



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CONSTITUTIONAL PETITION NO. 4 OF 2020

KIPNGENO RONO.....PETITIONER

VERSUS

KAPKOROS TEA FACTORY LTD.....1ST RESPONDENT

KENYA TEA DEVELOPMENT MANAGEMENT SERVICE....2ND RESPONDENT

CHAIRMAN DISPUTE RESOLUTION COMMITTEE.....3RD RESPONDENT

RULING

1. This ruling is in respect of the Petitioner's Notice of Motion dated 13th October 2020, the 2nd Respondent's Preliminary Objection, and the 3rd Respondent's Preliminary Objection both dated 26th October 2020. In his Notice of Motion filed on 14th October 2020, the Petitioner sought the following orders:-

- i. Spent
- ii. Spent.
- iii. That this court be pleased to issue conservatory orders restraining the Respondents from continuing with the process of nomination of directors and/or conducting the elections in respect and specific to NDARAWETA ELECTORAL AREA until the suit herein is heard and determined.
- iv. Spent
- v. That the decision of the verification committee and dispute resolution committee in relation to the application be stayed until the hearing and determination of the suit
- vi. That a mandatory injunction do issue compelling the Respondents to furnish the Petitioner with the minutes of the deliberation of the verification committee and the dispute resolution committee.
- vii. Spent
- viii. Cost of this Petition.

2. The application was supported by the affidavit of the petitioner Kipngeno Rono dated 13th October 2020. He averred that he was an active registered farmer within Ndaraweta electoral area and had previously worked as a logistic assistant at Tirgaga Tea Factory. He stated that the 1st Respondent advertised elections for directorship to be held on 3rd November 2020. That the Petitioner submitted his application for candidacy and attached all relevant documents. However, by a notification dated 30th November 2020, the Verification Committee rejected his candidacy on the grounds that he was not of good standing in the society.

3. Aggrieved by the decision of the verification committee, the Petitioner lodged an appeal dated 30th September 2020 to the Dispute Resolution Committee. The Petitioner's appeal was similarly rejected by the Dispute Resolution Committee Vide a letter dated 2nd October 2020 from the chairman of the Committee.

4. The Petitioner claimed that the decision to reject his candidacy was without basis and unlawful as he was never afforded an opportunity to present his case. He further claimed that the process was biased in favour a sitting director to vie for the position unopposed.

5. The Petitioner stated that the Respondents would not be prejudiced if the orders sought were granted as the only candidate cleared to vie was a sitting director. That in the converse, he (the petitioner) would suffer irreparable loss and damage if the orders sought were not granted.

The 1st Respondent's case

6. The 1st Respondent opposed the Notice of Motion Application through the Replying Affidavit of Dr. John Kennedy Omanga, the Company Secretary of the 1st and 2nd Respondents, dated 26th October 2020.

7. Dr. Omanga averred that on 15th September 2009 the 1st Respondent entered into a Management Agreement with Kenya Tea Development Agency Limited (KTDA) for the management and conduct of affairs or businesses of the 1st Respondent. That on 26th June 2010 KTDA invoked clause 12.1 of the Management Agreement and assigned all its duties to the 2nd Respondent herein. That among duties of the 2nd Respondent under the Management Agreement was to ensure the 1st Respondent complied with the annual one-third retirement of directors' rule by calling for the directors' elections from time to time. That in order to ensure the elections were conducted in a civilised and orderly manner Election Rules and Regulations were developed to guide the election and resolve disputes. Further, on 1st September 2020 potential candidates were notified the conditions applicants must comply with including being of good standing.

8. Dr. Omanga averred that he was aware that the Petitioner had offered himself as a candidate for the position of director. That on the 30th September 2020 after deliberations, the Verification Committee disqualified the petitioner, as he was not in good standing having been found guilty of green leaf falsification. That the Petitioner being dissatisfied with the decision of the Verification Committee appealed to the Dispute Resolution Committee. That the Dispute Resolution Committee in its decision on 2nd October 2020 upheld the decision of the Verification Committee.

