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17/10/19

REPUBLIC OF KENYA

PARLIAMENT OF KENYA LIBRARY

THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT

THIRD SESSION – 2019

DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

REPORT

ON ITS CONSIDERATION OF THE PETITION REGARDING THE UNETHICAL CONDUCT OF THE REGISTRAR OF COMPANIES BY MR. SAMUEL MATHERI HUNGU

THE NATIONAL ASSEMBLY
PAPERS LAID
DATE: 17 OCT 2019
TABLED
DATE:

CLERKS CHAMBERS
DIRECTORATE OF COMMITTEE SERVICES
PARLIAMENT BUILDINGS
NAIROBI
OCTOBER, 2019

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CHAIRPERSON'S FOREWORD

The petition was conveyed to the House by the Speaker on 11th June, 2019 and committed to Committee on 1st August, 2019 in accordance with the provisions of Standing Order No. 225 (2) (b). The Petition seeks to bring to the attention of the House regarding the unethical conduct of the Registrar of Companies.

The Petition was referred to the Departmental Committee on Justice and Legal Affairs for consideration and preparation of a report within sixty days in line with the requirements of Standing Order 227.

In considering the Petition, the Committee, during one of its sittings, held a meeting with the petitioner Mr. Samuel Matheri. The meeting was aimed at inquiring into the issues raised in the Petition.

May I take this opportunity to express gratitude to Committee Members for their resilience and devotion to duty which made the consideration of the Petition successful. May I also appreciate the Speaker and Clerk of the National Assembly for always providing guidance and direction to the Committee in discharge of its mandate. Finally, I commend the secretariat for exemplary performance in providing technical and logistical support to the Committee.

On behalf of the Departmental Committee on Justice and Legal Affairs and pursuant to the provisions of Standing Order 199 (6), it is my pleasant privilege and duty to present to the House a report of the Committee on its consideration of the petition regarding the unethical conduct of the Registrar of Companies by Samuel Matheri Hungu.

Hon. William Cheptumo, M.P.

Chairperson, Departmental Committee on Justice and Legal Affairs

1.0 PREFACE

1.1 Mandate of the Committee

1. The Departmental Committee on Justice and Legal Affairs derives its mandate from Standing Order No. 216(5) which provides for the functions of Departmental Committees as follows-

    a) Investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;

    b) Study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;

    c) Study and review all legislation referred to it;

    d) Study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;

    e) Investigate and enquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;

    f) Vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments)

    g) Examine treaties, agreements and conventions;

    h) Make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;

    i) Consider reports of Commissions and Independent Offices submitted to the House pursuant to provisions of Article 254 of the Constitution; and

    j) Examine any questions raised by Members on a matter within its mandate.

2. The Second Schedule of the Standing Orders on Departmental Committees further outlines the subjects of the Committee as follows-

    a. Constitutional affairs;
    b. The administration of law and Justice
    c. The Judiciary;
    d. Public prosecutions;
    e. Elections;
    f. Ethics, integrity and anti-corruption; and
    g. Human rights.

1.2 Committee Membership

3. The Committee was constituted on Thursday, 14th December, 2017 and comprises the following Members-

Chairperson
Hon. William Cheptumo, M.P.
MP Baringo North Constituency
Jubilee Party

Vice Chairperson
Hon. Alice Muthoni Wahome, M.P.
MP Kandara Constituency
Jubilee Party

Members

Hon. John Olago Aluoch, M.P.
Kisumu West Constituency
FORD-Kenya Party

Hon. George Peter Kaluma, M.P.
Homa Bay Town Constituency
Orange Democratic Movement Party

Hon. Roselinda Soipan Tuya, M.P.
Narok County
Jubilee Party

Hon. Charles Gimose, M.P
Hamisi Constituency
FORD-Kenya

Hon. Johana Ng'eno, M.P.
EmuruaDikirr Constituency
KANU-Party

Hon. W. Kamoti Mwamkale, M.P.
Rabai Constituency
Orange Democratic Movement Party

Hon. Ben Orori Momanyi, M.P.
Borabu Constituency
WIPER-Party

Hon. Zuleikha Hassan, M.P.
Kwale County
Orange Democratic Movement Party

Hon. Jennifer Shamalla, M.P.
Nominated MP
Jubilee Party

Hon. Beatrice Adagala, M.P
Vihiga County
African National Congress Party

Hon. Gladys Boss Shollei, CBS, M.P.
UasinGishu County
Jubilee Party

Hon. John Munene Wambugu, M.P.
Kirinyaga Central
Jubilee Party

Hon. George Gitonga Murugara, M.P.
Tharaka Constituency
Jubilee Party

Hon. Anthony Githiaka Kiai, M.P.
Mukurueni Constituency
Jubilee Party

Hon. John KiarieWaweru, M.P.
Dagoretti South Constituency
Jubilee Party

Hon. Japheth Mutai, M.P.
Bureti Constituency
Jubilee Party

Hon. Adan Haji Yussuf, M.P.
Mandera West Constituency
Economic Freedom Party

1.3 Committee Secretariat

4. The Committee secretariat comprises the following staff-

Mr. Abenayo Wasike
Senior Clerk Assistant
Lead Clerk

Mr. Denis Abisai
Principal Legal Counsel I

Ms. Halima Hussein
Clerk Assistant II

Ms. Fiona Musili
Research Officer II

Mr. Omar Abdirahim
Fiscal Analyst III

Ms. Roselyne Ndegi
Serjeant-at-Arms I

Mr. Richard Sang
Assistant Serjeant-at-Arms

Mr. Joseph Okongo
Media Liaison Officer

5. Minutes of sittings of the Committee on the consideration of the Petition are attached to this report as annexure 1.

2.0 CONSIDERATION OF THE PETITION BY THE COMMITTEE

6. The Committee commenced its consideration of the Petition by meeting the Petitioner on 19th September 2019. During the meeting, written and oral evidence was adduced as noted hereunder:-

2.1 Submissions by the Petitioner Mr. Samuel Matheri

7. Mr. Samuel Matheri appeared before the Committee to prosecute his petition regarding unethical conduct of the Registrar of Companies and submitted as follows:

(i). Midlands Limited is a public company and was incorporated by the farming community in Nyandarua through shares with the aim of securing a better share of the market value of their agri-produce.

(ii). Initially the farmers had no land but the Government of former President, His Excellency Mwai Kibaki gave them 25 acres of land.

(iii). It has a direct membership of early 3,000 and an indirect membership of close to 60,000 assuming every household of the estimated 12,000 households with an interest in the company has on average 5 members.

(iv). The numbers of households is estimated from the 40 odd shareholder self-help groups with an average membership of 250 together with the more than 2,700 who hold shares as individuals

(v). Successive Boards adhered to this provision of ensuring of holding Annual General Meetings (AGMs) every year since the company was launched on April 30th 2004 until January 2012. However the Board which was installed on January 2012 ignored this provision and no AGM was held until a member-requisitioned meeting on February 24th 2018.

(vi). The members wrote to the sitting Board and notified the Registrar giving the statutory 21 days for the Board to convene a meeting failure to which members would call for one however the period lapsed without either the Board or the registrar responding.

(vii). Members gave notice of a meeting accordingly and the sitting Board "went into flurry trying in every way" to derail the meeting. The meeting went successive and Secretary General was elected and the resolution was forwarded to the Registrar of Companies.

(viii). After the meeting the farmers were informed by the Registrar that they had not filed returns on time and that the Registrar had made the file inaccessible online forcing the secretary to make manual returns.

(ix). The Registrar of Companies stated to them that the newly elected Secretary was not properly appointed on grounds that the previous Secretary had not been involved.

(x). The Registrar of Companies later agreed to register the new officials for Midlands Limited and wrote to the petitioners accordingly. However, seven days later, the Registrar withdrew that letter and "purported" to reverse the planned registration.

(xi). It was "rumored that the illegitimate previous Board was working feverishly behind the scenes to transfer the company to an offshore shadow entity registered in notorious money laundering territory and tax-haven namely, the Island of Nevis in the West Indies call Primestar Holding Ltd".

(xii). The petitioner prays that Parliament–

(a) Investigates the conduct of the Registrar of Companies in relation to the matters raised in the Petition regarding Midlands Ltd;`

(b) Investigates the conduct of the Board with regard to the matters raised in the Petition with the aim of having the Board disbanded;

(c) Investigates the matter with the view of revealing the identity of the owners of Primestar Holdings Ltd which is the intended transferee.

2.2 Submissions by Mr. Kenneth Gathuma, Registrar of Companies and the Acting Director General of the Business Registration Service

8. Following the meeting with the Petitioner Mr. Samuel Matheri, the Committee invited the Registrar of Companies via a letter dated 23rd September, 2019 to apprise the Committee on the petition and specifically to address the following issues:-

(i). details of the current directorship of Midlands Ltd;
(ii). details of the returns filed by Midlands Ltd as required under the Companies Act;
(iii). registration status of Primestar Holding Ltd; and
(iv). Written justification why Mr. Samuel Matheri (Petitioner) has not been registered as a director of Midlands Ltd.

The Registrar of Companies and Acting Director of the Business Registration Service Mr. Kenneth Gathuma appeared before the Committee on Thursday 26th September, 2019 and submitted; THAT

9. From the records held at the registry index as at the 25th September, 2019 ,the Directors of Midland Limited C.1/87 as per the Annual Returns for the year 2018 are; Mary Wangui Mungai Kiarie, David Gacheru Macharia, William Maina Muguima and John Murage Wanyeki.

