



**Muchiri v Independent Electoral & Boundaries Commission & 3 others
(Civil Case E002 of 2024) [2024] KEHC 9980 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9980 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL CASE E002 OF 2024
RM MWONGO, J
JULY 30, 2024**

BETWEEN

JAMES BUNDI MUCHIRI PLAINTIFF

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
DEFENDANT**

TEA BOARD OF KENYA 2ND DEFENDANT

KIMUNYE TEA FACTORY LTD 3RD DEFENDANT

JAMES MUCHANGI KIRUNYU 4TH DEFENDANT

RULING

1. The matter before me is the Plaintiff's application dated 3rd July 2024 filed under certificate of urgency. The applicant seeks the following orders:
 1. Spent.
 2. That this honourable court be pleased to issue an order of temporary injunction barring the 3rd Respondents from admitting and confirming the 4th Respondent to the Board of Directors of Kimunye Tea Factory Limited as factory director and/or nominee director representing Njuku electoral area pending the hearing and determination of this application.
 3. That this honourable court be pleased to issue an order of temporary injunction barring the 3rd respondent from admitting and confirming the 4th Respondent to the Board of directors of Kimunye Tea Factory limited as factory director and/or nominee director representing Njuku electoral and pending the hearing and the determination of the main suit.



4. That this honourable court be pleased to issue an order directing the Factory Unit Manager Kimunye Tea Factory to supply the applicant with the following documents pending the hearing of the application:
 - a. Green leaf delivery data for James Muchangi Kirunyu of KM0050107.
 - b. Records of and parcels registered under James Muchangi Kirunyu of KM0050107.
 - c. The number of tea bushes registered each month from June 2023 - May 2024 for James Muchangi Kirunyu of KM0050107.
 - d. The date and number of tea bushes transferred by Boniface Kinyua Muchangi KM0050300 to James Muchangi Kirunyu KM0050107.
5. The cost of this application be provided for.
2. The application is premised on the grounds that:
 1. The IEBC irregularly and unprocedurally vetted and declared the 4th respondent as the winner in the elections conducted on 29th June, 2024 at Kimunye Tea Factory where he was vying for the seat of director in Njuku electoral area.
 2. That 4th respondent did not meet the requirements necessary to vie for the post of director in the company.
 3. That his election as the director representing Njuku electoral area is therefore null and void for failure to meet the required qualifications.
 4. That he is to be confirmed and admitted by the 3rd respondent as a newly elected director in a Special General Meeting that is to be held on 17th July 2024.
3. In essence the applicant's application challenges the election process employed by the IEBC on 28th/29th June 2024 in Kimunye Tea Factory elections which declared the 4th respondent as the duly elected for Njuku electoral area.
4. From his supporting affidavit, the applicant is apprehensive that the 4th Respondent, having met the electoral and vetting requirements will be admitted by the Kimunye Tea Factory Limited as a director at its Special General Meeting scheduled for 19th July 2024.
5. Upon filing the certificate, the application was certified urgent. Directions were given for service and filing of responses. On 9th July 2024 directions were given for filing and exchange of submissions.
6. On 15th July 2024, this court (Omido J) issued a temporary injunction until 24th July 2024. On that day, I extended the interim orders to 30th July 2024, to enable the close of pleadings and submissions, and thereafter delivery of ruling.
7. The 1st Respondent (I.E.B.C) filed a Replying Affidavit sworn by Acenia Njoroge a Returning Officer. She stated that she is opposed to the application because this court's jurisdiction is barred by the doctrine of exhaustion; that the impugned elections held on 29th June 2024 were conducted in accordance with Sections 4, 5 7(1) and 10 of the Manual for Elections of Directors of Small Holder Tea Factories 2nd June 2024 which she exhibited as "IEBC 4". She asserted that the Manual exhibited by the applicant was not the updated version and was intended to mislead the court.