9. The 1st Respondent averred that the Petitioner signed the Election Condition Acceptance and was bound by them and therefore was estopped from alleging that the verification process was biased. It was further averred that the 1st Respondent's electoral system guaranteed the right to be heard at the Verification Committee level and the Dispute Resolution Committee as an appeal process where representation is invited.

10. Dr. Omanga stated that the 1st and 2nd Respondents had strict election timelines which culminate in confirmation of the elected directors at the Annual General Meeting (AGM). He further stated that it was in the wider legitimate and public interest of the voters that the election be allowed to proceed as the Petitioner's private interests had nil chance of success and as he (Petitioner) remained unqualified to participate in the elections.

2nd Respondent's case

11. The 2nd Respondent in response to the Notice of Motion and Petition, filed a Notice of Preliminary Objection dated the 26th October, 2020 on the grounds reproduced verbatim that:

- i. The instant Petition and Application as filed did not disclose any cause of action or claim against the 2nd Respondent.
- ii. The 2nd Respondent is a known and disclosed agent of the 1st Respondent and as such cannot be sued where the principal was known.
- iii. As such any purported wrong committed by the 1st Respondent, which in any event was not the case herein, does not attract independent personal liability in court action against the 2nd Respondent itself, being the agent of the 1st Respondent.
- iv. In the circumstances, the Petitioner's entire suit against the 2nd Respondent is frivolous a monumental procedural and substantive legal nullity, fatally and irredeemably incompetent, an abuse of the court process, an afterthought, vexatious, mischievous and a proper candidate for dismissal and or striking out with costs.

3rd Respondent's case

12. The 3rd Respondent in response to the Notice of Motion petition, filed a Notice of Preliminary Objection dated the 26th October, 2020 on the grounds reproduced verbatim that:

- i. The 3rd Respondent is not a legal person capable of suing and or being sued before a court of law.
- ii. The 3rd Respondent was an adhoc committee established under Elections Rules and Regulations of the 1st Respondent and whose term expired on 2nd October 2020. Thereafter, the 1st Respondent stood dissolved and is no longer in existence.
- iii. In the circumstances, the suit herein as instituted against the 3rd Respondent and the interlocutory and/or permanent orders or prayers sought thereon are a monumental procedural and substantive legal nullity, fatally and irredeemably incompetent, an abuse of

the court process, an afterthought, in vain, vexatious and a proper candidate for dismissal and or striking out with costs.

13. The Application came up for hearing on 11th November 2020. Mr. Mugumya for the Petitioner relied on the grounds and the Affidavit in support of the Application. He submitted that the termination of the Petitioner's employment by Tirgaga Tea Factory Company Limited was outside the scope of the application; that Tirgaga Tea Factory Company Limited was not a party to the suit and therefore the Respondent's submission on the issue was outside the Petition. Counsel further contended that the Petitioner was a shareholder and he had attached all relevant documents that were required of him and was therefore qualified to participate in the directors' elections. He submitted that the Petitioner had established a prima facie case and would suffer prejudice if the orders were not granted. He relied on **International Centre for Policy and Conflict & 5 others vs Attorney General & 5 Others**.

14. Mr. Mugumya submitted that the P.O by the 2nd and 3rd Respondent were statements of fact and not law and that they fell short of the principles set in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**. He contended that it would not be possible for the 3rd Respondent to appoint an advocate and file pleadings if it did not exist. He asked the court to grant the Petitioner conservatory orders.

15. Mr. Milimo represented all the three Respondents. He placed reliance on the Replying Affidavit and the P.Os in opposing the Application. On the 2nd Respondent's P.O counsel contended that the Petitioner's case did not disclose a cause of action against the 2nd Respondent. He further submitted that it is a principle of law that a party cannot sue an agent where there is a disclosed principal. That the 2nd Respondent was a disclosed agent of the 1st Respondent as evidenced by the Management Agreement establishing the agency relationship. He cited the case of **Victor Mabachi & another vs Nurtun Bates Limited [2013] eKLR** and **John Gitonga Arithi vs Kinoro Tea Factory Company Limited & 3 others**.