10. Prime Star Holdings Ltd is a foreign registered company and the Registrar does not have further details.

2.3 Justification as to why Samuel Matheri (Petitioner) has not been registered as a Director of Midlands Limited

a) On 27th November, 2017, shareholders of Midlands Limited requisitioned for an Extra Ordinary General Meeting (EGM) pursuant to the provisions of Section 277(2) of the Companies Act, 2015. The EGM was held on 24th February, 2018 wherein new directors to wit; Mr Samuel Matheri Hungu **(Petitioner),** Benson Njoroge Kariba, Peter Wahome Kamoche and Edward Wangondu Ndichu and a new Company Secretary Mr John Gachanga were appointed.

b) The Certified Company Secretary, Mr John Gachanga who was appointed at the EGM, lodged minutes, annual return forms and resolutions of the meeting with the Registrar of Companies on 11th April,2018.

c) On 20th April, 2018, the Registrar wrote to the Certified Company Secretary on record Mr. Gilbert Otieno informing him about the lodged documents and required him to confirm whether he was privy to the EGM that was held on 24th February, 2018.

d) The Certified Company Secretary on record, Mr Gilbert Otieno confirmed in writing to the Registrar of Companies that he was privy to the said meeting but stated that he did not attend the EGM and that such meeting was illegal as most of the requisionists of the EGM were not members of the company.

e) The Registrar vide letter dated 06th June, 2018, invited the two Company Secretaries and the Directors for a meeting in order to ventilate and seek clarity on:

(i). Whether the requisitionists in issuing the notice of 27th November,2017 and fixing the date for the Extra Ordinary Meeting on 24th February,2018 acted within the provisions of section 277(2) of the Companies Act;

(ii). Whether the threshold set under Section 277(2) and 279 of the Companies was met;

(iii). Whether the requisitionists validly appear in the shareholders Register and if they strictly complied with the provisions of Sections 249 of the Companies Act with respect to the appointment of the Company Secretary.

f) The meeting was held on 12th June, 2018 in the Registrar's Boardroom and in attendance were current company directors, directors who were appointed on 24th February, 2018, both Certified Secretaries and representatives of the Registrar of Companies wherein the matters in issue were discussed at length.

g) Pursuant to the above deliberations, a report by the Registrar dated 20th June, 2018 nullified the Extra Ordinary Meeting held on 24th February, 2018 and appointments

thereto as the enabling provisions under the Companies Act, 2015 were not followed to the letter.

2.4 Registrar's determination and the enabling provisions under the Companies Act, 2015

Section 249 (1) of the Companies Act, 2015; duty to notify Registrar of change of secretary or joint secretary

h) The Requisitionists purportedly appointed John Gachanga Mungai as a Company Secretary during the extra ordinary meeting was held on 24th February, 2018 but that appointment was not lodged with the Registrar as provided for under Section 249 of the Companies Act, 2015.

i) In addition, a public company shall ensure that a notice that a person has been appointed as a secretary or a joint secretary of the company is accompanied by written consent by the person to act as a secretary or joint secretary.

j) Under Section 249 of the Companies Act, 2015, refusal to comply with the requirements of lodging resolutions and minutes for registration within 14 days after a person is appointed or ceased to hold appointment as a Company Secretary of a company attracts criminal sanctions.

Section 277 and 279 of the Companies Act, 2015;

As to whether the threshold set out under Sec 277 of the Companies Act, 2015 was met:

k) The Certified Public Secretary on record CPS Gilbert Otieno contended that the Requisitionists did not meet the statutory threshold set out under Section 277 since CPS John Gachanga Mungai failed to fully demonstrate that the Requisitionists whose names did not appear in the shareholders register were truly members of the company.

l) That the effect of the share pledge by the principal Requisitioners No. 52 and 55 (member No.1451 and 1484 in the Shareholders' Register) to African Agricultural Capital Fund LLC as Lender /Investor stopped them from requisitioning for an EGM owing to impairment of their rights to vote, to dividends or to other rights exercisable by a shareholder

m) In addition, CPS John Gachanga Mungai did not furnish a duly executed list of the 160 members present during the meeting and who purportedly participated in the elections as reported in the minutes. Further a cursory look at the list of Requisitionists against the company's register of shareholders revealed discrepancies in names and in their I.D numbers.

n) **From the foregoing, the documents that were lodged on 11th April, 2018 were expunged pursuant to Sec 862 of the Companies Act, 2015 and the *status-quo* of Midlands Limited was maintained since the Extra Ordinary General Meeting that was held on the 24th February, 2018 and appointments thereto were not in compliance with the strict and mandatory provisions of the law.**

o) Subsequently, the registrar vide a letter dated 20th June 2018 communicated the above findings to CS Mr. John Muchanga.

p) Aggrieved by the Registrar's decision, CS John Gachanga Mungai on behalf of **MIDLANDS COMPANY LIMITED** filed a Chamber Summons Application being **Judicial Review Miscellaneous Application Number 315 of 2018** under a certificate of urgency dated 31st July 2018 seeking leave to commence Judicial Review proceedings against the Registrar of Companies for orders of:

(i). **Mandamus**; to compel the Registrar of Companies to receive and register the returns of **MIDLANDS COMPANY LIMITED** lodged on 11th April 2018 pursuant to the company resolutions reached on 24th February 2018 and issue a certificate of newly elected directors.

(ii). **Prohibition;** directed at Mary Wangui Kiarie, David Gacheru, John Murage Wanyeki, William Maina Muguima and CS Gilbert Otieno to restrain them from interfering with the management, administration, supervision, handling or in any way dealing with the affairs of **Midlands Company Limited** and holding themselves out as the Board of Directors of the company or Company Secretary until the hearing and determination of the matter.

q) The ex-parte applicant argued that the decision by the Registrar of Companies to decline to accept the returns filed is characterized with procedural impropriety and is a breach of statutory public duty contrary to the provisions of Section3, & 843(1) of The Companies Act,2015.

r) The Registrar filed grounds of opposition and submissions to the application and on the 18th July 2019, the court dismissed the application in its entirety with costs to the Respondents.***(Attached herewith is the Courts ruling on Judicial Review Miscellaneous Application Number 315 of 2018)***

s) It is worth noting that there are other yet to be concluded court cases relating to Midlands Company Limited at the Commercial & Admiralty Division being **Nairobi High Court Commercial Civil Case No 93 of 2016, Nairobi High Court Commercial Civil Case No. 13 of 2018** as well as **Nyahururu High Court Civil Case No 1 of 2018** between various parties involved in the wrangle for control of Midlands Company.

The Committee directed that the Registrar of Companies to further furnish the Committee with the Registrar's letter dated 20th June, 2018 to Midlands Limited Secretary Mr. John Gachanga Mungai and details of the parties to the various on-going court matters where Midland Limited Company is party to.

The Registrar of Companies via a letter dated 27th September, 2019 submitted the list of all the on-going court matters where Midlands Limited Company is a party to as follows;

a. Naphtali Mungsi Mureithi Vs AACF & Mildlands Ltd at Nyahururu High Court Civil Case No. 1 of 2018

b. Juanco Group Ltd Vs Mildlands & African Agricultual Capital LLC at Nairobi High Court Commercial Civil Case No. 13 of 2018

c. Junghae Wainaina Vs African Agricultural Capital Fund LLC & Mildlands Ltd at NBI HCCC No. 93 of 2016

3.0 COMMITTEE'S OBSERVATIONS

11. The Committee observed the following in the consideration of the Petition, that-

(i). Whereas the Petitioner denied in his submission before the Committee that there were no pending court cases, the Registrar of Companies informed the Committee that there were three (3) active cases before the courts in which Midland Limited Company is a party, being: ***Naphtali Mungai Mureithi Vs AACF & Mildlands Ltd at Nyahururu High Court Civil Case No. 1 of 2018,*** **Juanco Group Ltd Vs Midlands & African Agricultural Capital LLC at Nairobi High Court Commercial Civil Case No. 13 of 2018, and** ***Junghae Wainaina Vs African Agricultural Capital Fund LLC & Midlands Ltd at NBI HCCC No. 93 of 2016;***

(ii). In addition to the fact that the Petitioner concealed and failed to disclose this material fact, the sub judice rule prescribed in Standing Order 89 of the National Assembly Standing Orders restrains Parliament from considering matters which are active before the courts. Standing Order 89 provides that;

(1) Subject to paragraph (5), no Member shall refer to any particular matter which is sub judice or which, by the operation of any written law, is secret.

(2) A matter shall be considered to be sub judice when it refers to active criminal or civil proceedings and the discussion of such matter is likely to prejudice its fair determination.

(3) In determining whether a criminal or civil proceeding is active, the following shall apply-

(a) Criminal proceedings shall be deemed to be active when a charge has been made or a summons to be appear has been issued;
(b) criminal proceedings shall be deemed to have ceased to be active when they are concluded by verdict and sentence or discontinuance;
(c) civil proceedings shall be deemed to be active when arrangements for hearing, such as setting down a case for trial, have been made, until the proceedings are ended by judgment or discontinuance;
(d) appellate proceedings whether criminal or civil shall be deemed to be active from the time when they are commenced by application for leave to appeal or by notice of appeal until the proceedings are ended by judgment or discontinuance.

(4) A Member alleging that a matter is sub judice shall provide evidence to show that paragraphs (2) and (3) are applicable.

(5) Notwithstanding this Standing Order, the Speaker may allow reference to any matter before the House or a Committee.

(iii). The Registrar of Companies made submissions before the Committee indicating that Company Secretary John Gachanga Mungai on behalf of Midlands Company Limited filed a Chamber Summons Application being Judicial Review Miscellaneous Application Number 315 of 2018 under a certificate of urgency dated 31st July 2018 seeking leave to commence Judicial Review proceedings against the Registrar of Companies;

(iv). The matters canvassed in the Application for Judicial Review are similar to the matters in the Petition and the court had already pronounced itself on the matter by dismissing the application;

(v). It was the responsibility of the Petitioner; not the Registrar, to seek and obtain details of Prime Star Holdings which is a foreign company whose records are not held by the Registrar of Companies.

4.0 COMMITTEE'S RECOMMENDATION

12. In response to the prayers by the Petitioner the Committee recommends that the Petition be rejected on the following grounds—

(i). **The Petitioner failed to make full and faithful disclosure of the facts material to the Petition and more particularly pertaining to the existence of active court cases on the subject matter of the Petition;**

(ii). **Standing Order 89 of the National Assembly Standing Orders embodies the sub-judice rule which restrains National Assembly from considering and determining matters active before the courts;**

(iii). **The Registrar of Companies conducted himself and acted in accordance with the provisions of the Companies Act and the law rendering the prayer by the Petitioner that Parliament "investigates the conduct of the Registrar of Companies and Registrar General in relation to the matters raised in this Petition" unmerited;**

(iv). **The Company Secretary John Gachanga Mungai on behalf of Midlands Company Limited had filed *Judicial Review Miscellaneous Application Number 315 of 2018* seeking leave to commence proceedings against the Registrar of Companies on the subject matter herein, which application was dismissed;**

(v). **Primestar Holdings is a foreign company whose records are not held by the Registrar of Companies. It is therefore impracticable for the National Assembly to investigate and reveal the identity of the owners of Primestar Holdings as prayed by the Petitioner.**

Signed.....**Date**17·010·19

Hon. William Cheptumo, M.P.
Chairperson, Departmental Committee on Justice and Legal Affairs

ANNEXURE 1

Minutes of Committee sittings on the consideration of the Petition

MIN No. 720/2019:- **CONSIDERATION AND ADOPTION OF THE ON THE LEGISLATIVE PROPOSAL ON THESEXUALASSAULT FORENSIC EVIDENCE BILL, 2019 BY HON. GATHONI WAMUCHOMBA, M.P.**

The Committee considered and unanimously adopted its report on the Legislative Proposal on the Sexual Assault Forensic Evidence Bill, 2019 by Hon. Gathoni Wmuchomba. The adoption was proposed by Hon. Anthony Kiai and seconded by Hon. Jennifer Shamalla.