8. According to Section 6 of the *Elections Manual* a Dispute Resolution Committee DRC is established. Under Section 7(1) (2) the DRC has power to hear and determine disputes arising from shortlisting, within four (4) days of receiving the dispute.
9. According to the 1st Respondent's affidavit the Manual for Elections was provided to all Tea Factories; that the application is only disputing that the 4th Defendant did not meet the requirements set out in the Manual; that the 4th Defendant was unprocedurally vetted and declared the winner; and that the applicant has not triggered or used the remedies available in the Manual for resolving both pre and post elections disputes.
10. Further, the 1st Respondent asserts that the applicant having violated the doctrine of exhaustion of internal remedies, the court's jurisdiction cannot avail to him; and that the doctrine of exhaustion serves the purpose of ensuring the postponement of judicial consideration of disputes so that they can be determined within the mechanisms set up outside of the courts.
11. The 1st Respondents affidavit also asserts that the strict timelines set out in the Election Manual for elections disputes are essential to ensure expedition, efficiency and reasonability in disposal of disputes.
12. Finally, the 1st Respondent highlighted several legal authorities in respect of the doctrine of exhaustion, jurisdiction, and on the threshold for grant of temporary injunctions. She asserted that the nomination, vetting and elections conducted by the IEBC were free, fair and verifiable and in strict compliance with the Manual for Elections.
13. The 2nd Respondents response was made through the Replying Affidavit the of Chief Executive Officer of the Tea Board of Kenya. He pointed out that over the years the Tea Sector management challenges had festered leading to attempts to reform the legal and other frameworks regulating the sector. These efforts included the amendment of The *Tea Act* 2020, *The Crops (Tea Industry Regulations, 2020*, and Presidential Executive order No. 3 of 2021 on revitalization of the Tea Sector.
14. Hot on the heels of the reforms, elections for Tea Factory Companies as well as KTDA were held throughout the country. These ushered in substantial changes that were opposed through the filing of multiple suits. All these suits were eventually consolidated in Nairobi High Court Petition No. E254 of 2020 and No. 016 of 2011. Flowing from those cases, court orders were issued that prevented the implementation of the Tea Sector reforms. Multiple applications and appeals were also filed resulting in the cases dragging on for years to the detriment of players in the sector.
15. According to the 2nd Respondents, upon intervention of the Government at the highest levels and Tea Factories, a Mediation Settlement Agreement was reached. By it, the parties agreed primarily, that all pending cases be marked as settled, elections of new directors be held; and that the government would take measures to address concerns raised against the subject legislation and regulations. The Mediation Settlement was adopted as a consent order and a Decree issued in the Consolidated Petitions E254 of 2020 and E016 of 2021. The Decree was annexed as "CWG 2".
16. The said Court Decree formed the basis and framework for the elections of the 3rd Respondents, and all Tea Factories nationwide. Elections were to be held on or before the end of June 2024 in accordance with the Memoranda and Articles of Association of the respective Tea Factory Company's, in force in October 2020. The 3rd Respondent Tea Factory Company conducted elections for its directors on 28/29th June 2024 using the company's Memorandum and Articles of Association and the Election of Directors Manual of Small Holders Tea Factories 2024.
17. The 2nd Respondent stated that the 4th Respondent's nomination papers were accepted by the 1st Respondent and he was cleared to vie pursuant to the Manual for Election of Directors. The said



manual provides for a person aggrieved with the nomination to lodge the dispute with the chairperson of the Dispute Resolution Committee within 48 hours of the pronouncement of the results.

18. According to the 2nd Respondents, no dispute was lodged with the Dispute Resolution Committee by the Applicant. They note that the applicant has admitted in paragraph 6 of his supporting affidavit that the 4th Respondent delivered 3,500 bags of green leaf to the 3rd Respondent that such delivery was accordance with Article 87 (4) of the Articles of the 3rd Respondent.

Analysis and determination

19. From the foregoing background and pleadings, the kernal issues for determination by the court are:
- 1) Whether this court has jurisdiction to hear this matter concerning the election of the 4th Respondent to the Board of Directors of Kimunye Tea Factory Limited representing Njuku electoral area (the question of Jurisdiction & the Doctrine of Exhaustion)
 - 2) Whether the orders of temporary injunction sought by the applicant herein, and orders to supply to the applicant with listed documents should be issued (“the orders for supply of documents”).