16. With regard to the 3rd Respondent's P.O. Mr. Milimo submitted that the Managing Director of the 2nd Respondent had the mandate to appoint members of the 3rd Respondent and that the tenure of the 3rd Respondent's Committee terminated in October 2020. Counsel argued that the 3rd Respondent was not a legal person capable of being sued in a court of law. He relied on **Geoffrey Chege Kirundi vs Dispute Resolution Committee of Kenya Tea Development Agency Holdings Ltd & another [2017] eKLR**.

17. On the 1st Respondent's Replying Affidavit, Mr. Milimo submitted that the elections were conducted under regulations to which participants were bound and that one of the conditions was that a person wishing to participate in the elections had to be of good standing in the society. Counsel contended that the Petitioner was not in good standing as his employment had been terminated after being taken through due process for theft of tea leaves. That the decision to terminate the Petitioner's employment neither been challenged nor set aside and was still valid. He relied on **Mohammed A. Malim vs Registered Trustees of the Agricultural Society of Kenya & 33 Others [2019] eKLR**.

18. Counsel further submitted that the Petition did not raise a constitutional question and that the elections were an internal matter of the company. He further argued that the Petitioner's claim touched on an employment issue which was outside the scope of this court.

19. On the orders sought, Mr. Milimo contended that the Petitioner had not satisfied any of the conditions for their grant. He argued that the Petitioner failed to demonstrate loss and how it was not possible for him to be compensated. Additionally, he submitted that the court had the power to nullify the elections. Counsel further submitted that the P.Os raised pure issues of law which were not disputed. He placed reliance on **Paul Mogaka Magoma v Gianchore Tea Factory Co & 2 others [2016] eKLR** and **Kenya Tea Development Agency Holdings Ltd & 53 Others v Cabinet Secretary, Ministry of Agriculture, Livestock Fisheries & Co-operative & Others Nairobi High Court Constitutional Petition No. E243 of 2020**

Analysis and determination

20. I have considered the application, and the submissions as well as the authorities cited to me by the parties. I find the following issues for determination:-

- i. Whether the 2nd and 3rd Respondents' are proper parties to the suit.
- ii. Whether the Petitioner merits the conservatory orders sought.

21. The first issue addresses the 2nd and 3rd Respondent's preliminary objections. The relevant principles are found in the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696**. At page 700 Pr. D-F Law JA (as he then was) stated:-

“...A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbold, P.; on the other hand at pg.701 paragraph B-C added the following:

“A Preliminary usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial

discretion....”

22. In the present case, the Preliminary Objection raised by the 2nd and 3rd Respondents is that they were wrongly enjoined in the petition. The importance of proper parties before the court cannot be gain said. I agree with Aburili J’s reasoning in **Football Kenya Federation v Kenyan Premier League Limited & 4 others [2015] eKLR**, where she held that:-

“It is my humble view that the presence of proper parties before the court is sine quo non exercise of jurisdiction of the court. I am fortified on this point by the holding in *Appex International Ltd & Anglo leasing & Finance International Ltd vs Kenya Anti-Corruption Commission (2012) eKLR cited with approval Goodwill & Trust Investments Ltd & Another Vs Will & Bush Ltd (Supreme Court Of Nigeria), where the court held:*

“it is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed. The parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court the court lacks jurisdiction to hear the suit, and where the court purports to exercise jurisdiction which it does not have, the proceedings before it and its judgment will amount to a nullity no matter how well reasoned.”

23. In this case, the 2nd Respondent contends that it is an agent of the 1st Respondent and the general principle is that an agent of a disclosed principal cannot be sued. The Court of Appeal in **City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & another [2016] eKLR** pronounced itself thus:

“In ANTHONY FRANCIS WAREHEIM T/A WAREHEIM & 2 OTHERS V. KENYA POST OFFICE SAVINGS BANK, CIVIL APPLN NOs. NAI 5 & 48 OF 2002, at page 10, this Court unanimously held as follows:

“It was also prima facie imperative that the court should have dismissed the respondent’s claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued.....”