MIN No. 721/2019:- **CONSIDERATION AND ADOPTION OF THE ON THE LEGISLATIVE PROPOSAL ON THE FOR THE CRIMINAL PROCEDURE CODE (AMENDMENT) BILL, 2019 BY HON NELSON KOECH, MP.**

The Committee considered and unanimously adopted its report on the Legislative Proposal on Criminal Procedure Code (Amendment) Bill, 2019 by Hon. Nelson Koech. The adoption was proposed by Hon. George Murugara and seconded by Hon. Alice Wahome.

MIN No. 722/2019:- **CONSIDERATION AND ADOPTION OF THE REPORT ON THE PETITION REGARDING UNETHICAL CONDUCT BY REGISTRAR OF COMPANIES BY SAMUEL MATHERI HUNGU**

The Committee considered and unanimously adopted its report on the Petition regarding unethical conduct of Registrar Companies by Samuel Matheri Hungu. The adoption was proposed by Hon. Jennifer Shamalla and seconded by Hon. William Kamoti.

MIN No. 723/2019:- **ADJOURNMENT**

There being no other business to transact, the meeting was adjourned at 11:30am.

Signed.....
Chairperson

Date.....17.010.19.....

MINUTES OF THE ONE HUNDRED AND SEVENTY FOURTH SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON FRIDAY 11TH OCTOBER, 2019 AT 10.00 A.M. IN PRIDE HALL, OLE SERENI HOTEL

PRESENT-

1. Hon. William Cheptumo, M.P. - **Chairperson**
2. Hon. Peter Opondo Kaluma, M.P.
3. Hon. Charles Gimose, M.P.
4. Hon Zulekha Hassan, MP
5. Hon. Jennifer Shamalla, M.P.
6. Hon. Adan Haji Yussuf, M.P

ABSENT WITH APOLOGIES-

1. Hon. Alice Muthoni Wahome, M.P. - **Vice Chairperson**
2. Hon. John Olago Aluoch, M.P.
3. Hon. Roselinda Soipan Tuya, M.P.
4. Hon. William K. Mwamkale, M.P.
5. Hon. Ben Momanyi, M.P.
6. Hon. Johana Ng'eno, M.P.
7. Hon. Gladys Boss Shollei, CBS, M.P.
8. Hon. Japheth Mutai, M.P.
9. Hon. John M. Wambugu, M.P.
10. Hon. George G. Murugara, M.P.
11. Hon. Anthony G. Kiai, M.P.
12. Hon. Beatrice Adagala, M.P.
13. Hon. John Kiarie Waweru, M.P.

IN ATTENDANCE- **COMMITTEE SECRETARIAT-**

1. Mr. Abenayo Wasike	-	Senior Clerk Assistant
2. Ms.Halima Hussein	-	Second Clerk Assistant
3. Mr. Salem Lorot	-	Legal Counsel II
4. Ms. Fiona Musili	-	Research Officer II
5. Mr. Simon Maina	-	Support staff

MIN No. 710/2019:- **PRELIMINARIES**

The meeting commenced at 10.00 a.m. with a word of prayer from Hon. Peter Kaluma

MIN No. 711/2019:-

CONSIDERATION OF THE DRAFT REPORT ON THE PETITION REGARDING THE UNETHICAL CONDUCT OF THE REGISTRAR OF COMPANIES BY MR. SAMUEL MATHERI HUNGU

The Committee considered its draft report on the petition regarding unethical conduct of the Registrar of Companies by Mr. Samuel Matheri Hungu and observed the following; THAT-

1. Whereas the Petitioner denied in his submission before the Committee that there were no pending court cases, the Registrar of Companies informed the Committee that there were three (3) active cases before the courts in which Midland Limited Company is a party, being: ***Naphtali Mungai Mureithi Vs AACF & Mildlands Ltd at Nyahururu High Court Civil Case No. 1 of 2018,*** **Juanco Group Ltd Vs Midlands & African Agricultural Capital LLC at Nairobi High Court Commercial Civil Case No. 13 of 2018, and** ***Junghae Wainaina Vs African Agricultural Capital Fund LLC & Midlands Ltd at NBI HCCC No. 93 of 2016;***

2. The sub judice rule prescribed in Standing Order 89 of the National Assembly restrains National Assembly from considering matters which are active before the courts;

3. The Registrar of Companies made submissions before the Committee indicating that Company Secretary John Gachanga Mungai on behalf of Midlands Company Limited filed a Chamber Summons Application being Judicial Review Miscellaneous Application Number 315 of 2018 under a certificate of urgency dated 31st July 2018 seeking leave to commence Judicial Review proceedings against the Registrar of Companies;

4. The matters canvassed in the Application for Judicial Review are similar to the matters in the Petition and the court had already pronounced itself on the matter by dismissing the application;

5. It was the responsibility of the Petitioner; not the Registrar, to seek and obtain details of Prime Star Holdings which is a foreign company whose records were not held by the Registrar of Companies.

The Committee recommended that the prayers in the Petition be rejected on the following grounds; THAT-

1. The Petitioner failed to make full disclosure of the facts material to the Petition and more particularly pertaining to the existence of active court cases on the subject matter of the Petition;

2. Standing order 89 of the National Assembly Standing Orders embodies the sub judice rule which restrains National Assembly from considering and determining matters active before the courts;

3. The Registrar of Companies conducted himself and acted in accordance with the provisions of the Companies Act and the law rendering the prayer by the Petitioner that Parliament "investigates the conduct of the Registrar of Companies and Registrar General in relation to the matters raised in this Petition" unmerited;

4. The Company Secretary John Gachanga Mungai on behalf of Midlands Company Limited had filed *Judicial Review Miscellaneous Application Number 315 of 2018* seeking leave to commence proceedings against the Registrar of Companies on the subject matter herein, which application was dismissed;

5. Primestar Holdings was a foreign company whose records are not held by the Registrar of Companies. It is therefore impracticable for the National Assembly to investigate and reveal the identity of the owners of Primestar Holdings as prayed by the Petitioner.

MIN No. 713/2019:- **ADJOURNMENT**

There being no other business to transact, the meeting was adjourned at 12:50pm.

Signed.....

Chairperson

Date.....17.010.19.....

MINUTES OF THE ONE HUNDRED AND SIXTY SEVENTH SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON THURSDAY 26TH SEPTEMBER, 2019 AT 10.21 A.M. IN COMMITTEE BOARDROOM, 2ND FLOOR, PROTECTION HOUSE, PARLIAMENT BUILDINGS

PRESENT-

1. Hon. William Cheptumo, M.P. - **Chairperson**
2. Hon. Alice Muthoni Wahome, M.P. - **Vice Chairperson**
3. Hon. John Olago Aluoch, M.P.
4. Hon. Johana Ng'eno, M.P.
5. Hon. George G. Murugara, M.P.
6. Hon. Anthony G. Kiai, M.P.
7. Hon. Japheth Mutai, M.P.
8. Hon. Beatrice Adagala, M.P.
9. Hon. John M. Wambugu, M.P.
10. Hon. Adan Haji Yussuf, M.P
11. Hon. John Kiarie Waweru, M.P.

ABSENT WITH APOLOGIES-

1. Hon. Roselinda Soipan Tuya, M.P.
2. Hon. Peter Opondo Kaluma, M.P.
3. Hon. William K. Mwamkale, M.P.
4. Hon Zulekha Hassan, MP
5. Hon. Ben Momanyi, M.P.
6. Hon. Charles Gimose, M.P.
7. Hon. Gladys Boss Shollei, CBS, M.P.
8. Hon. Jennifer Shamalla, M.P.

IN ATTENDANCE-

COMMITTEE SECRETARIAT-

1. Mr. Denis Abisai - Principal Legal Counsel I
2. Ms.Halima Hussein - Second Clerk Assistant
3. Ms. Fiona Musili - Research Officer II
4. Mr. Omar Abdirahim - Fiscal Anayst III
5. Mr. Simon Maina - Support staff

IN ATTENDANCE-

OFFICE OF THE REGISTRAR OF COMPANIES

1. Mr. Kenneth Gathuma - Registrar of Companies and Acting Director of the Business Registration Service
2. Mr. Hiram Gachugi - Legal Counsel

MIN No. 675/2019:- **PRELIMINARIES**

The meeting commenced at 10.21 a.m. with a word of prayer from the chairperson

MIN No. 676/2019:- **CONFIRMATION OF MINUTES OF PREVIOUS SITTINGS**

Confirmation of minutes of previous Sittings was deferred.

MIN No. 677/2019:- **MEETING WITH REGISTRAR OF COMPANIES TO CONSIDER HIS PETITION REGARDING UNETHICAL CONDUCT BY THE REGISTRAR OF COMAPANIES**

The Registrar of Companies and Acting Director of the Business Registration Service Mr. Kenneth Gathuma appeared before the Committee to explain the following regarding the petition;

1. **Details of the current status report of Midlands Limited**

Mr. Kennth Gathuma submitted that from the records held at the registry index as at the 25th September,2019 ,the directors of Midland Limited C.1/87 as per the Annual Returns for the year 2018 are; Mary Wangui Mungai Kiarie, David Gacheru Macharia, William Maina Muguima and John Murage Wanyeki.

2. **Registration status of Prime star Holdings Ltd**

The Registrar of Companies informed the meeting that Prime Star Holdings Ltd was a foreign registered company and the Registrar does not have further details

3. **On the issue regarding why Samuel Matheri (Petitioner) has not been registered as a director of Midlands Ltd, the Registrar submitted THAT-**

(i). On 27th November, 2017, shareholders of Midlands Limited requisitioned for an Extra Ordinary General Meeting (EGM) pursuant to the provisions of Section 277(2) of the Companies Act, 2015. The EGM was held on 24th February, 2018 wherein new directors to wit; Mr Samuel Matheri Hungu **(Petitioner),**Benson Njoroge Kariba,Peter Wahome Kamoche and Edward Wangondu Ndichu and a new Company Secretary Mr John Gachanga were appointed.

