<sup>14</sup> was cited. It does underline again the need for spontaneity—contemporaneity; there it was not sufficiently contemporaneous to be part of the *res gestae*.

There is one slightly different point. As stated in Phipson on Evidence, 8th ed., at p. 61: " Declarations are no proof of the " fact they accompany; the existence of the fact must be " established independently." If the statement of the unidentified woman in the present case was admissible at all, it would only be admissible to prove that she thought that she saw the owner of a building which she thought was on fire. It would not be evidence to prove, or support any evidence, that the appellant was at the scene of the fire. She might not even have known which building was on fire. In support of the contention that the statement is not evidence of the truth of the matter stated, see *Lloyd v. Powell Duffryn Steam Coal Co. Ltd.*<sup>15</sup>

No case is to be found which comes anywhere near this case, suggesting that the statement of this unidentified woman 230 yards away from the fire and 26 or more minutes after it started could be admissible on the authority of any known principle, or be said to be part of the *res gestae*. An irregularity in the trial cannot be cured by consent of counsel: *Abdul Rahman v. King-Emperor*.<sup>16</sup> There was no other evidence of identification and therefore it cannot be said, having regard to all the circumstances of the case, that if this evidence had been excluded a reasonable jury, properly directed, must have found the appellant guilty,

<sup>9</sup> (1887) 18 Q.B.D. 537, 540.

<sup>10</sup> [1912] 3 K.B. 19, 21.

<sup>11</sup> [1914] A.C. 545.

<sup>12</sup> *Ibid.* 556.

<sup>13</sup> *Ibid.* 566.

<sup>14</sup> 14 Cox C.C. 341.

<sup>15</sup> [1914] A.C. 733, 752.

<sup>16</sup> (1926) L.R. 54 I.A. 96.

and there has been a substantial miscarriage of justice justifying the intervention of the Board in accordance with the well-known rule: *Dharmasena v. The King*.<sup>17</sup> The accused has been deprived of a fair trial in this case. The circumstances of this case are such that the appellant should be given his costs throughout: *Johnson v. Rex*<sup>18</sup> and *Waugh v. The King*.<sup>19</sup>

*C. Lloyd Luckhoo* followed, and dealt with the facts, the evidence and the time factor.

*Gahan Q.C.* and *Godfrey Le Quesne* for the Crown. In *Renouf v. Attorney-General for Jersey*<sup>20</sup> the Board recognized that there had been a serious misdirection, but nevertheless they dismissed the appeal. On the facts of the present case, if any inadmissible evidence were excluded a reasonable jury properly directed and having regard only to admissible evidence would have convicted the accused, and there has been no substantial miscarriage of justice. First, on the question whether or not the impugned evidence was admissible, it is difficult to get a clear statement from the authorities as to the rule governing the admission of hearsay evidence as part of the *res gestae*. What is the *res*? In this case it might be either of two things, the fire, or the evidence given of the incident in which Cato observed this motor-car. If it be taken as the setting of the fire and all the incidents connected with it, there is, it is frankly admitted, the greatest difficulty in saying that what some person stated was part and parcel of the fire. It would not be possible for evidence to be given that this or that spectator at the fire heard some other spectator say that he had seen the accused at the scene of the fire; that could only be proved by direct evidence of the person who saw the accused at the scene. The evidence of Cato was in effect that this woman's shout directed his attention to a motor-car, and that therefore he observed a motor-car and saw in it a person whom he could not definitely identify, but it was a fair man resembling the accused. The evidence of Cato properly included evidence, as part of the *res gestae*, of the contemporaneous remark which caused him particularly to notice the passing motor-car and its driver. [Reference was made to *O'Hara v. Central S.M.T. Co.*,<sup>21</sup> to Stephen's Digest of the Law of Evidence, art. 3, and to the judgment of Parke B. in *Wright v. Doe. d. Tatham*.<sup>22</sup>]. There is nothing to show that this evidence, if it were inadmissible, had any serious prejudicial

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effect, and there has been no miscarriage of justice: *Stirland v. Director of Public Prosecutions*.<sup>23</sup> If there is such evidence that any reasonable jury properly directed and confining its attention to the admissible evidence, would convict, then the conviction would stand although counsel had raised no objection to the reception of inadmissible evidence. Apart from Cato's evidence, the guilt of the accused was proved beyond any reasonable doubt.