...In the circumstances of this case, the 2nd respondent cannot be sued as agent where there is a disclosed principal [the appellant]. There is therefore no cause of action against the 2nd respondent. The principle of common law is that where the principal is disclosed, the agent is not to be sued. In the circumstances of this case, the principal (the appellant) is disclosed and the agent (the 2nd respondent) cannot therefore be sued. There are no factors vitiating the liability of the disclosed principal. Accordingly, the enjoinder of the 2nd respondent in this case is unwarranted.”

24. In the present case, the 1st Respondent attached a Management Agreement between itself and the 2nd Respondent’s holding company disclosing an agency relationship which fact remains uncontroverted. Based on the common law principle as outlined by the Court of Appeal, the absence of factors vitiating the liability of the principal, the enjoinder of the 2nd Respondent in the Petition is unwarranted. Having so found, the order which commends itself to me, which I hereby make, is to strike out the 2nd Respondent from the petition. Thus, the 2nd Respondent’s P.O succeeds and is upheld.

25. The 3rd Respondent’s preliminary objection is premised on the argument that it is not a legal person and therefore cannot be sued. In the **FKF case (supra)** the court quoted the matter of **Phakey Vs World Wide Agencies Ltd 1948 815 EACA 1, Free Pentecostal Fellowship in Kenya Vs KCB NRB HCC 5116/2002(OS)** where the court stated that:

“the position in common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 of the CPR. In the instant case, the suit was instituted in the name of a religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so, it lacked the capacity to institute proceedings in its own name.”

26. In the present case, the Petitioner has enjoined the chairman of the Dispute Resolution Committee and not the committee itself. The 3rd Respondent was correct in stating that the committee cannot be sued. From the pleadings however, it is clear that the Petitioner has sued the chairman, who is the representative of the Committee and, who by law, can be sued. Furthermore, the Petitioner’s claim is against the decision of the Committee, making it imperative to enjoin the head of the Committee. The 3rd Respondent is indeed a proper and necessary party in the suit. For this reason, I find the 3rd Respondent’s Preliminary Objection not merited and I dismiss it.

27. Having dispensed with the preliminary objections, I now turn to the issue whether or not the conservatory orders are merited. In so doing I am guided by the principle that at this stage, the court is not called upon and is indeed not required to make any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition. In **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR Onguto J** (as he then was) summed the applicable principles as follows:-

“In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim Conservatory order is not granted, the petition or its substratum will

be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.”

28. In **Wilson Kaberia Nkunja vs. The Magistrates and Judges Vetting Board and Others, Nairobi High Court Constitutional Petition No.154 of 2016** the court summarized the principles as follows:-

(a) **An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.**

(b) **Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and**

(c) **The public interest must be considered before grant of a conservatory order.**

29. The issue in contention in this application is whether the Applicant has established a prima facie case that warrants the grant of conservatory orders. As it has been held in various decisions, a prima facie case is not a case which must succeed at the hearing of the main case but which discloses arguable issues and in a case alleging violation of rights, arguable constitutional issues. **Odunga J in Kevin K. Mwiti & Others v Kenya School of Law & Others [2015] eKLR** stated:

“...A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues.”

30. In determining whether a matter discloses a prima facie case the court looks at the whole case. The Petitioner must demonstrate that there is a possibility that the decision of the Respondents infringed on his rights.

31. The Petitioner alleged that in arriving at its decision dismissing the Petitioner’s appeal, the 3rd Respondent did not furnish him with reasons for his decision and that he was denied a chance to present his case contrary to Article 47 of the Constitution. He further alleged that the Respondents denied him an opportunity for arbitration which opportunity was accorded to other candidates, which was discriminatory. He further submitted that his termination from service was on mutual agreement and that the 1st Respondent was estopped from imputing improper character upon him.

32. I have evaluated the Petitioner’s case, it is my finding that he has demonstrated a prima facie case. He has therefore met the 1st condition.