(ii). The Certified Company Secretary, Mr John Gachanga who was appointed at the EGM, lodged minutes, annual return forms and resolutions of the meeting with the Registrar of Companies on 11th April,2018.

(iii). On 20th April, 2018, the Registrar wrote to the Certified Company Secretary on record Mr Gilbert Otieno informing him about the lodged documents and required him to confirm whether he was privy to the EGM that was held on 24th February, 2018

(iv). The Certified Company Secretary on record, Mr Gilbert Otieno confirmed in writing to the Registrar of Companies that he was privy to the said meeting but stated that he did not attend the EGM and that such meeting was illegal as most of the requisionists of the EGM were not members of the company.

(v). The Registrar vide letter dated 06th June, 2018, invited the two Company Secretaries and the Directors for a meeting in order to ventilate and seek clarity on;

a) Whether the requisitionists in issuing the notice of 27th November, 2017 and fixing the date for the Extra Ordinary Meeting on 24th February,2018 acted within the provisions of section 277(2) of the Companies Act;

b) Whether the threshold set under Section 277(2) and 279 of the Companies was met;

c) Whether the requisitionists validly appear in the shareholders Register and if they strictly complied with the provisions of Sections 249 of the Companies Act with respect to the appointment of the Company Secretary.

(vi). A meeting was held on 12th June, 2018 in the Registrar's boardroom and in attendance were current company directors, directors who were appointed on 24thFebruary, 2018, both Certified Secretaries and representatives of the Registrar of Companies wherein the matters in issue were discussed at length.

(vii). Pursuant to the deliberation of the meeting held on 12th June, 2019 a report by the Registrar dated 20th June, 2018 nullified the Extra Ordinary Meeting held on 24th February, 2018 and appointments thereto as the enabling provisions under the Companies Act, 2015 were not followed to the letter.

(viii). The Requisitionists purportedly appointed John Gachanga Mungai as a Company Secretary during the extra ordinary meeting was held on 24th February, 2018 but that appointment was not lodged with the Registrar as provided for under Section 249 of the Companies Act, 2015.

(ix). Under Section 249 of the Companies Act, 2015, refusal to comply with the requirements of lodging resolutions and minutes for registration within 14 days after a person is appointed or ceased to hold appointment as a Company Secretary of a company attracts criminal sanctions.

(x). The Certified Company Secretary on record Mr. Gilbert Otieno contended that the Requisitionists did not meet the statutory threshold set out under Section 277 since CPS John Gachanga Mungai failed to fully demonstrate that the

Requisitionists whose names did not appear in the shareholders register were truly members of the company.

(xi). In addition, Company Secratary John Gachanga Mungai did not furnish a duly executed list of the 160 members present during the meeting and who purportedly participated in the elections as reported in the minutes. Further a cursory look at the list of Requisitionists against the company's register of shareholders revealed discrepancies in names and in their I.D numbers.

(xii). Pursuant to Sec 862 of the Companies Act, 2015 the *status-quo* of Midlands Limited was maintained since the Extra Ordinary General Meeting that was held on the 24th February, 2018 and appointments thereto were not in compliance with the strict and mandatory provisions of the law.

(xiii). The registrar vide a letter dated 20th June 2018 communicated the findings to Company Secratart Mr. John Muchanga.

(xiv). Aggrieved by the Registrar's decision, Mr John Gachanga Mungai on behalf of **MIDLANDS COMPANY LIMITED** filed a Chamber Summons Application being **Judicial Review Miscellaneous Application Number 315 of 2018** under a certificate of urgency dated 31st July 2018 seeking leave to commence Judicial Review proceedings against the Registrar of Companies The ex-parte applicant argued that the decision by the Registrar of Companies to decline to accept the returns filed is characterized with procedural impropriety and is a breach of statutory public duty contrary to the provisions of Section3, & 843(1) of The Companies Act,2015.

(xv). The Registrar filed grounds of opposition and submissions to the application and on the 18th July 2019 and the court dismissed the application in its entirety with costs to the Respondents. ***(Attached herewith is the Courts ruling on Judicial Review Miscellaneous Application Number 315 of 2018)***

(xvi). there are other yet to be concluded court cases relating to Midlands Company Limited at the Commercial & Admiralty Division being **Nairobi High Court Commercial Civil Case No 93 of 2016, Nairobi High Court Commercial Civil Case No. 13 of 2018** as well as **Nyahururu High Court Civil Case No 1 of 2018** between various parties involved in the wrangle for control of Midlands Company

The Committee noted that the Petitioner denied in his submission that the matter raised in the petition was pending before court and directed the Registrar of Companies to further furnish the Committee with details of the various on-going court matters where Midland Limited Company is party to.

MIN No. 678/2019:- **ANY OTHER BUSINESS**

No matter arose.

MIN No. 679/2019:- **ADJOURNMENT**

There being no other business to transact, the meeting was adjourned at 11:20am.

Signed.....
Chairperson

Date.....17/01/2019

MINUTES OF THE ONE HUNDRED AND SIXTY SIXTH SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON THURSDAY 19TH SEPTEMBER, 2019 AT 9:50A.M. IN COMMITTEE BOARDROOM, 2ND FLOOR, PROTECTION HOUSE, PARLIAMENT BUILDINGS

PRESENT-

1. Hon. William Cheptumo, M.P. - **Chairperson**
2. Hon. John Olago Aluoch, M.P.
3. Hon. Roselinda Soipan Tuya, M.P.
4. Hon. Peter Opondo Kaluma, M.P.
5. Hon. William K. Mwamkale, M.P.
6. Hon. George G. Murugara, M.P.
7. Hon. Anthony G. Kiai, M.P.
8. Hon. Japheth Mutai, M.P.
9. Hon. Jennifer Shamalla, M.P.
10. Hon. Beatrice Adagala, M.P.
11. Hon. John M. Wambugu, M.P.
12. Hon. Adan Haji Yussuf, M.P

ABSENT WITH APOLOGIES-

1. Hon. Alice Muthoni Wahome, M.P. - **Vice Chairperson**
2. Hon. Ben Momanyi, M.P.
3. Hon. Charles Gimose, M.P.
4. Hon. Zuleikha Hassan, M.P.
5. Hon. Gladys Boss Shollei, CBS, M.P.
6. Hon. Johana Ng'eno, M.P.
7. Hon. John Kiarie Waweru, M.P.

IN ATTENDANCE- **COMMITTEE SECRETARIAT-**

1. Mr. Denis Abisai - Principal Legal Counsel I
2. Ms.Halima Hussein - Second Clerk Assistant
3. Ms. Fiona Musili - Research Officer II
4. Mr. Omar Abdirahim - Fiscal Analyst III
5. Mr. Simon Maina - Support staff

IN ATTENDANCE- **PETITIONER**

1. Mr. Samuel Matheri Hungu - Petitioner
2. Mr. Benson N. Kariba - Shareholder, Mildlands Limited
3. Mr.Gad Gathu - Lawyer

MIN No. 670/2019:- **PRELIMINARIES**

The meeting commenced at 9:50 a.m. with a word of prayer from the Chairperson

MIN No. 671/2019:- **CONFIRMATION OF MINUTES OF PREVIOUS SITTINGS**

Confirmation of minutes of previous Sittings was deferred.

MIN No. 672/2019:- **CONSIDERATION OF THE DRAFT REPORT ON THE LEGISLATIVE PROPOSAL BY HON OLE SANKOK ON CONSTITUTION OF KENYA (AMENDMENT) BILL, 2019**

The Committee considered and unanimously adopted its draft report on on the legislative proposal by Hon Ole Sankok on the Constitution of Kenya (Amendment) Bill, 2019. The adoption was proposed by Hon Anthony Kia and seconded by Hon. William Kamoti.

MIN No. 673/2019:- **MEETING WITH MR. SAMUAL MATHERI TO CONSIDER HIS PETITION REGARDING UNETHICAL CONDUCT BY THE REGISTRAR OF COMPANIES**

Mr. Samuel Matheri appeared before the Committee to prosecute his Petition regarding unethical conduct of the Registrar of Companies and submitted as follows: THAT-

1. Midlands Limited is a public company and was incorporated by the farming community in Nyandarua through shares with the aim of securing a better share of the market value of their agri-produce.

2. Initially the farmers had no land but the Government of former President, His Excellency Mwai Kibaki gave them 25 acres of land.

3. It has a direct membership of early 3,000 and an indirect membership of close to 60,000 assuming every household of the estimated 12,000 households with an interest in the company has on average 5 members.

4. The numbers of households is estimated from the 40 odd shareholder self-help groups with an average membership of 250 together with the more than 2,700 who hold shares as individuals

5. Successive Boards adhered to this provision of ensuring of holding Annual General Meetings (AGMs) every year since the company was launched on April 30th 2004 until January 2012. However the Board which was installed on January 2012 ignored this provision and no AGM was held until a member-requisitioned meeting on February 24th 2018.

6. The members wrote to the sitting Board and notified the Registrar giving the statutory 21 days for the Board to convene a meeting failure to which members would call for one however the period lapsed without either the Board or the registrar responding.

7. Members gave notice of a meeting accordingly and the sitting Board "went into flurry trying in every way" to derail the meeting. The meeting went successive and Secretary General was elected and the resolution was forwarded to the Registrar of Companies.

8. After the meeting the farmers were informed by the Registrar that they had not filed returns on time and that the Registrar had made the file inaccessible online forcing the secretary to make manual returns.

9. The Registrar of Companies stated to them that the newly elected Secretary was not properly appointed on grounds that the previous Secretary had not been involved.

10. The Registrar of Companies later agreed to register the new officials for Midlands Limited and wrote to the petitioners accordingly. However, seven days later, the Registrar withdrew that letter and "purported" to reverse the planned registration.

11. It was "rumored that the illegitimate previous Board was working feverishly behind the scenes to transfer the company to an offshore shadow entity registered in notorious money laundering territory and tax-haven namely, the Island of Nevis in the West Indies call Primestar Holding Ltd".

12. He prays National Assembly Investigates the conduct of the Registrar of Companies in relation to the matters raised in the Petition regarding Midlands Ltd and the Board with regard to the matters raised in the Petition with the aim of having the Board disbanded.

Having heard the Petitioner, the Committee resolved to invite the Registrar of Companies for a meeting to apprise the Committee on the petition and specifically to address the following issues:-

1. details of the current directorship of Midlands Limited;
2. details of the returns filed by Midlands Limited as required under the Companies Act;
3. registration status of Primestar Holding Limited
4. Written justification why Mr. Samuel Matheri (petitioner) has not been registered as a director of Midlands Ltd.

