



REPUBLIC OF KENYA



KENYA LAW
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**Ronoh & 4 others v Kibirech & 3 others (Petition E007 of 2024)
[2024] KEHC 11366 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11366 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
PETITION E007 OF 2024**

JK SERGON, J

SEPTEMBER 26, 2024

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22(1), 23(1),
24(1),(3), 27(1) AND (2), 32, 36(1), 47, 48, 159(1) (2) (A) (B) AND (E),
165(3) (A), (B) & 258 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLES 10, 19, 20, 21, 22(1), 23(1), 24(1), (3),
27(1) AND (2), 32, 36(1), 47 & 48 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

**RAYMOND K RONO 1ST PETITIONER
KENNETH KIPTOO NG'ETICH 2ND PETITIONER
KENETH CHERUIYOT 3RD PETITIONER
WELDON KIPKIRUI CHERUIYOT 4TH PETITIONER
DAVID KIPRONO NG'ETICH 5TH PETITIONER**

AND

**NG'ETICH PHILIP KIBIRECH 1ST RESPONDENT
MOMUL TEA FACTORY LIMITED 2ND RESPONDENT
TEA BOARD OF KENYA 3RD RESPONDENT
INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
(IEBC) 4TH RESPONDENT**



JUDGMENT

1. The petitioner filed the petition dated July 16, 2024 seeking the following reliefs;
 - (i) A declaration that the election conducted by the 2nd, 3rd and 4th respondents in respect of Seretut Zone on 28th June, were unconstitutional in so far as it was conducted in violation of articles 10, 27(1), (2), (3) & (5), 32, 47 (1) and (2) of *the constitution*.
 - (ii) A declaration that the respondents actions were in violation of the petitioner's right to equal treatment, benefit and protection of the law as enshrined in article 27 of *the constitution*, freedom of conscience, religion, belief and opinion pursuant to article 32 of *the constitution* and the right of fair administrative action guaranteed by article 47 of *the constitution*.
 - (iii) A declaration that the election of the 1st respondent was unlawful, illegal, null and void having been marred with unconstitutionality, irregularity and malpractices.
 - (iv) A declaration that the 1st respondent is not qualified to contest for elections as a director of the 2nd respondent.
 - (v) A permanent injunction barring and/or restraining the respondents from clearing to vie, confirming and/or appointing the 1st respondent as a director of the 2nd respondent.
 - (vi) Costs of the petition
 - (vii) Any other relief the honorable court may deem fit and just to grant.
2. A brief factual background of the petition is as follows; That on 28th June, 2024, IEBC the 4th respondent conducted elections for the directors of Momul Tea Factory, the 2nd respondent pursuant to a memorandum of understanding signed between the parties. According to the elections manual promulgated by the Tea Board of Kenya, the 3rd respondent, the elections were to be held between 7am and 3pm on 28th June, 2024. Contrary to the express provisions of clause 9 (18) of the election manual, the election commenced at 5PM and continued past midnight on 29th June, 2024. That this eventually curtailed the participation of a number of the 2nd respondents tea growers of the Seventh Day Adventists Church from voting as their faith obligates them to desist from participating in other activities between 6PM on Fridays and 6PM on Saturdays. That the elderly, women and persons with disabilities and other vulnerable shareholders and/or tea growers of Momul Tea Factory where denied the right to participate in these elections on account of the ungodly hours. That under clause 105 (b) of the 2nd respondents articles of association which stipulates that no person shall hold the office of director beyond the age of seventy and the 4th respondent cleared the 1st respondent nonetheless. That in spite of the foregoing irregularities, the 2nd respondent issued a notice for a special general meeting to be held on 17th July, 2024 when Ngetich Phillip Kibirech is set to be confirmed and/or appointed as director representing Seretut Zone.
3. The petition is supported by the supporting affidavit sworn by Raymond K. Ronoh with the consent of the 2nd, 3rd, 4th and 5th petitioners, all smallholder tea farmers affiliated to the 2nd respondent.
4. The petitioners aver that they are apprehensive that unless the 2nd respondent is restrained by this court, it shall proceed to appoint and confirm the 1st respondent as director despite the glaring irregularities and malpractices that marred his election.