Jurisdiction & Doctrine of Exhaustion

20. All parties in this dispute unanimously agree that the 1st Defendant (IEBC) was mandated to conduct free and fair elections for directors of Small Holder Tea Factories including Kimunye Tea Factory Limited the 3rd Defendant/Respondent. All parties agree that the election exercise included vetting of candidates vying for the post of director.
21. Similarly, it is not in dispute that the procedure for the election of the directors was contained in the Manual for Elections of Directors of Small Holder Tea Factories. It is agreed that the Elections of Directors were prescribed by the Articles of Association of Kimunye Tea Factory Limited as existing in October 2020. In this regard the nominee had to show he had 3,500 kg of green leaf.
22. It is also not in dispute that the elections of directors were obligated following a Consent Decree issued by a 3 Judge bench in Nairobi High Court Consolidated Petitions E254 of 2020 and E016 of 2021; By the said Decree small holder tea factory elections were to be held on or before the end of June 2024. Thus, the framework for the elections of Kimunye Tea Factory directors carried out on 28/29th June 2024 was pursuant to the said Decree.
23. The said Consent Decree mandated each small holder Tea factory to convene a Special General Meeting within 21 days of the conclusion of director’s nominations. The purpose of the said was to confirm newly elected directors.
24. It is upon this background that the election of the 4th Respondent is sought to be enjoined on the grounds in the application Notice of Motion dated 3rd July 2024. The prayers sought all concern the admission and confirmation of the 4th Respondent following the election, and impugn the alleged irregular and unprocedural vetting and declaration of the 4th Respondent as the winner of the said elections. It is alleged that the 4th Respondent did not meet the requirement necessary to vie for the post of directors, and thus that the election ought to be declared null and void.
25. The 1st 2nd and 3rd Respondents all argued that the question of the elections could not be determined by this court, because doing so would violate the doctrine of exhaustion of internal remedies; Hence that this court had no jurisdiction.



26. The applicant exhibited a fourteen (14) page “Manual Election of Directors of Small Holder Tea Factories”. At clauses 6-8 of that Manual, a Dispute Resolution Committee is established “to consider and determine disputes arising from short listing of candidates and elections of directors.”
27. In particular clauses 7 & 8 set out in detail the procedure as to how disputes arising from shortlisting of candidates, and disputes arising from the elections held in an electoral area, must be made in writing to the Chairman of Election Dispute Resolution Committee, the time frame for making such complaint, and fee for filing such complaint.
28. The 1st 2nd and 3rd Defendants agree that there was a Manual for elections and that the one exhibited by the applicant is an early draft. They submit that the proper document, which they exhibited, was the “Manual for Election of Directors of Small Holder Tea Factories 2nd Edition June 2024”.
29. I am satisfied that the Manual 2nd Edition 2024 is the correct Manual that was used by the IEBC in conducting the pre-elections screening process and the elections. For purposes of the discussion on exhaustion of remedies and jurisdiction, both version of the Manual contains mandatory dispute resolution mechanisms provisions that there quite similar.
30. The Dispute resolution Mechanism in the Manual 2nd Edition 2024 is as follows:
 6.
 - (1) There is hereby established a Dispute Resolution Committee to consider and determine disputes arising from shortlisting of candidates, elections of directors of the tea factory and enforcement of the electoral code of conduct.
 - (2) The Election Dispute Resolution Committee shall comprise of three members appointed by the electoral body.
 - (3) The quorum for conducting the business of the Election Dispute Resolution Committee shall be three members.
 - (4) Unless a unanimous decision is reached, a decision on any matter before the committee shall be by a majority votes of the members present and voting and in the case of an equality of votes, the chairperson or person presiding over the meeting shall have a casting vote.
 - (5) The Election Dispute Resolution Committee shall be appointed by the electoral body at least twenty-one (21) days prior to the date of elections.
 - (6) In performance of its functions and subject to the provisions of this manual, the Election Dispute Resolution Committee shall regulate its own procedures.
 - (7) The term of the Election Dispute Resolution Committee shall commence from the date of appointment up to the date of the General Meeting.
 - (1) A dispute arising from the shortlisting of candidates in an electoral area shall be made in writing to the Chairman of the Election Dispute Resolution Committee within twenty-four (24) hours from the date of publishing the shortlisted candidates.
 - (2) The aggrieved party shall file the grounds of the dispute arising from the shortlisting together with copies of relevant documents with the Election



Dispute Resolution Committee, and pay to the factory account a non-refundable fee of Kshs.5,000/= (Five Thousand).