MIN No. 674/2019:- **ADJOURNMENT**

There being no other business to transact, the meeting was adjourned at 11:20am.

Signed.....
Chairperson

Date.....17.10.19.....

ANNEXURE 2

Adoption list

DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

ADOPTION LIST FOR THE REPORT ON THE CONSIDERATION OF THE PETITION REGARDING THE UNETHICAL CONDUCT OF THE REGISTRAR OF COMPANIES BY MR. SAMUEL MATHERI HUNGU

DATE: TUESDAY 15TH OCTOBER, 2019

VENUE: COMMITTEE ROOM 12, NEW WING, MAIN PARLIAMENT BUILDINGS

NO.	NAME	SIGNATURE
1.	Hon. William Cheptumo, M.P. - **Chairperson**	
2.	Hon. Alice Wahome, MP. - **Vice Chairpserson**	
3.	Hon. John Olago Aluoch, MP.	
4.	Hon. Roselinda Soipan Tuya, MP.	
5.	Hon. Ben Momanyi,MP.	
6.	Hon. William Kamoti, MP.	
7.	Hon. Peter Opondo Kaluma, MP.	
8.	Hon. Zuleikha Hassan, MP.	
9.	Hon. Johana Ngeno Kipyegon, MP.	

10.	Hon. Charles Gimose, MP.	
11.	Hon. John Kiarie Waweru, MP.	
12.	Hon. George Gitonga Murugara, MP.	
13.	Hon. Adan Haji Yussuf, MP.	
14.	Hon. Japheth Kiplangat Mutai, MP.	
15.	Hon. Anthony Githiaka Kiai, MP.	
16.	Hon. Jennifer Shamalla, MP.	
17.	Hon. Beatrice Adagala, MP.	
18.	Hon. John Munene Wambugu, MP.	
19.	Hon. Boss Shollei, CBS, MP.	

ANNEXURE 3

Submissions by the Registrar of Companies

REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

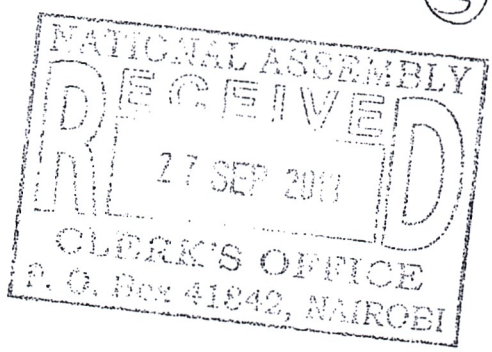
BUSINESS REGISTRATION SERVICE

Ref. No: BRS/C.1/87

27th September, 2019

Your Ref: NA/DCS/JLAC/2019/66

The Clerk of the National Assembly,
The National Assembly,
Parliament Buildings,
P.O Box 41842-00100
NAIROBI



Dear

RE: APPEARANCE BEFORE THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS –MIDLANDS LIMITED C.1/87

The above refers wherein the Registrar of Companies was required to furnish the committee with; the Registrar's letter dated 20th June, 2018 to the Company Secretary John Gachanga Mungai and details of the parties to the various on-going court matters that we cited in our submissions;

a) Naphtali Mungai Mureithi Vs. AACF & Midlands Limited; Nyahururu High Court Civil Case No 1 of 2018
b) Juanco Group Limited Vs. Midlands Ltd & African Agricultural Capital LLC Nairobi High Court Commercial Civil Case No. 13 of 2018
c) Junghae Wainaina Vs African Agricultural Capital Fund LLC & Midlands Limited NBI HCCC No.93 of 2016

Attached herein is a copy of the Registrar's letter dated 20th June, 2019 as requested.

SHERIA HOUSE, HARAMBEE AVENUE
P.O. Box40112-00100, NAIROBI, KENYA. TEL: +254 20 2227461/2251355/0711945555/0732529995
E-MAIL: info.statelawoffice@kenya.go.ke WEBSITE: www.attorney-general.go.ke

DEPARTMENT OF JUSTICE
CO-OPERATIVE BANK HOUSE, HAILLE SELLASIE AVENUEP.O. Box 56057-00200, Nairobi-Kenya TEL: Nairobi 2224029/ 2240337
E-MAIL: legal@justice.go.ke WEBSITE: www.justice.go.ke

ISO 9001:2008 Certified

REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

BUSINESS REGISTRATION SERVICE

Our Ref: BRS/C.1/87

20th June, 2018

Your Ref: TBA

John Gachanga Mungai,CPS/584

P.O Box 44635-00100

Nairobi.

RE: MIDLANDS LIMITED C.1/87-MEETING HELD AT THE REGISTRAR'S BOARDROOM ON THE 12th JUNE, 2018

The above refers wherein the following were discussed;

1. Determination on whether the Requisitionists in issuing the notice dated 27th November, 2017 and setting the date for the Extra Ordinary General Meeting on 24th February, 2018 under the provisions of section 277 (2) of the Companies Act, 2015 was in strict compliance with the law and hence whether changes in the company's records can be effected following the said Extra Ordinary Meeting.

2. Whether the decisions reached in the meeting of the company where CPS John Gachanga Mungai was appointed as the Company Secretary together with Benson Njoroge Kariba, Matheri Hungu, Peter Wahome Kamoche and Edward Wangondu Ndichu as directors of the company were valid.

Cc; 1. Gilbert Oduor Otieno, CPS/045,

P.O Box 47808-00100,

Nairobi

2. Institute of Certified Public Secretaries of Kenya,

Kilimanjaro Road, Upper Hill, CPS Governance Centre,

P.O Box 46935-00100,

Nairobi

REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

BUSINESS REGISTRATION SERVICE

Ref. No: BRS/C.1/87

25th September, 2019

Your Ref: NA/DCS/JLAC/2019/66

The Clerk of the National Assembly,
The National Assembly,
Parliament Buildings,
P.O Box 41842-00100
NAIROBI

Dear

RE: APPEARANCE BEFORE THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS –MIDLANDS LIMITED C.1/87

I refer to your letter dated 23rd September, 2019 whereby you requested for;

1. Details of the current status report of Midlands Limited;
2. Details of the returns filed by Midlands Limited as required under the Companies Act,2015 ;
3. Registration status of Prime star Holdings Ltd; and
4. Written justification why Samuel Matheri (Petitioner) has not been registered as a director of Midlands Ltd.

The brief background;

a) From the records held at the registry index as at the 25th September,2019 ,the directors of Midland Limited C.1/87 as per the Annual Returns for the year

2018 are; Mary Wangui Mungai Kiarie, David Gacheru Macharia, William Maina Muguima and John Murage Wanyeki.

b) Prime star Holdings Ltd is a foreign registered company and we do not have further details.

Justification as to why Samuel Matheri (Petitioner) has not been registered as a director of Midlands Ltd.

c) On 27th November, 2017, shareholders of Midlands Limited requisitioned for an Extra Ordinary General Meeting (EGM) pursuant to the provisions of Section 277(2) of the Companies Act, 2015. The EGM was held on 24th February, 2018 wherein new directors to wit; Mr Samuel Matheri Hungu (Petitioner),Benson Njoroge Kariba,Peter Wahome Kamoche and Edward Wangondu Ndichu and a new Company Secretary Mr John Gachanga were appointed.

d) The Certified Company Secretary, Mr John Gachanga who was appointed at the EGM, lodged minutes, annual return forms and resolutions of the meeting with the Registrar of Companies on 11th April,2018.

e) On 20th April,2018, the Registrar wrote to the Certified Company Secretary on record Mr Gilbert Otieno informing him about the lodged documents and required him to confirm whether he was privy to the EGM that was held on 24th February,2018

f) The Certified Company Secretary on record, Mr Gilbert Otieno confirmed in writing to the Registrar of Companies that he was privy to the said meeting but stated that he did not attend the EGM and that such meeting was illegal as most of the requisionists of the EGM were not members of the company.

g) The Registrar vide letter dated 06th June, 2018, invited the two Company Secretaries and the Directors for a meeting in order ventilate and seek clarity on;

- Whether the requisitionists in issuing the notice of 27th November,2017 and fixing the date for the Extra Ordinary Meeting on 24th February,2018 acted within the provisions of section 277(2) of the Companies Act;
- Whether the threshold set under Section 277(2) and 279 of the Companies was met;

- Whether the requisitionists validly appear in the shareholders Register and if they strictly complied with the provisions of Sections 249 of the Companies Act with respect to the appointment of the Company Secretary ;

h) The above meeting was held on 12th June, 2018 in the Registrar's boardroom and in attendance were current company directors, directors who were appointed on 24thFebruary, 2018, both Certified Secretaries and representatives of the Registrar of Companies wherein the matters in issue were discussed at length.

i) Pursuant to the above deliberations, a report by the Registrar dated 20th June, 2018 nullified the Extra Ordinary Meeting held on 24th February, 2018 and appointments thereto as the enabling provisions under the Companies Act, 2015 were not followed to the letter.

<u>Registrar's determination and the enabling provisions under the Companies Act, 2015</u>

Section 249 (1) of the Companies Act, 2015; duty to notify Registrar of change of secretary or joint secretary.

j) The Requisitionists purportedly appointed John Gachanga Mungai as a Company Secretary during the extra ordinary meeting was held on 24th February, 2018 but that appointment was not lodged with the Registrar as provided for under Section 249 of the Companies Act, 2015.

k) In addition, a public company shall ensure that a notice that a person has been appointed as a secretary or a joint secretary of the company is accompanied by written consent by the person to act as a secretary or joint secretary.

l) Under Section 249 of the Companies Act, 2015, refusal to comply with the requirements of lodging resolutions and minutes for registration within 14 days after a person is appointed or ceased to hold appointment as a Company Secretary of a company attracts criminal sanctions.