The practice is that in no criminal appeals, unless there are very exceptional circumstances, will the Board allow costs. The general rule is expressed in *Shamdasani v. King Emperor*.<sup>24</sup>

*Le Quesne* followed.

*G. D. Roberts Q.C.* replied.

May 28. Lord Normand announced that their Lordships would humbly advise Her Majesty that the appeal should be allowed, and that they would give their reasons later.

July 1. The reasons of their Lordships for allowing the appeal were delivered by LORD NORMAND, who stated the facts set out above and continued:—An important question of principle is involved in the issue on the admission of the evidence, and their Lordships propose to deal with it at once. That approach to the appeal carries with it no inconvenience, for this evidence is concerned with an incident which stands apart from the matters dealt with in the rest of the evidence.

The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost. Nevertheless, the rule admits of certain carefully safeguarded and limited exceptions, one of which is that words may be proved when they form part of the *res gestae*. The rules controlling this exception are common to the jurisprudence of British Guiana, England and Scotland. It appears to rest ultimately on two propositions, that human utterance is both a fact and a means of communication, and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words, and the dissociation of the words from the action would impede the discovery of truth. But the judicial applications of these

<sup>23</sup> [1944] A.C. 315, 327.

<sup>24</sup> (1945) L.R. 72 I.A. 189.

two propositions, which do not always combine harmoniously, have never been precisely formulated in a general principle. Their Lordships will not attempt to arrive at a general formula, nor is it necessary to review all of the considerable number of cases cited in the argument. This, at least, may be said, that it is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it, in time, place and circumstances, that they are part of the thing being done, and so an item or part of real evidence and not merely a reported statement: *The Queen v. Bedingfield*,<sup>25</sup> *O'Hara v. Central S.M.T. Co.*<sup>26</sup>

How slight a separation of time and place may suffice to make hearsay evidence of the words spoken incompetent is well illustrated by the two cases cited. In *Bedingfield's* case<sup>27</sup> a woman rushed with her throat cut out of a room in which the injury had been inflicted into another room where she said something to persons who saw her enter. Their evidence about what she said was ruled inadmissible by Cockburn C.J. In *O'Hara's* case,<sup>28</sup> a civil action, the event was an injury to a passenger brought about by the sudden swerve of the omnibus in which she was travelling. The driver of the omnibus said in his evidence that he was forced to swerve by a pedestrian who hurried across his path. Hearsay evidence of what was said by a man on the pavement at the scene of the accident as soon as the injured party had been attended to was held to be admissible in corroboration of the driver's evidence. But what was said 12 minutes later, and away from the scene, by the same man was held not part of the *res gestae*. In *Christie's* case,<sup>29</sup> the principle of the decision in *Bedingfield's* case<sup>30</sup> was approved by Lord Reading, with whom Lord Dunedin concurred, and no criticism of it is to be found in the speeches of the other noble and learned Lords who sat with them. In *The Queen v. Gibson*<sup>31</sup> the prosecutor gave evidence in a criminal trial that, immediately after he was struck by a stone, a woman going past pointing to the prisoner's door said, "the person who threw the stone went in there." This evidence was not objected to at the trial, but it was admitted by counsel for the prosecution in a case reserved that the evidence was incompetent. The conviction was quashed,

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and from their judgments it is clear that the judges who took part in the decision were far from questioning the correctness of counsel's admission. In *Gibson's case*<sup>31</sup> the words were closely associated in time and place with the event, the assault. But they were not directly connected with that event itself. They were not words spontaneously forced from the woman by the sight of the assault, but were prompted by the sight of a man quitting the scene of the assault and they were spoken for the purpose of helping to bring him to justice.