- (3) The aggrieved party shall serve the other party (ies) and the electoral body with the particulars of the dispute arising from the shortlisting within twenty-four (24) hours of filing the dispute. Service shall be effected by hand delivery or email address or WhatsApp or to the last known postal address by prepaid recorded delivery or registered post.
- (4) The Election Dispute Resolution Committee shall within twenty -four (24) hours of receiving a dispute arising from shortlisting, give notice to the parties concerned of the date and place of hearing of the application dispute.
- (5) The Election Dispute Resolution Committee shall consider and determine the dispute arising from the shortlisting and communicate the final decision in writing to the affected parties within four (4) days of receiving the dispute arising from the shortlisting.

8.

- (1) A dispute arising from the elections held in an electoral area shall be made in writing to the Chairman of Election Dispute Resolution Committee within forty-eight (48) hours from the date of declaration of the election results.
- (2) The aggrieved party shall file the grounds of the election dispute together with copies of relevant documents with the Election Dispute Resolution Committee, and pay to the factory account a non-refundable fee of Kshs.10,000/= (Ten Thousand only).
- (3) The aggrieved party shall serve the other party (ies) and the electoral body with the particulars of the election dispute within twenty-four (24) hours of filing the dispute. Service shall be effected by hand delivery or email or WhatsApp or to the last known postal address by prepaid delivery or registered post.
- (4) The Election Dispute Resolution Committee shall within twenty-four (24) hours of receiving an election dispute give notice to the parties concerned of the date of hearing of the election dispute.
- (5) The Election Dispute Resolution Committee shall consider and determine the election dispute and communicate the final decision in writing to the affected parties within seven (7) days of receiving the electoral dispute.
- (6) Meetings of the Election Dispute Resolution Committee shall be held at the tea factory.
- (7) The tea factory shall bear the costs of the Election Dispute Resolution Committee.
- (8) The filing of an election dispute pursuant to Clause 8(1) shall not operate as a stay of the election unless the Election Dispute Resolution Committee so orders.
- (9) Any dispute arising from the election shall in the first instance be referred to the Election Dispute Resolution Committee.



(10) Any person who is not satisfied with the decision of the Election Dispute Resolution Committee may refer the matter to the court.

31. From the above provisions, all disputes arising from pre-election shortlisting and the actual election are required to be submitted to the Dispute Resolution Committee. The word used for referral of disputes is in Clauses 7 and 8 is the mandatory “shall”.
32. Indeed, Clauses 8 (9) and (10) specifically provide that dispute arising from the election shall in the first instance be referred to the Election Dispute Resolution Committee; and that, it is only a person who is not satisfied with the decision of the Election Dispute Resolution Committee that may refer the matter to court.
33. The question herein is whether, notwithstanding the provisions in the Manual, this Court can take up jurisdiction over the dispute when the same was not processed through the Dispute Resolution Committee as obligated by Clauses 6-8 of the Manual.
34. The question of jurisdiction has been held to be so central in judicial proceedings, that where a court finds it has no jurisdiction it must down its tools. Parties cited the locus classicus on jurisdiction; the case of *The owners of Motor Vessel Lilian S v Caltex Oil Kenya Ltd* (1989) KLR 1 where it was stated by Nyarangi JA:
- “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.....
- It is for that reason that the question of jurisdiction once raised by a party or by the court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined.”
35. The issue of jurisdiction is so determinative that it can be raised at any stage of the proceedings; See Court of Appeal in *Jamal Salim v Yusuf Abdulahi Abdi & Another* Civil Appeal No. 103/2016 [2018] eKLR; and *Kakuta Maimai Hamisi v Persis Pesi Tobiko & Ors* [2013] eKLR. Jurisdiction, however cannot be conferred by consent of the parties or be carried on the grounds that parties have acquiesced to it.
36. A close reading of the Manual at Clause 7 on a short-listing dispute, shows that such dispute should be filed within 24 hours of the publication of the short list. The applicant is correct on that point. However, his complaint is not merely about the short-listing. He disputes the irregular and unprocedural vetting, and also that the 1st Respondent “declared the 4th Respondent as the winner in the election conducted on 29th June 2024”. (See ground 1 of the Notice of Motion). Consequently prayer 2 of the motion seeks an injunction barring the 3rd Respondents from admitting and confirming the 4th Respondent to the Board of Directors.
37. An election is a process not an event. Hence, the argument that the applicant discovered the short listing after the 24-hour dispute period does not hold. In fact, upon discovering the alleged irregularity, he challenged, not just the short-listing, but the entire election. In that regard, he had recourse to Clause 8(1) of the Manual, to challenge the election within 48 hours from the date of declaration of the results. He has not asserted that he could not or was prevented from doing so.