Section 277 and 279 of the Companies Act, 2015;

As to whether the threshold set out under Sec 277 of the Companies Act, 2015 was met;

m) The CPS on record CPS Gilbert Otieno contended that the Requisitionists did not meet the statutory threshold set out under Section 277 since CPS John Gachanga Mungai failed to fully demonstrate that the Requisitionists whose names did not appear in the shareholders register were truly members of the company.

n) That the effect of the share pledge by the principal Requisitioners No. 52 and 55 (member No.1451 and 1484 in the Shareholders' Register) to African Agricultural Capital Fund LLC as Lender /Investor estopped them to requisition for an EGM owing to impairment of their rights to vote, to dividends or to other rights exercisable by a shareholder.

o) In addition, CPS John Gachanga Mungai did not furnish a duly executed list of the 160 members present during the meeting and who purportedly participated in the elections as reported in the minutes. Further a cursory look at the list of Requisitionists against the company's register of shareholders revealed discrepancies in names and in their I.D numbers.

p) From the foregoing, the documents that were lodged on 11th April, 2018 were expunged pursuant to Sec 862 of the Companies Act, 2015 and the *status-quo* of Midlands Limited was maintained since the Extra Ordinary General Meeting that was held on the 24th February, 2018 and appointments thereto were not in compliance with the strict and mandatory provisions of the law.

q) Subsequently, the registrar vide a letter dated 20th June 2018 communicated the above findings to CS Mr. John Muchanga.

r) Aggrieved by the Registrar's decision, CS John Gachanga Mungai on behalf of MIDLANDS COMPANY LIMITED filed a Chamber Summons Application being Judicial Review Miscellaneous Application Number 315 of 2018 under a certificate of urgency dated 31st July 2018 seeking leave to commence Judicial Review proceedings against the Registrar of Companies for orders of:

- Mandamus; to compel the Registrar of Companies to receive and register the returns of MIDLANDS COMPANY LIMITED lodged on 11th April 2018 pursuant to the company resolutions reached on 24th February 2018 and issue a certificate of newly elected directors.
- Prohibition; directed at Mary Wangui Kiarie ,David Gacheru, John Murage Wanyeki, William Maina Muguima and CS Gilbert Otieno to

restrain them from interfering with the management ,administration, supervision, handling or in any way dealing with the affairs of Midlands Company Limited and holding themselves out as the Board Of Directors of the company or Company Secretary until the hearing and determination of the matter.

s) The ex-parte applicant argued that the decision by the Registrar of Companies to decline to accept the returns filed is characterized with procedural impropriety and is a breach of statutory public duty contrary to the provisions of Section3, & 843(1) of The Companies Act,2015.

t) The Registrar filed grounds of opposition and submissions to the application and on the 18th July 2019, the court dismissed the application in its entirety with costs to the Respondents. *(Attached herewith is the Courts ruling on Judicial Review Miscellaneous Application Number 315 of 2018)*

u) It is worth noting that there are other yet to be concluded court cases relating to Midlands Company Limited at the Commercial & Admiralty Division being Nairobi High Court Commercial Civil Case No 93 of 2016, Nairobi High Court Commercial Civil Case No. 13 of 2018 as well as Nyahururu High Court Civil Case No 1 of 2018 between various parties involved in the wrangle for control of Midlands Company.

Submitted for your information.

KENNETH GATHUMA
Ag. DIRECTOR GENERAL

KENYA LAW
Where Legal Information is Public Knowledge

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 315 OF 2018

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY

FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND MANDAMUS

AND

IN THE MATTER ARTICLES 165(5)(6) AND (7) OF THE CONSTITUTION

AND

IN THE MATTER OF THE COMPANIES ACT

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

REGISTRAR OF COMPANIES.....1ST RESPONDENT

MARY WANGUI KIARIE.....2ND RESPONDENT

DAVID GACHERU.....3RD RESPONDENT

JOHN MURAGE WANYEKI.....4TH RESPONDENT

WILLIAM MAINA MUGUIMA.....5TH RESPONDENT

GILBERT OTIENO.....6TH RESPONDENT

EX-PARTE:

MIDLANDS COMPANY LIMITED

RULING

Introduction

1. Midlands Company Limited, hereinafter "the Applicant", is a private company incorporated in Kenya under the provisions of the Companies Act, Cap 486 of the Laws of Kenya. It has sued the Registrar of Companies, which is a statutory office established by section 831 of the Companies Act, as the 1st Respondent herein. Also sued are various individuals whom the Applicant claims are its former Chairman, Directors and Company Secretary, as the 2nd, 3rd 4th , 5th and 6th Respondents respectively.

2. The Applicant filed a Chamber Summons application dated 31st July 2018, seeking leave to institute judicial review proceedings as against the Respondents for the following orders:

(a) That this Court be please to grant leave to the Ex parte Applicant to apply for orders of mandamus to compel the 1st Respondent herein to receive and register the returns of the ex parte Applicant Company as submitted by John Gachanga Mungai the New Company Secretary of the company resolutions reached on 24th February 1018 and that the 1st respondent do issue a certificate of newly elected Directors.

(b) That this Court be pleased to grant leave to the Ex parte Applicant to apply for orders of Prohibition, that shall be directed at the 2nd, 3rd, 4th, 5th and 6th Respondents restraining the 2nd, 3rd, 4th, 5th and 6th Respondents from interfering with the management, administration, supervision, handling or in any way dealing with the affairs of the Ex parte Applicant and holding out as Board of Directors and/or as the company's certified Public Secretary until the hearing and determination of this matter.

(c) That the costs of this application be in the cause.

3. This Court directed that the application for leave be heard and determined *inter partes*, and parties were directed to file their respective pleadings and submissions in this regard. The Applicant in this regard relied on its statement of facts dated 31st July 2018, and verifying affidavit sworn on the same date by John Gachanga Mungai, who described himself as the Applicant's Company Secretary. The said deponent also filed a further affidavit sworn on 5th December 2018. The advocates on record for the Applicant, Mutito Thiongo & Company Advocates, in addition filed submissions.

4. The 1st Respondent filed Grounds of Opposition dated 26th November 2018 opposing the application, which were supplemented by submissions dated 26th March 2018 filed by K. Odhiambo, a Litigation Counsel at the Attorney General's Chambers. The 2nd to 6th Respondents on their part filed Grounds of Opposition dated 8th October 2018, and a replying affidavit sworn on the same dated by the 2nd Respondent. The 2nd to 6th Respondents' advocates on record, Githara & Associates Advocates, filed submission dated 26th November 2018 on the said Respondents behalf

The Applicant's Case

5. The gist of the Applicant's case is that the 1st Respondent has declined to register its duly elected Board of Directors, after the Applicant requested it to do so in a letter dated 20th June 2018, and contrary to its mandate under the provisions of sections 3, 38(2) and 138 of the Companies Act 2015. The Applicant explained that it held Annual General Meeting in August 2012 and in January 2013, during which its shareholders approved the recruitment of new investors, and the amendment of it Articles of Association to accommodate an agreement entered into with a new investor, namely African Agricultural Capital Fund (AACF). Further, that the Applicant elected a new Board of seven (7) Directors in the Annual General Meeting held in January 2013.

6. However, that between 2013 and 2017 the said Board of Directors through neglect and total disregard of the law and the provisions contained in the Articles of Association, did not convene any yearly Annual General Meeting as required. Furthermore,

that during that period, a total number of five (5) Directors resigned and the Board of Directors was left to operate with only two (2) directors, and could therefore not transact any lawful business. According to the Applicant, the remaining two directors could have appointed additional members to reinstate a quorum under the provisions of its Articles of Association, but abdicated their responsibility, and instead allowed AACF to do the appointing of two directors with a view of sabotaging the interest of the other shareholders. Further, that in spite of this addition, the board was still illegitimate and could not transact any lawful business under the Applicant's Articles of Association.

7. Consequently, that the shareholders of the Applicant requisitioned the Board of Directors to call for a general meeting in a letter dated 27th November 2017, which was served upon the chairman of the Board and the 1st Respondent pursuant to Section 277(1) of the Companies Act, and which the 1st Respondent ignored. That an extra-ordinary general meeting was nevertheless called and held on 24th February 2018, after it was duly convened by the shareholders. The Applicant averred that the 1st Respondent on 20th April 2018 then wrote to the former company secretary, namely Gilbert Otieno (the 6th Respondent herein), and copied the letter to John Gachanga Mungai (the new company secretary), asking for a clarification as to whether the 6th Respondent was privy to the said extraordinary general meeting, and for him to verify the Applicant's records held at the Companies Registry.

8. The Applicant averred that the new Company Secretary, Mr. John Gachanga Mungai, tried to file the statutory meeting documents among other documents after the outcome of the extraordinary general meeting on several occasions, but the Applicant's file went missing at the Companies Registry and nobody was willing to cooperate in tracing the records. Further, that the newly appointed Company Secretary only managed to have a limited access to the Applicant's account, before the same was also eventually frozen by the Company Registry.

9. The Applicant further averred that there was various correspondence between the newly appointed Company Secretary and the 1st Respondent on the resolutions from the extraordinary general meeting, culminating in a letter dated 6th June 2018 from the 1st Respondent informing that the said Company Secretary should make representations and clarify whether the threshold of Section 277 (2) and Section 249 of the Companies Act, 2015 had been met or complied with.

10. That the newly appointed Company Secretary accordingly responded as to how the threshold contemplated under Section 277(2) and Section 249 had been met, and also pointed other malpractices being practised by 6th Respondent. However, that despite all the improprieties, malpractices and procedural failings by the Board in record, the 1st Respondent by a letter dated 20th June 2018, acted *ultra vires* by arrogating upon himself the powers of a court of law by purporting to make a determination on the validity of the extraordinary general meeting, voting rights, as well as the membership of the company.

11. Further, that the 1st Respondent also failed to observe the provisions of the Applicant's Articles of Association as read together with the Companies Act 2015, and the Applicant's shareholder's register as held at Registrar of Companies. According to the Applicant, the 1st Respondent's actions will have an adverse impact on the its actions and has reinforced the former Board of Directors illegal actions of failing to hold annual general meetings for five years.

The Respondents' Cases

The 1st Respondent's Case

12. The 1st Respondent opposed the application on the following grounds:

(a) That the Chamber summon application is defective, has no merit and is based on a misconception of the law.

(b) That the application offends the provisions of Part XI of The Companies Act 2015.

(c) That this court has no jurisdiction to handle this matter. The substratum of the application in it's entirety is a commercial dispute which squarely falls within the ambit of Companies Act and therefore the right forum should be The Commercial & Admiralty Division of the High Court.

(d) That the application is an appeal disguised as a judicial review application yet a judicial review court does not sit as an appellate court so as to substitute its views with that of the respondent.

(e) That the matters raised in the application are matters that substantively require a merit review a function which this court cannot embark on as judicial review largely concerns itself with the decision making process.

The 2nd – 6th Respondents' Case

13. The 2nd to 6th Respondents also opposed the application on the following grounds in their Grounds of Opposition:

(a) The deponent of the verifying affidavit who purports to bring the application in the name of the Applicant lacks locus to file the proceedings either in his name or in the name of the Applicant.