The special danger of allowing hearsay evidence for the purpose of identification requires that it shall only be allowed if it satisfies the strictest test of close association with the event in time, place and circumstances. "Identification is an act of the mind, and "the primary evidence of what was passing in the mind of a man "is his own testimony, where it can be obtained. It would be "very dangerous to allow evidence to be given of a man's words "and actions, in order to show by this extrinsic evidence that he "identified the prisoner, if he was capable of being called as a "witness and was not called to prove by direct evidence that he "had thus identified him": *Christie's case*, per Lord Moulton.<sup>32</sup>

There is yet another proposition which can be affirmed, that for identification purposes in a criminal trial the event with which the words sought to be proved must be so connected as to form part of the *res gestae*, is the commission of the crime itself, the throwing of the stone, the striking of the blow, the setting fire to the building or whatever the criminal act may be. The respondent's counsel submitted that any relevant event or action may be accompanied by words which may have to be proved in order to bring out its true significance. There is a limited sense in which this is true, but it is not always true, and much depends on the use to be made of the evidence. In *Christie's case*<sup>32</sup> hearsay evidence of certain words uttered by a child, the victim of an indecent assault, in the presence and hearing of the accused were held to be admissible in explanation of the demeanour of the accused in response to them. But the evidence was held inadmissible for the purpose of showing that the child identified the accused as his assailant. In the present case identification is the purpose for which the hearsay was introduced, and its admission goes far beyond anything that has been authorized by any reported case.

Before assessing the prejudice caused by the wrongful admission of the hearsay evidence, and deciding whether it affected the

<sup>31</sup> 18 Q.B.D. 597.

<sup>32</sup> [1914] A.C. 545, 558.

substantial justice of the trial, the nature and effect of the other evidence must be looked at. One important observation falls to be made at the outset. There was no other evidence of identification that was of any value, and the effect of this on the jury's mind would not improbably be to throw into relief the hearsay evidence and to give it prominence. Another result is that the Crown has to rely on circumstantial evidence only to connect the appellant with the commission of the crime. Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. Joseph commanded the steward of his house, "put my cup, the silver cup, in the sack's "mouth of the youngest," and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

Over-insurance of the stock or building by the appellant would, if proved, have been a most material circumstance, and the Crown therefore made every effort to prove it. Their Lordships have carefully considered the evidence about the policies of insurance entered into by the appellant, and they are satisfied that the Crown's case on over-insurance completely broke down. There was no attempt to obtain insurance without the inspection of the subjects insured by the companies' agents, and there was no concealment of previous policies when further cover was being negotiated. There was no evidence of irregular disposal of stock after insurance was effected, and no evidence that the appellant could have had any expectation of recovering more than the value of stock or buildings destroyed. Furthermore, it was proved that the appellant had purchased and received delivery of goods for stock up to the eve of the fire, and that his dealings with wholesalers had been honest and above board. It was also proved that he had in bank at the time of the fire a sum of about \$12,000. It was truly said that evidence of over-insurance goes to motive and that it is not necessary for the Crown to prove the motive of a crime. But the failure to prove motive in this case left the Crown with the heavy onus of satisfying the jury that the appellant wilfully destroyed his property without any proved prospect of gain.

The Crown relied greatly on evidence that the back door of the

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building, which had been locked by a padlock on the outside and also fastened by a bar fixed by nails on the inside when the shop was closed at 4 p.m. on the afternoon before the fire, was found at the time of the fire to be neither padlocked nor barred. The appellant had volunteered to the police a statement that he had returned to the shop at about 5.30 p.m. to get a satchel for his daughter. The suggestion is that he went back to the shop at that time to unfasten the bar on the inside and so to make it possible, when he returned at night to set fire to the premises, to enter quietly by the back door instead of by the front door, which made a noise when it was opened. There would have been great force in this if it had been proved that the windows were all securely fastened, but that was not proved. It cannot be left out of account that someone other than the accused may have entered by a window after taking the precaution of unlocking the padlock of the back door so that he would have a ready means of escape after he started the fire. The evidence leaves the matter in a state of suspicion and doubt, but it is inconclusive.