5. The said petition is opposed by the 1st, 2nd & 4th Respondents who filed their response to the petition and replying affidavits.
6. Ngetich Philip Kibirech, the 1st respondent, filed a response to the petition dated 26th August, 2024. In the response to the petition, the 1st respondent conceded that the delay in the start of polls as scheduled equally affected and robbed and denied him of votes and a bigger margin than his opponents.
7. The 1st respondent further avers that he was properly cleared to contest while his age was past the age limit set in the articles of association as the 2nd and 4th respondents were well aware of the legal implication of article 27 of *the constitution* and the *Companies Act*, 2015.
8. The 1st respondent further avers that the elections were in furtherance of a Court order dated 11th April 2024 which set out clear-cut deadlines for the small scale tea factories across Kenya.
9. The 1st respondent avers that save for minor and normal aspects touching on the elections of 28/6/2024, he affirms that the elections were credible, free and fair and no incidences of violence were ever reported and that his appointment and confirmation as the director for Seretut Zone was legal, valid and proper and that in any event the candidate who lost the elections in Seretut Zone was aware of the dispute resolution mechanism provided for in the 2024 Elections Manual.
10. The 1st respondent in his response to the petition sought the following reliefs;
 - (i) The tea growers' elections in Seretut Zone and specifically the election, appointment and confirmation of the 1st respondent as the director representing Seretut Zone was free and fair.
 - (ii) The Petition in its entirety fails the test of a constitutional petition to challenge the election of the 1st Respondent and the general conduct of the elections in Seretut Zone by the 3rd & 4th Respondents.
 - (iii) The Petitioners being voters in Seretut Zone voted for their candidates of choice hence were not prejudiced and or their individual and or collective rights infringed and violated by the 1st, 2nd, 3rd & 4th Respondents.
 - (iv) The Petition lacks merit and has not established any constitutional violations meted on the tea growers and/or the Petitioners hence it should be dismissed with costs.
 - (v) The Petitioners herein do bear the costs of this petition.
11. The 1st respondent, 2nd and 4th respondent filed a joint response to the petition dated 31st July, 2024. In the response to the petition, they aver that they are aware that election manual stipulates that elections are to be held between the hours of 7 a.m. and 3 p.m., however, in this case it was necessary to make adjustments due to delays in the receipt of voting materials.
12. The respondents herein aver that decision to alter the election timelines was not made unilaterally; rather, it was decided in full consultation and concurrence of all contestants and stakeholders. Even then the election was conducted in compliance with in accordance with the principles of fairness and inclusivity, ensuring that the electoral process remained free, fair, and transparent despite the logistical challenges encountered and as such, the appointment and confirmation of the 1st respondent as a director of the 2nd respondent was proper and valid.
13. The 1st respondent in their joint response to the petition sought the following reliefs;
 - (i) The Petition as filed in its entirety does not meet the threshold of a constitutional Petition.
 - (ii) The election of the 1st Respondent was as a result of a free, fair and credible election.



- (iii) The petitioners' rights have not been threatened, infringed and/or violated by the 1st, 2nd & 4th Respondents or at all.
 - (iv) The petition lacks merit and should be dismissed.
 - (v) The petitioners bear the costs of this petition
14. Ngetich Philip Kibirech the 1st respondent filed a replying affidavit, he avers that he duly made an application for the position of the director when the court ordered for elections in the small scale tea factories in Kenya. That he was cleared and issued with a clearance certificate by the 3rd Respondent.
 15. The 1st respondent avers that the Companies Act, 2015 did away with the age limit and as such the Constitution of Kenya in Article 27 guarantees him equal protection and benefit of the law.
 16. The 1st respondent avers that he had been reliably informed that the conduct of the small scale tea growers elections across the country were marred with delays occasioned by factors beyond the control of the 1st, 2nd, 3rd and 4th respondents and the factors propounded by the Petitioners would therefore mean that the national elections in the small scale tea factories should all be invalidated.
 17. Ngetich Philip Kibirech the 1st respondent filed a further replying affidavit, he reiterated that he duly ran for the position of director of the 2nd respondent and was elected to the said position in a free, fair, and transparent electoral process on the 28th of June 2024.
 18. The 1st respondent avers that he was aware that the elections for the directors of the 2nd respondent were scheduled to take place from 7:00 am to 3:00 pm on the 28th of June 2024, but they did not commence until 4:00 pm.
 19. The 1st respondent avers that he was aware from information received from the election officials and communicated to all aspirants, that the delay in commencement of voting was as a result of delay in arrival of polling materials in Kericho due to the "Gen Z Protests"
 20. The 1st respondent avers that due to the delays in the arrival of polling materials, and upon consultation between the election officials and all other stakeholders, including his competitors, it was agreed to extend the voting hours.
 21. The 1st respondent reiterated that the petitioners' prayer to have him barred from holding office due to age would be in direct violation of his constitutional right not to be discriminated against based on age.
 22. The 1st respondent therefore urged this Court to find and hold that the petitioners have not demonstrated any constitutional violations or irregularities warranting the nullification of his election as a director of the 2nd Respondent.
 23. The 4th respondent filed a replying affidavit sworn by Cosmas Korir duly appointed as the returning officer Momul Tea Factory by IEBC.
 24. The 4th respondent avers that the delay in the elections was primarily due to logistical challenges experienced by the 4th Respondent which challenges stemmed from the "Gen Z Protests," which significantly disrupted the coordination of activities between the IEBC headquarters in Nairobi and the electoral areas in question and as a result, it became necessary to extend the voting period beyond the hours specified in the election manual.
 25. The 4th respondent avers that upon the commencement of elections at 4 p.m, priority was given to members of the Seventh-day Adventist Church, women, and the elderly to vote. In further response the 4th Respondent avers that this measure was implemented to accommodate those who might have



