REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL CASE NO. E003 OF 2021

JOHN NYAMBOGA MORIASI.....PETITIONER/APPLICANT

VERSUS

1. THOMAS ONCHABA NYANDIEKA.....1ST DEFENDANT/RESPONDENT

2. CHAIRMAN, ELECTIONS COMMITTEE

GIANCHORE TEA FACTORY CO. LTD.....2ND DEFENDANT/RESPONDENT

3. RETURNING OFFICER.....3RD DEFENDANT/RESPONDENT

4. GIANCHORE TEA FACTORY CO. LTD.....4TH DEFENDANT/RESPONDENT

5. TEA BOARD OF KENYA.....5TH DEFENDANT

RULING

By the Notice of Motion dated 3rd June 2021 the plaintiff/applicant herein filed a Notice of Motion by which he sought the following orders: -

"1. THAT the application herein be certified urgent and the same be heard ex-parte in the first instance.

2. THAT the Honourable court be pleased to grant an interim order of injunction restraining the 2nd, 3rd and 5th Respondents, their agents, servants and or anybody working under their instructions from swearing in and or issuing any certificate to the 1st respondent and or recognizing him in any manner as the chairperson and or Director of the 4th respondent and or the 1st respondent be restrained from accessing, threatening and or entering the premises of the 4th respondent pending the hearing and determination of this application.

3. THAT the Honourable court be pleased to grant an interim order of injunction restraining the 2nd, 3rd and 5th respondents, their agents, servants and or anybody working under their instructions from swearing in and or issuing any certificate to the 1st respondent and or recognizing him in any manner as the chairperson and or Director of the 4th respondent and or the 1st respondent be restraining from accessing, threatening and or entering the premises of the 4th respondent pending the hearing and determination of this suit.

4. THAT the Officer Commanding Nyamira Police Station to ensure compliance of the orders.

5. THAT cost of this application be borne by the respondents.

6. Such further and or other orders be made as the court may deem fit and expedient."

In response to the application the 1st defendant/respondent filed a notice of preliminary objection in which he asserts that: -

"1. The entire suit contravenes regulation 18 of the Tea (Tea Factory Limited Company Elections) Regulations, 2021, the suit contravenes the provision of regulation.

2. The suit as filed and presented before the Honourable Court is frivolous, vexatious and lacking in merit.

3. In the circumstances, the suit is procedurally and substantively bad in law, hence suitable to be dismissed and/or struck out with costs to the Respondent."

Noting that a preliminary objection has the effect of disposing a suit this court directed that the preliminary objection would be heard first the reason being that the preliminary objection touches on the issue of the jurisdiction of this court to hear and determine the application and the suit and as was stated in the case of **The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd [1989] KLR 1:** -

"Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tool in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."

Counsel for the parties consented to disposing the preliminary objection by way of written submissions and the same were duly received save that those of the plaintiff/applicant and the 2nd and 3rd defendants/respondents arrived very late on 28th July 2021 whereas the ruling had been scheduled for 29th July 2021.

The gist of the preliminary objection is that the plaintiff/applicant did not before coming to this court exhaust the election dispute resolution mechanism provided in **Regulation 18** of the **TEA (TEA FACTORY LIMITED ELECTIONS) REGULATIONS, 2021** and as such he is not properly before this court and this court has no jurisdiction to hear the application. To support this submission Counsel for the 1st defendant/respondent cited the case of **Paul Mogaka Magoma v Gianchore Tea Factory Co. & 2 others [2016] eKLR** where it was held:-

"The applicant has not demonstrated to this court that he exhausted the company's internal mechanism of dispute resolution before coming to court. Furthermore, he did not also demonstrate that he had any difficulties or reservations exploring the dispute resolution mechanism provided for by the company's resolutions. Courts have severally held the position that they would be reluctant to enter into the arena of disputes arising from the internal management of companies especially where there are provisions for internal mechanisms to deal with such disputes."

Counsel also cited the case of **Job Fellis Ndarera & another v Nyamache Tea Company Limited & 2 others [2016] eKLR** where the court held: -

"51. It is therefore my finding that the rules contained in the elections manual speak for themselves and are derived from the Company Law, the Company's Articles of Association and Management agreement. It is my finding that the said election rules were therefore binding on the applicants in so far as the elections dispute resolution forum is concerned and therefore, the respondents did not have to produce the Memorandum and Articles of Association to prove the existence of the internal dispute resolution mechanism.

52. Having regard to the observations and findings that I have made hereinabove, my ruling is that this court lacks jurisdiction to deal with the application and grant the orders sought. The order that commends itself to me therefore is an order to dismiss the application dated 14th January 2016 with costs to the respondents."

Counsel further cited the case of **Okiya Omtatah Okoiti & another v Kenya Power & Lighting Company Limited (KPLC) & 4 others [2020] eKLR** where the court was emphatic that: -

"47. It is trite that where procedures and processes exist for resolution of disputes such processes must be exhausted first, before a party can approach court."

Counsel also relied on the decision of the Court of Appeal case of **Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Kenry & 1756 others [2015] eKLR** to support his submission that the plaintiff/applicant should first have exhausted the dispute resolution mechanism in Regulation 18 before coming to this court. Counsel also submitted that the plaintiff/applicant's suit is frivolous, vexatious and lacking in merit for the same reason. He urged this court therefore to dismiss and/or strike it out with costs to the 1st defendant.