(b) The Board of the Applicant has not authorized these proceedings to be instituted in the name of the company.

(c) The Application is in the nature of a derivative action but has not complied with part XI or Part XXIX of the Companies Act, 2015. The same is therefore incompetent and an abuse of the Court Process for failure to comply with the mandatory requirements of the Act.

(d) The proceedings have wrongly and unlawfully been instituted in the name of the Applicant.

(e) The application on the face of it is an appeal against the substantive decision of the 1st Defendant and this Court and the proceedings filed are the wrong forum for the deponent of the verifying affidavit.

(f) No facts have been pleaded or evidence tendered to justify the grant of leave as sought.

14. The 2nd Respondent stated in the replying affidavit she swore on behalf of the 2nd to 6th Respondents that she is a director of the Applicant Limited at an Annual General Meeting held on 12th January 2013, and the Chairman of the Board of Directors thereof having been so appointed in 2014, and had been authorized by her co-directors who are named as the 3rd to 6th Respondent's herein to swear the affidavit on their behalf. Further, that the deponent of the Applicant's verifying affidavit, John Gachanga Mungai, purports to bring the present application in his alleged capacity as the Company Secretary of the Applicant which he is not, neither is he a member of the Company nor does his name appear in the register of members of the Company.

15. Further, that the 6th Respondent is the Company Secretary of the Applicant, and that the issue of who is the rightful Company Secretary of the Company had been canvassed before the 1st Respondent and a ruling thereon issued on 20th June 2018. Therefore, that the said John Gachanga Mungai is a meddler and interloper in the Applicant company, and being neither a member nor an officer of the Applicant lacks any locus to bring the present application, which application should be struck out *in limine* for offending Parts XI and XXIX of the Companies Act, 2015.

16. On the decision of the 1st Respondent that is the subject matter of the present proceedings, the deponent stated that she was aware that in December 2017, her office received the requisition for an Extra-Ordinary General Meeting dated 27th November 2017, by persons purporting to be members of the Applicant. That upon scrutiny, it was established that the requisition did not meet the threshold required under Section 277 of the Companies Act for various reasons which she enumerated, and that she duly notified the requisitionists as much. However, that the requisitionists purported to hold the said meeting and elect new directors in the absence of the duly elected directors of the Company. That the alleged new Directors then sought registration, whereupon the 2nd to 6th Respondents instructed the Company's advocates to issue a letter of protest to the 1st Respondent, who issued a notice to the Applicant's Company Secretary to clarify the issues raised in the letter of protest.

17. The 2nd to 6th Respondents contended that after various correspondences, visits and a meeting with the 1st Respondent, all the parties were heard and had an opportunity to canvass their issues, and that the 1st Respondent rendered a reasoned decision on the matter through a letter dated 20th June 2018. Therefore, that what the said John Gachanga Mungai is challenging is the substantive decision of the 1st Respondent, and that this is therefore not a proper matter for judicial review, but rather is a matter to be referred to the Company Court in the Commercial Division of this Court.

18. Lastly, the 2nd to 6th Respondents averred that from the representations made before the 1st Respondent in the meeting held on

12th June 2018, it is clear that the said John Gachanga Mungai who has instituted the present application is doing so in collusion with two former shareholders of the Applicant company namely Jung'ae Wainaina and his company Juanco Group Limited, who are plaintiffs in two cases namely **Nairobi Commercial HCC 93 of 2016 - Jung'ae Wainaina vs African Agricultural Capital Fund & Midlands Limited** and **Nairobi HCC 13 of 2018- Juanco Group Limited vs Midlands Limited & African Agricultural Capital Fund & Midlands Limited.** That this is for the reason that the advocates who act for the two plaintiffs in the two cases above, were the same ones who accompanied John Gachanga Mungai in making the representations before the 1st Respondent.

19. Furthermore, that there is yet a third suit filed by one Naphtali Mungai Mureithi in Nyahururu High Court being **Nyahururu High Court Civil Case No.1 of 2018 - Naphtali Mungai Mureithi vs African Agricultural Capital Fund & Midlands Limited** where the management and constitution of the Applicant's Board are in issue.

The Determination

20. The applicable law on leave to commence judicial review proceedings is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The reason for the leave was explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows:

"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".

21. The Applicant in this regard submitted that the Respondents had juxtaposed jurisdiction to forum, and cited the cases of **Owners of Motor Vessel "Lilian S" v Caltex Oil (K) Ltd , Mombasa Civil Appeal No. 50 of 1989** and **Samuel Kamau Machaia & Another v Kenya Commercial Bank Ltd & 2 Others (2012) eKLR**, for the position that a court's jurisdiction flows from either the Constitution or legislation or both, and that that more than one court may have jurisdiction over a certain case. That on the other hand, the appropriate forum is a matter governed mostly by statutes and court rules, and is the place where it would be most convenient for the parties to have the matter heard by a court with the requisite jurisdiction.

22. According to the Applicant, by dint of Article 165(3)(a) of the Constitution of Kenya, 2010, the High Court has unlimited original jurisdiction over civil and criminal matters, and as regards the issue of forum, Section 11(1) of the High Court (Organization and Administration) Act No. 27 of 2015 has administratively partitioned the High Courts in Kenya into various divisions for effective administration of justice. Further, as the matter-in-issue stems from a decision made by the 1st Respondent which was procured by a faulty reasoning in the decision-making process, it is therefore not a commercial dispute, but rather recourse sought by the Applicant over a public officer's decision. That the right forum therefore is the Judicial Review Division of the High Court of Kenya.

23. In addition, that this matter is not peremptorily an appeal, as the decision of the 1st Respondent was administrative and the relief from such can only be *via* judicial review. Further, that the application is not a derivative action as it is not sought by shareholders with respect to a wrong perpetrated against the company by persons in charge of the company, but is a case where the Applicant is aggrieved by the decision of a third-party, namely the 1st Respondent.

24. The 1st Respondent on its part submitted that this court is not the right forum to preside over this matter and therefore does not have jurisdiction to preside over this matter, as the matter is a contest between various factions laying claim to directorship of the Applicant which is a private company. According to the 1st Respondent, judicial review deals with the decision making process and

does not delve into merit review of a contested decision or of contested facts as in this case, and to grant leave would cause the judicial review court to embark upon an examination and appraisal of the evidence of who is a director or not of the company with a view to establishing their claim.

25. Therefore, that judicial review would not be the best tool to resolve the dispute in court due to its limited scope. That in those circumstances, the best course would be to file a suit at the Commercial & Admiralty Division of the High Court where parties would have an opportunity to present their contested facts to the court. Reliance was placed on the decision in **Republic v Attorney General & 2 others Ex-parte Xplico Insurance Company Limited [2014] eKLR** for this proposition.

26. In addition, that there are other yet-to- be-concluded court cases relating to control and directorship of the Applicant at the Commercial & Admiralty Division of the High Court, being **Nairobi High Court Commercial Civil Case No 93 of 2016, Nairobi High Court Commercial Civil Case No. 13 of 2018** as well as in **Nyahururu High Court Civil Case No 1 of 2018** between various parties involved in the contest for control of the Applicant. That it is therefore clear that the Applicant company is embroiled in a dispute of directorship which it now seeks to ventilate in this forum, which amounts to forum shopping and therefore an abuse of court process.

27. Lastly, the 1st Respondent submitted that the application is an appeal from the 1st Respondent's decision disguised as a judicial review application. That the Applicant is effectively asking the court to rectify the register of the company under section 863 of the Companies Act, by compelling the 1st Respondent to accept the heavily contested returns which it has already declined as they do not meet the statutory requirements. Therefore, that the application is an appeal disguised as a judicial review, and this court is ill equipped to make a determination on the matter.

28. The 2nd to 6th Respondents' contended in their submissions that it is trite law that for a company to institute a suit or proceedings, a resolution would have to be made by its Board of Directors authorizing the institution of the suit, and that this is a mandatory requirement of the law. Various judicial decisions were cited in support of this position, including **Kenya Commercial Bank Limited vs Stagecoach Management Ltd, [2014] eKLR, Affordable Homes Africa Limited vs Ian Henderson & 2 Others, HCC 524 of 2004, Assia Pharmaceuticals vs Nairobi Veterinary Centre Ltd, HCC 391 of 2000,** and the rule in **Foss vs Harbottle [1843] 67 ER 189.**

29. Further, that in exceptions such as in the case of derivative suits, it was held in **Ghelani Metals Limited & Others vs Elesh Ghelani Natwarlal & Another [2017] e KLR** that one of the clear requirements for anyone to bring a derivative suit on behalf of a company is that the suit must be brought by a member of the Company. That John Gachanga Mungai is therefore attempting to bring what would in effect be a derivative suit in the name of the Applicant, but while lacking any locus, as he is neither an officer nor a member of the Applicant company.

30. Reliance was also placed on the decision in **Apex Finance International Limited & Another vs KACC [2012] eKLR,** that the juristic status of an applicant and the proper parties in an application for judicial review is an important question that goes to jurisdiction of the court. Also cited in this regard was the decision in **Wilmot Mwadilo & Others vs Eluid Timothy Mwamunga& Another , (2017) e KLR.**

31. According to the 2nd and 6th Respondents, the Applicant is being used to leverage on the interests of plaintiffs in previous suits involving the Directors of the Applicant company, namely Nairobi HCCC 13 of 2018 as well as Nyahururu HCCC 1 of 2018. In addition, that the present application does not challenge the procedural fairness of the process undertaken by the 1st Respondent, but challenges the substantive decision issued by the Registrar on 20th June 2018 declining to register the persons purporting to have been elected Directors of the Company. Therefore, that the judicial review proceedings are the wrong forum for such a challenge.

32. Lastly, on the issue of costs, the 2nd to 6th Respondents urged the court to find that since John Gachanga Mungai filed the suit without authority, he should personally bear the costs of the application, and cited the decision in **Wilmot Mwadilo & Others vs Eluid Timothy Mwamunga& Another (supra)** in this regard.

33. I have considered the arguments made by the parties on the issue of leave, as well as the criteria for granting leave which is multifarious. The relevant factors to be considered in the grant of leave can be summarized as the capacity and interests of the applicant, the nature of the applicant's claim, the merit or otherwise of the applicant's claim, and the propriety of judicial review proceedings to resolve the claim. In the present application, as regards the first factor, it is evident that the directorship of the

Applicant is disputed, and there is on-going litigation on the same. It has therefore not been established that the Applicant has the legal capacity to bring the instant judicial review proceedings, and the dispute as to its *locus* and capacity needs to be resolved first.