- been particularly impacted by the delay and to ensure a fair and inclusive electoral process for all voters, in line with the principles of equity and fairness enshrined in the Kenyan law.
26. The 4th respondent avers that the elections were credible, free, and fair, conducted in a thoroughly transparent manner.
 27. The 4th respondent avers that upon conclusion of the said process, the results were tallied openly and transparently by the polling station presiding officers culminating in the election of the 1st respondent as director. The 4th respondent avers that the said election has not been challenged by any of the 1st respondent's opponents.
 28. The matter came up for inter partes hearing on the 23rd of July 2024, the court directed that the said petition be disposed of by way of written submissions. The parties complied and filed their submissions which this court has considered.
 27. The petitioners contended that the entire election exercise was not credible, free and fair as it was marred with irregularity, lack of transparency and accountability. The petitioners reiterated that it is not in dispute that the impugned elections were conducted out of the set timelines. The elections had been earmarked to be conducted between 7 AM and 3PM on 28th June, 2024 yet the respondents jointly admitted that the elections instead commenced at 4PM on 28th June, 2024 and were conducted well into the night. The petitioners maintained that in so far as the 2nd and 4th respondents unilaterally decided to alter the election timeline without any notice or involvement and/ or participation of the petitioners and by extension the 2nd Respondent's tea growers, this decision invariably occasioned the violation of *the constitution*.
 28. The petitioners further submitted that the 1st respondent was not eligible to be elected as director in the first place as clause 105 (b) of the 2nd respondent's articles of association clearly stipulates that no person shall hold office as director beyond the age of 70 years and cited the case of Nelson Andayi Havi v Law Society of Kenya & 3 others {2018} eKLR the Court called upon to determine the constitutionality of age limits held: "*The Constitution* prohibits unfair discrimination. But it is not every differentiation that amounts to discrimination. It is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination. Hence, the challenged provisions are 'Consistent with *the Constitution*.'" Similarly, in the instant case, the petitioners maintained that the fact that the 2nd respondent's articles of association differentiates persons who are eligible to be elected as director cannot in itself be termed as unconstitutional.
 29. The respondents submitted that the petitioners had not proven that SDA members, women, the elderly and persons with disabilities had been disenfranchised due to the late commencement of the voting process. They further submitted that in electoral disputes, evidence of disenfranchisement typically includes affidavits or testimonies from affected individuals, witness statements, photographs, videos, or other documentation demonstrating how and to what extent individuals were prevented from exercising their voting rights. Without such evidence, it is impossible to establish that the rights of the alleged groups were violated. Mere assertions in a petition, without corroborative evidence, do not meet the legal threshold required to prove constitutional violations. This was the position of the Court of Appeal in John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR, where the court emphasized that allegations of electoral malpractices, including disenfranchisement, must be proved by cogent evidence. General allegations without supporting evidence are insufficient.
 30. The respondents relied on section 83 of the *Elections Act* which is particularly instructive in determining the validity of an election in cases where there are allegations of non-compliance with



electoral laws. It states: “No elections shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in *the constitution* and in that written law or that the non-compliance did not affect the result of the election.” They argued that the aforementioned section essentially implies that not every breach of electoral laws or irregularity will invalidate an election. For an election to be nullified, the irregularities must be of such a nature that they affect the overall outcome of the election. They cited the case of Hassan Mohamed Hassan & another v Independent Electoral & Boundaries Commission & 2 others [2013] eKLR provides valuable insights into how the courts interpret Section 83 of the *Elections Act*. The court held that a breach of regulations or procedures, which does not significantly interfere with the democratic choice of voters, is not sufficient to invalidate an election. The Court is primarily concerned with whether the alleged irregularities were so substantial that they undermined the principles of a free and fair election. The respondents maintained that election process, despite some logistical challenges, adhered to the constitutional principles of transparency, fairness, and impartiality and that they demonstrated efforts to accommodate various voter groups, ensuring an inclusive and participatory process.