33. Before granting conservatory orders however, the court is required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant. This principle was clearly stated in the case of the **Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General, [2011] eKLR** which held that:-

“At this stage, a party seeking a conservatory order only requires to demonstrate that...unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

34. The Petitioner’s contention must be weighed against those of the Respondents who have dealt with other participants vying for candidacy as a director under the same rules and regulations. The Respondents contended that they had strict timelines by which to conduct the elections and confirm the new directors to ensure that the running of the factory is not affected. On the other hand, the Petitioner argued that the process was biased aimed at favouring the current sitting director to sail through unopposed.

35. In this case, it is clear that the Petitioner would be prejudiced if the elections went on without his participation having been disqualified under unclear circumstances.

36. The third principle in considering whether or not to grant conservatory order is whether it would be in public interest. The Supreme Court in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Ors [2014] eKLR** expressed itself on the matter as follows:

“Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the “prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success’ in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes...The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal...These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely...That it is in the public interest that the order of stay be granted. This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution.”

37. The Petitioner sought to halt the Petitioner’s electoral process on the basis that it was biased to favour one candidate. He maintained that

the Respondents would not be prejudiced as the current director was unopposed and would continue serving as such until elections are held. The Respondents are of the contrary position. They contended that Petitioner is ineligible to vie for the directorship due to his lack of good standing. Additionally, they submitted that they were required to confirm the new director at the next Annual General Meeting.

38. I have weighed the opposing views. As I had earlier stated the Petitioner's main contention is that in reaching a decision to disqualify him from candidacy, due process was not followed thus infringing on his right to fair administrative action. I observe however that the Petitioner has not sought to review the decision of the Dispute Resolution Committee. He has not shown this court how members of the Ndaraweta electoral area shall be affected if he does not participate in the election. To grant the conservatory orders in the circumstances of this case would be disproportionate to the mischief that is sought to be cured by such orders. I find that the public interest lies in allowing the elections to proceed. It does not necessarily follow that in every petition that the Petitioner discloses a prima facie case, conservatory orders must be issued as a matter of course. Whereas I cannot at this stage make definite findings on the fate of the petition, it is clear to me that the Petitioner has not made out a case for the grant of the conservatory orders sought. In any case nothing stops the court from nullifying the election and ordering a fresh election should the petitioner succeed in the Petition. See **Kenya Tea Development Agency Holdings Ltd & 53 Others v Cabinet Secretary, Ministry of Agriculture, Livestock Fisheries & Co-operative & Others (supra)**.

39. Finally, the Petitioner sought a mandatory injunction to compel the Respondents to furnish him with the minutes of deliberations of the Verification Committee and the Dispute Resolution Committee. Discussing the circumstances under which mandatory injunctions can be issued, the Court of Appeal in the case of **Kenya Breweries Ltd & another v Washington O. Okeyo [2002] eKLR**; cited with approval **Vol. 24, 4th Edition of Halsbury's Laws of England**, paragraph 948 that:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application”.

40. Guided by the above precedent and in the circumstances of the case, I am persuaded that the prayer is merited. Disclosure of the deliberations of the two committees is not only just and fair but will assist in dispensing of the Petition in a timeous manner.

41. The following orders flow:-

- a. The 2nd Respondent's Preliminary Objection is merited and is upheld. The 2nd Respondent is consequently struck out of the petition.
- b. The 3rd Respondent's Preliminary Objection lacks merit and is dismissed.
- c. The prayer for conservatory orders to stop the Respondents from nominating candidates and holding elections in respect of Ndaraweta electoral Area is denied.
- d. That a mandatory injunction do issue compelling the Respondents to furnish the Petitioner with the minutes of deliberations of the Verification Committee and the Dispute Resolution Committee in respect to the Petitioner's application and petition.
- e. The interim orders earlier granted are discharged.
- f. Each party to bear its own costs.

42. Orders accordingly.

Ruling delivered, dated and signed at Bomet this 27th day of Janaury 2021.

.....

R. LAGAT KORIR

JUDGE

Ruling delivered in the presence of Mr. Mugumya for the Petitioner, Mr. Korir holding brief for Mr. Milimo for the Respondents, and Kiprotich (Court Assistant).