On the other hand, the appellant had the opportunity, and perhaps a better opportunity than anyone else, of preparing and carrying out the crime. There is evidence that, with the exception of some petrol, all the combustible materials, such as wooden boxes and straw, used to start the fire had been kept in the premises and that pains had been taken by the criminal to ensure the destruction of the stock book, cash book and some other business documents. These are circumstances of suspicion pointing to the appellant, but an intelligent jury ought not to omit to consider that any criminal who maliciously set fire to the appellant's premises might naturally have first acquainted himself with their contents and might also have maliciously tried to make sure of the destruction of the appellant's business books, either in order to embarrass the appellant or to throw suspicion on him.

Lastly, the Crown relied on the appellant's conduct. He does not appear to have been told by anyone that a fire had occurred on his premises. He said in his statements to the police that he spent the night of October 8 to 9 at home with his wife; he then said: "At 8 a.m. I was going to the Esso filling station to get "gasolene when I saw a crowd standing opposite my store; I "went up and noticed the building was gutted with fire and my "stock destroyed by fire. It was only then that I learnt of the "disaster." It was submitted that this shows a very casual attitude on the part of an innocent man whose property has been

burnt. But if the meaning of the statement is that the appellant gave only a cursory glance at his gutted store, it is almost equally inexplicable whether he was himself the cause of the fire or not. It is not profitable to speculate about the meaning which the jury may have attached to this piece of evidence or about the inference which they may have drawn from it. There is more cogency in the point that, if his story was true, he had a good alibi and yet no member of his household was called to testify that he was at home in bed when the fire occurred. That is a circumstance which might well have caused the jury to doubt the appellant's innocence. The appellant did not give evidence, but the question is whether the Crown proved its case by competent evidence and in a trial which was not vitiated by the admission of incompetent evidence.

The circumstantial evidence falls short of conclusiveness, and a properly instructed jury having it alone before it would have had a more than usually difficult decision to make. There were several circumstances pointing to the appellant's guilt, and though not one of them alone was of great moment, yet juncta juvant and it could not have been said that there was no legal evidence to support a verdict of guilty. That, however, does not decide the issue of the appeal. It is now necessary to consider whether the admission of Cato's hearsay evidence was, having regard to the weakness of the other evidence, "something which" deprived the accused of the substance of fair trial and the "protection of the law" (*Ibrahim v. The King*<sup>33</sup>; *Renouf v. Attorney-General for Jersey*<sup>34</sup>; *Dharmasena v. The King*<sup>35</sup>). It is a principle of the proceedings of the Board that it is for the appellant in a criminal appeal to satisfy the Board that a real miscarriage of justice has occurred. In *Dal Singh v. The King Emperor*,<sup>36</sup> it was observed in a case where this Board had no ground for doubting that the appellant had been properly convicted, that the mere admission of incompetent evidence, not essential to the result, is not a ground for allowing an appeal against conviction. In the same case it was stated that "the dominant question is the broad one whether substantial justice has been done" and that in the particular case the question was "whether looking at the proceedings as a whole, and taking into account what has properly been proved, the conclusion come to has been a just one."<sup>37</sup>

<sup>33</sup> [1914] A.C. 599.

<sup>34</sup> [1936] A.C. 445.

<sup>35</sup> [1951] A.C. 1.

<sup>36</sup> (1917) L.R. 44 I.A. 137.

<sup>37</sup> *Ibid.* 146.