34. The nature of an applicant's claim is also relevant to the issue of leave, as there are certain decisions and actions that many not be amenable to judicial review, particularly arising from the requirement the decision or actions should emanate from the exercise of a public function. In the present application the dispute between the Applicant and 2nd to 6th Respondents emanates from the statutory functions of the 1st Respondent under the Companies Act, and is therefore one that would ordinarily fall under the jurisdiction of this Court as granted by Article 165(3) of the Constitution.

35. However, this fact notwithstanding, this Court notes that the subject matter of the impugned decision by the 1st Respondent is also the subject of other court cases that are on-going. The deponent of the Applicant's verifying affidavit, as its alleged company Secretary, ought to have known about the on-going litigation, and it is instructive in this regard that he did not deny knowledge of or dispute the existence of some of the cited cases, and that there also non-disclosure of the said litigation in his initial pleadings. There is thus the risk of this Court being *sub judice* and issuing contradictory orders to those issued by Courts of concurrent jurisdiction. To this extent, this application is also an abuse of the process of Court

36. This brings into play the last factor canvassed by the parties as regards whether this Court is the proper forum to hear the Applicant's claim. The grounds raised by the Applicant are disputed by the Respondents, and will require the adducing of evidence and resolution of the dispute as regards the bona fide directors of the Applicant. This is not a matter that is amenable to judicial review for two reasons.

37. Firstly, it is notable that the exercise of supervisory jurisdiction and grounds of judicial review pursuant to which this supervision is conducted, are premised on the application and interpretation of the law and applicable legal principles on uncontested facts and evidence. It is normally the case that the body whose decision is under challenge is the primary fact finder and decision maker, and the judicial review Court role is limited to a review of the facts and decisions already made, and is not envisaged as the initiator of the said facts or decisions.

38. Secondly, there are alternative fora that are more appropriate to resolve the factual disputes raised in this application, such as the Civil or Commercial Division of the High Court, where no restrictions or limitations exist as those that arise in judicial review.

39. In the premises, I find that the Applicant's Chamber Summons Chamber Summons application dated 31st July 2018 is not merited, and is hereby dismissed with costs to the Respondents.

40. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF JULY 2019

P. NYAMWEYA

JUDGE

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ANNEXURE 4

Copy of the Petition

REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY (THIRD SESSION)

CONVEYANCE OF PUBLIC PETITION

(No. 55 of 2019)

REGARDING UNETHICAL CONDUCT BY THE REGISTRAR OF COMPANIES UNDER THE WATCH OF THE REGISTRAR GENERAL

Honourable Members, Standing Order 225(2) (b) requires the Speaker to report to the House any Petition, other than those presented by a Member. I therefore wish to report to the House that my office has received a Petition, submitted by Mr. Samuel Matheri Hungu on behalf of Midlands Limited as a shareholder.

The petitioner is praying that the House investigates the conduct of the Registrar of Companies and the Registrar General. The petitioner claims that by knowingly ignoring the fact that the above mentioned company has not held any Annual General Meetings since 13th January 2013, the two public officers are in breach of Article 48 of the company's Articles of Association which states that Annual General Meetings should be held within a maximum interval of 15 months and Section 277 of the Companies Act, 2015 which provides for the convening of an extra ordinary General Meeting.

Honourable Members, the petitioner is of the opinion that the aforementioned public officers are keeping an illegitimate Board of Directors in office by denying calls to convene an extra ordinary general meeting

The petitioner is skeptical of the Board's intentions to transfer the farmers' company to an offshore entity, Primestar Holdings, in the West Indies and raises concern regarding the underlying intentions of the sale and the consequences it may inflict on the 12,000 rural households that are shareholders in the company.

Honourable Members, given the circumstances around the sale, the petitioner is apprehensive that there is intent by the public officers and the alleged illegitimate board to commit fraud that could have dire consequences on the citizens who are shareholders of the company and occasion greater, far reaching consequences for agro-processing in general.

Honourable Members, the petitioner prays that the House investigates the conduct of the Registrar of Companies and the Registrar General in relation to the matters raised in this Petition, identifies the owners of Prime Star Holdings Ltd and conducts an inquiry into the intended sale of Midlands Limited to the overseas entity.

I thank you!

THE HON. JUSTIN B.N. MUTURI, EGH, MP

SPEAKER OF THE NATIONAL ASSEMBLY

Tuesday, 11th June, 2019

(1)

TO: NATIONAL ASSEMBLY OF KENYA,

C/O THE CLERK,

KENYA NATIONAL ASSEMBLY

PARLIAMENT BUILDINGS

P.O BOX 41842/00100,

NAIROBI, KENYA

TEL: 0721 767 630

MY REF TBA

YOUR REF DLS/ PETITIONS/2018

RECEIVED
17 OCT 2018
CLERK'S OFFICE

RE: PETITION TO PARLIAMENT UNDER ARTICLE 37 AND 119 OF THE CONSTITUTION, PETITION TO PARLIAMENT (PROCEDURE) ACT AND STANDING ORDERS 223 OF THE NATIONAL ASSEMBLY ON UNETHICAL CONDUCT BY THE REGISTER OF CAMPANIES UNDER THE WATCH OF THE REGISTER GENERAL

I, the undersigned,

Citizen of Kenya, representing Midlands Limited (a public company Reg. No. Cl/87) wish to state that it is in the public interest that I formally lodge this petition concerning the Registrar of companies under the watch of the Registrar General who has acted contrary to the principle that a public officer is expected to uphold ethical and lawful conduct and to be to fair and responsible in the courses of his//her duties.

I humbly draw the attention of the following:

THAT

1. The Construction of Kenya 2010 response all sovereign authority in the people of Kenya.
2. The people of Kenya have delegated legislative authority to parliament as the representatives of the people. The delegation is not absolute and can be exercised by the people simultaneously.
3. The registrar of companies is charged with the responsibility of ensuring the companies are governed and managed in accordance with their articles of Association and within the law. The Article of Association of the company stipulates (at Article 48) that Annual General Meetings must be held within a maximum interval of 15 months and that one of the mandatory business in Annual General Meetings (at Article 53) is the elected of directors

RE: PETITION TO PARLIAMENT UNDER ARTICLES 37 AND 119 OF THE CONSTITUTION, PETITION TO PARLIAMENT (PREOCEDURE) ACT AND STANDING ORDERS 223 OF THE NATIONAL ASSEMBLY ON UNETHICAL CONDUCT BY THE REGISTRAR OF COMPANIES UNDER THE WATCH OF THE REGISTRAR GENERAL.

4. It was within the knowledge of the two public officers that the subject company has not held any Annual general Meeting since 13th January 2013- a staggering span of nearly 70 months.
5. The two public officers have actively and deliberately ignored loud clamor from shareholders for the holding of a general meeting (Extra-ordinary General meeting) convened by the shareholders.
6. Section 277 of the Companies Act, 2015 provides for the convening of an Extra-ordinary General Meeting which coincides with Article 49 of the Articles of association of the subject company.
7. The Registrar of companies together with the Registrar General refused to recognize the shareholders Extra-ordinary General meeting notwithstanding the fact that per Article 48 as read together with article 53 (both of Articles of Association of the subject company) has no legitimate board since May 2014- a period approaching 5 years now.

THAT

8. The illegitimate board is overly keen to transfer the farmers' company to an offshore entity of dubious credentials.

   The intended transferee:-

   Primestar holding Ltd
   C/o Clifton's Estate
   St Thomas parish
   Nevis, West Indies

   Is said to be registered under nominee status and that its real owners remain a shadow in the background.
9. The fact that the two public officers are in the know about the illegitimacy of the board raises a lot of pertinent questions. To start with:-

   I) How did a company in the West Indies come to know of a struggling farmers' company in rural Kenya and develop such an intense interest to own it, such that its co-operators

RE: PETITION TO PARLIAMENT UNDER ARTICLES 37 AND 119 OF THE CONSTITUTION, PETITION TO PARLIAMENT (PREOCEDURE) ACT AND STANDING ORDERS 223 OF THE NATIONAL ASSEMBLY ON UNETHICAL CONDUCT BY THE REGISTRAR OF COMPANIES UNDER THE WATCH OF THE REGISTRAR GENERAL.

(i.e the illegitimate Board) are willing to hijack the company Board by hook or crook in order to implement the transfer?

II) What is there for the illegitimate Board? Do some of them have shares in the intended transferee?

III) Could there be a case of planned laundering of proceeds of crime through this sale?

IV) Could it be proceeds of corruption committed here in Kenya and which the perpetrators now want to bring back as clean money?

V) Or could the illegitimate Board be planning to defraud the farmers?

10. More than 12,000 rural households are shareholders in the subject company. They have dreams to emancipate themselves through this company which they created as a market for their agro-produce with a capacity for value addition. Should the same fall under the control of this shadowy company, this dream could evaporate overnight. Where-upon the desperate farmers could create unrest.
11. Agro-processing (as part of industrialization and as a component of food security) is a very important cog in the Government's Big Four Agenda. The subject company is very well equipped to undertake serious agro-processing but this is being frustrated by the illegitimate Board which is in turn being maintained in office by the two public officers.
12. Redress was sought from the office of the Solicitor general which in turn bore no fruits.

THAT

13. To the best of my knowledge the issues in respect of which this petition is made are not pending before any court of law, constitutional or legal body.

HEREFORE your humble petitioners pray that parliament:

a. Deals with this petition immediately in view of the urgency of the urgency of this matter and the issues presented herein.

RE: PETITION TO PARLIAMENT UNDER ARTICLES 37 AND 119 OF THE CONSTITUTIO.
PARLIAMENT (PROCEDURE) ACT AND STANDING ORDERS 223 OF THE NATIONAL ASSEM.
UNETHICAL CONDUCT BY THE REGISTRAR OF COMPANIES UNDER THE WATCH OF THE REGIS.
GENERAL

b. Investigates the conduct of the Registrar of Companies and Registrar General in relation to the matters raised in this petition.

c. investigates the conduct of the Board with regard to this matter with the aim of having the Board disbanded.

d. investigates this matter with the view of revealing the identity of the owners of Primestar Holdings Ltd which is the intended transferee.

And your petitioner will ever pray

Name of petitioner	Full address	National ID or Passport Number	Signature or thumb impression
TEL 0721767630			
SAMUEL MATHERI HUNGU	63-20318 NORTH KINANGOP	350790	