38. Thus, what is now before this court is a mixed pre-election and election dispute, both of which were required under the Elections Manual to be determined at first instance by the Dispute Resolution Committee. Thereafter, if the applicant was still aggrieved, he could refer the dispute to the court.
39. In Mombasa Constitutional Petition No. 159 *William Odhiambo Ramogi & 3 Ors v AG & 4 Ors, Muslim for Human Rights & 2 Ors (Interested Parties)* [2020] eKLR the High Court well explained the issue of exhaustion of administrations remedies as follows:
- “ 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution .”
40. There are a plethora of authorities on the doctrine of exhaustion. See for example *Geoffrey Muthiga Kabiru & 2 Ors v Samuel Munga Henry & 1756 Ors* [2015] where the Court of Appeal stated in respect of a church dispute that:
- “It is plain to see, that the Church did have [in] place a rather elaborate system for dispute resolution which the plaintiffs in the various suits ought to have had recourse to, and exhausted, before litigating in court. We concur with the learned Judge’s categorical finding in paragraph 75 of his judgment thus:
- “That though the court has jurisdiction to deal with the plaintiff’s complaints it is premature as they did not strictly follow the Church Constitution providing for dispute resolution mechanisms.”
41. In Muthiga, the Court of Appeal then held:
- “It is imperativ the Constitution e that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of the last resort and not the part of call the moment a storm covers within churches, as is bound to happen. The exhaustion doctrine is a round one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This accords with Article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.”
42. The doctrine of exhaustion applies in any scenario where either a statute or subsidiary legislation require that an internal dispute mechanism be employed; or where parties have subjected themselves by rules or by contract, or voluntarily ad hoc, to submit their disputes at the first instance to alternative mechanisms of dispute resolution, rather than to invoke litigation in courts.
43. In this regard disputes such as election related disputes required by statute to be resolved through a dispute resolution panel; or disputes such as those under membership and church constitutions, or those under a commercial or such-like contract for mediation, arbitration or other first-instance adjudication, must first undergo resolution through the selected mechanisms before being litigated



in court. This is what Article 159 of the Constitution envisages when it commands the courts to exercise judicial authority in compliance with the principle of promoting the use of alternative dispute resolution mechanisms.

44. The doctrine of exhaustion has exceptions two of which were well stated in R v IEBC & Ors Ex Parte National Super Alliance (NASA) Kenya & 6 Ors [2017] eKLR where the court opined:

“59... .. what emerges from our jurisprudence in these cases are at least two principles: while exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shakira Limited case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau & 9 Others v Aelous (K) Ltd and 9 Others.

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit, must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be considered restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 Others [2018] eKLR.

45. In this case, there is nothing in the evidence on record, to suggest that the exhaustion principle would not serve the values enshrined in the Constitution . Similarly, there is nothing on record to suggest that the applicant would lack adequate or quality audience before the forum created under the Elections Manual. Indeed, the Dispute Resolution Committee designed under the Manual would have firsthand access to all election materials and other direct relevant information to enable it discharge its determinative first instant duty extremely effectively.

Disposition

46. I think I have said enough on the issue of jurisdiction and the doctrine of exhaustion. In light of all the foregoing, I find and hold that the applicant failed to utilise the Dispute Resolution Mechanism at the first instance. Accordingly, he is not entitled to litigate the dispute here, that ought to have been



determined in the Dispute Resolution Committee under the Election's Manual. In short, this court is not the correct forum with first instance jurisdiction to deal with the applicant's dispute.

47. Having found that the court lacks jurisdiction, it must lay down its tools. Accordingly, there is no necessity to determine the second issue on whether the orders of temporary injunction lie.
48. Accordingly, the application is hereby dismissed with costs.
49. Orders accordingly.

DATED AT KERUGOYA THIS 30TH DAY OF JULY 2024

R. MWONGO

JUDGE

Delivered in the present of:

Wambui holding brief for K. Mwaura for Plaintiff/Applicant

Inyenje for 1st & 3rd Defendant/Respondent

Wahome for 2nd Defendant/Respondent

Ndana for 4th Defendant/Respondent

Court Assistant, Murage