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Their Lordships have therefore in the end to decide whether the appellant has shown that the improper admission of the hearsay evidence of identification was so prejudicial to the appellant, in a case where the rest of the evidence was weak, that the proceedings as a whole have not resulted in a fair trial. The test is whether on a fair consideration of the whole proceedings the Board must hold that there is a probability that the improper admission of hearsay evidence turned the scale against the appellant.

Their Lordships are satisfied that the hearsay evidence was in a high degree prejudicial. Its effect may be gauged by considering what Cato's evidence would have amounted to if it had been excluded. He could then only have said that in consequence of something heard by him his attention was directed to a man driving a black car who resembled the appellant. This evidence would have been worthless for the purpose of identifying the appellant with the man who set fire to a building a furlong away and 26 minutes earlier. It is the hearsay and the hearsay alone which gives dramatic force to Cato's otherwise valueless evidence of identification, and confers on it a specious importance. It is impossible to avoid the conclusion that the jury might well, and probably did, regard Cato's hearsay evidence as sufficient to turn the scale. Counsel for the Crown sought to belittle the prejudice. It was said that the fact that no objection was taken to it at the trial should be allowed "to have some bearing on the question whether the accused was really "prejudiced" (*Stirland v. Director of Public Prosecutions*<sup>38</sup>). That is a consideration which weighs in a case where the evidence improperly admitted would not by its nature cause serious prejudice, or where the other evidence left little or no reasonable doubt of the appellant's guilt. But it is of no real moment in the present case. It was also submitted that the direction of the judge in his charge sufficiently safeguarded the appellant. The jury were directed that the evidence was not conclusive, but that it could be taken along with other evidence, and that if from other facts the jury found that the accused was there, this evidence "tied up with it." Cato's whole evidence was accordingly left to the jury's consideration to make of it what they could along with the other evidence. It is not necessary to decide what would have been the result if there had been a clear direction to disregard entirely the hearsay evidence. But no

<sup>38</sup> [1944] A.C. 315.

direction short of that could avail to save the verdict, and the appeal must succeed.

The result was intimated to the parties at the conclusion of the argument. Thereupon the appellant's counsel asked for the costs of the appeal and of the proceedings in the Supreme Court. The practice of the Board is against giving expenses to the successful appellant in a criminal appeal save in very special circumstances (*Johnson v. The King*<sup>39</sup>), and special circumstances were found in *Waugh v. The King*.<sup>40</sup> In the present case there are no circumstances which would justify a departure from the ordinary rule of practice.

Their Lordships have therefore humbly advised Her Majesty that the appeal should be allowed. There will be no order as to costs.

Solicitors: *Hy. S. L. Polak & Co.; Burchells.*

<sup>39</sup> [1904] A.C. 817, 825.

<sup>40</sup> [1950] A.C. 203.

J. C.

1952

LEJZOR  
TEPER  
v.  
THE QUEEN.

NATIONAL BANK OF AUSTRALASIA LD. APPELLANT;  
AND  
SCOTTISH UNION AND NATIONAL INSUR-  
ANCE CO. LD. AND OTHERS . . . . . RESPONDENTS.

J. C.\*

1952  
July 10.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

*Australia (Queensland)—Currency—Bank—Scheme of arrangement—Issue of stock—Australian and English registers—Right to transfer from one register to another—Voluntary liquidation—Redemption of stock—Nominal value in Australian pounds.*

Pursuant to a scheme of arrangement between the Queensland National Bank and its creditors, which was sanctioned in 1897, the bank created interminable inscribed deposit stock which the registered holders of existing securities of the bank, which had arisen from deposits made either in London or in Australia, accepted in satisfaction and discharge of such securities. The scheme further provided, inter alia, that registers of the stock were to be kept at specified offices of the bank in Australia and in London, and that any registered holder was entitled at his option to have his stock

\* *Present*: VISCOUNT SIMON, LORD NORMAND, LORD OAKSEY, LORD TUCKER and LORD COHEN.