31. The respondents argued that petitioners were seeking to enforce an age-based restriction from the articles of association of the 2nd Respondent, which is incompatible with the current constitutional framework. The articles of association in question were adopted under the provisions of the repealed *Companies Act*, which may have permitted certain age-based restrictions that are no longer justifiable under the current legal regime. They argued that since the enactment of the *Companies Act*, 2015, there has been a shift towards aligning corporate governance practices with constitutional mandates.
32. This court has considered the pleadings and submissions filed by the parties and the sole issue is whether this court has jurisdiction to hear this matter concerning the election of the 1st Respondent to the Board of Directors of Momul Tea Factory Limited representing Seretut electoral area bearing in mind the question of Jurisdiction & the Doctrine of Exhaustion
33. 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 virtue of 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 Momul Tea Factory directors carried out on 28/29th June 2024 was pursuant to the strict timelines set in the said decree.
34. All parties in this dispute unanimously agree that the 4th Respondent (IEBC) was mandated to conduct free and fair elections for directors of Small Holder Tea Factories including Momul Tea Factory Limited the 2nd Respondent.
35. The 1st respondent in the averments of his replying affidavit in response to the petition maintained that the elections were credible, free and fair and no incidences of violence were ever reported and that his appointment and confirmation as the director for Seretut Zone was legal, valid and proper and that in any event the candidate who lost the elections in Seretut Zone was aware of the dispute resolution mechanism provided for in the 2024 Elections Manual.
36. This court therefore had the benefit of carefully studying the manual in question which titled “Manual for Election of Directors of Small Holder Tea Factories 2nd Edition June 2024” in the said manual, in particular clauses 6, 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. Therefore 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”. The question herein is whether, the provisions in the Manual notwithstanding, 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.

37. In the case of *Geoffrey Muthiga Kabiru & 2 Ors v Samuel Munga Henry & 1756 Ors* [2015] the Court of Appeal stated that: “It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of 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.”
38. 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.
39. Article 159 (2) of *the Constitution* recognizes alternative dispute resolution and the courts have upheld this constitutional requirement. However, there is precedent that takes cognisance of unique and peculiar circumstances and therefore amenable to exceptional circumstances to the exhaustion of local remedies. The case of *Krystalline Salt Limited v Kenya Revenue Authority* (2019) eKLR defined exceptional circumstances as; “What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile. This Court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to respect the applicable remedy.” Similarly, section 9(4) of the Fair Administrative Action stipulates that a High Court may in exceptional circumstances and on application exempt such a person from obligation in exhausting local remedies before instituting proceedings. However, in this case the Petitioner has not demonstrated exceptional circumstances on exhaustion of local remedies.
40. The above notwithstanding, this court finds that the elections held on 28th June, 2024 were free and fair. The 4th respondent conceded to logistical challenges experienced which challenges stemmed from the nationwide “Gen Z Protests,” which significantly disrupted the coordination of activities between the IEBC headquarters in Nairobi and the electoral areas in question, however maintained that the elections were credible, free, and fair, conducted in a thoroughly transparent manner. This court finds that the petitioner did not furnish cogent evidence to prove the allegations of election irregularity and electoral malpractice. Section 83 of the *Elections Act* No. 24 of 2011 states that; “No election shall be declared to be void by reason of noncompliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in *the Constitution* and in that written law or that the non-compliance did not affect the result of the election.”
41. This court therefore finds and holds that the petitioner failed to utilize the dispute resolution mechanism prescribed in the Elections Manual at the first instance. This Court is not the correct forum on the first instance in the petitioner’s dispute. Even assuming that the dispute is properly before this



Court, this court is satisfied that the Election complained of was free and fair. The irregularities pointed out did not affect substantially the outcome and validity of the Election. In the end, In the end, I find no merit in the Petition. The same is ordered struck out and dismissed with costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 26TH DAY SEPTEMBER, 2024.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant - Rutoh

Koech for 1st, 2nd & 4th Respondents

E. K. Korir for 1st Respondent

No Appearance for the Petitioner