For the plaintiff/applicant, it is submitted that the preliminary objection is geared to confuse the court and can be best described as an abuse of the court process. Counsel for the plaintiff/applicant submitted that what is in issue is that the 1st defendant/respondent who did not meet the conditions for the impugned election forced his way into the ballot by printing documents, cleared himself and declared himself the winner. Counsel submitted that what the other candidates garnered in the elections or how the 1st defendant/respondent was declared the winner are all questions of fact to be established through evidence but are not procedural issues or technicalities and for substantial justice to be done this case must be heard. Counsel contended that a preliminary objection must be one that could ultimately end in striking out the suit but that that would be a drastic step which is discouraged under **Article 159** of the **Constitution**. Counsel submitted that moreover, the preliminary objection does not meet the test laid in the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited [1969] EA 696.** While conceding that the impugned elections were held under the **TEA (TEA FACTORY LIMITED COMPANY ELECTIONS) REGULATIONS, 2021** and that there was an Election Committee in place and further that the Election Committee was chaired by the 2nd defendant/respondent Counsel submitted that **Regulation 10** detailed the qualifications that were to be met by the candidates and stated that the 1st defendant/respondent did not meet those qualifications. Counsel contended that whether the 1st defendant/respondent met those qualifications is a fact to be determined by this court and hence the preliminary objection does not apply. Counsel submitted that indeed the plaintiff/applicant upon noticing the electoral irregularities raised the same with the Election Committee on 30th April 2021 and the same were escalated to the 5th defendant/respondent by the chair of the Election Committee. Counsel

pointed out that the 1st defendant/respondent did not file a defence or replying affidavit in opposition to the suit but has instead sought to rely on technicalities to save himself from **"the evil he did."** Counsel asserted that under **Article 165 (3) (a) of the Constitution** this court has unlimited original jurisdiction in criminal and civil matters and it is immaterial whether the plaintiff/applicant moved this court by way of petition or plaint. Counsel contended that what matters is that this court applies the law. Counsel asserted that where there is any conflict between written law and the Constitution the latter must prevail. He reiterated that allowing the preliminary objection will undermine the provisions of **Article 159** of the **Constitution**. He urged this court to therefore uphold **Article 159** of the **Constitution** and dismiss the preliminary objection with costs to the plaintiff/applicant.

The 2nd and 3rd defendant/respondents opposed the preliminary objection in submissions which to a large extent echo those of the plaintiff/applicant word for word. Like the plaintiff/applicant they too urge this court to exercise its judicial discretion to find the preliminary objection not merited and dismiss it with costs so as to uphold substantive justice as required under **Article 159** of the **Constitution.**

The 4th defendant/respondent did not file any submissions.

The preliminary objection is however supported by the 5th defendant/respondent. Counsel for the 5th defendant/respondent submitted that the impugned elections were held pursuant to a call by the farmers/shareholders of the 4th defendant/respondent Tea Factory reached at an Extra Ordinary General Meeting; that the farmers resolved to appoint the Elections Committee and the Returning Officer in accordance with their by-laws and other enabling legislation and went to the elections on 30th April 2021 and the 1st defendant/respondent emerged the winner. Counsel submitted that the suit by the plaintiff/applicant is not only procedurally and substantively bad in law but it is incurably defective because the applicant did not exhaust the available internal dispute resolution mechanism provided in the election regulations. Counsel contended that even though **Article 165 (3) (a)** of the **Constitution v**ests this court with unlimited original jurisdiction in civil and criminal matters it lacks jurisdiction where alternative dispute resolution mechanisms have been provided for but have not been exhausted. Counsel submitted that **Regulation 18** of the **TEA (TEA FACTORY LIMITED COMPANY ELECTIONS) REGULATIONS, 2021** was incorporated in the Memorandum and Articles of Association of the 4th defendant/respondent and urged this court not to entertain this suit. Counsel cited a long line of cases to support those submissions. Counsel urged this court to find that the plaintiff/applicant being a shareholder of the 4th defendant/respondent is bound by the rules and regulations of the company and that moreover the courts are enjoined to promote Alternative Dispute Resolution Mechanisms by dint of **Article 159** of the **Constitution**. Counsel urged this court to uphold the preliminary objection and hence dismiss this suit with costs.

Regulation 18 of the **TEA (TEA FACTORY LIMITED COMPANY ELECTIONS) REGULATIONS, 2021** provides as follows: -

> **"18. (1) A dispute arising from the election held in a specific electoral**
>
> **area shall be made in writing to the Election Committee within forty-eight (48) hours.**
>
> **(2) The aggrieved party shall file the grounds of the election dispute together with copies of relevant documents with the Election Committee.**
>
> **(3) The aggrieved party shall serve the other party within twenty fours (24) hours of filling the dispute.**
>
> **(4) The Election Committee shall give notice to the parties of the date and place of hearing of the dispute.**
>
> **(5) The Election Committee shall consider and determine the dispute and communicate the final decision to the affected parties within seven (7) days.**
>
> **(6) The filing of a dispute pursuant to rule (15) shall not operate as a stay of the election unless the Election Committee so orders."**

The **Tea Factory Limited Companies** were required by **Regulation 19** to incorporate **Regulation 18** in their **Memorandum and Articles of Association** and it is Counsel for the 5th respondent's case that the 4th defendant/respondent duly complied with **Regulation 19** before holding its elections. It is instructive that the plaintiff/applicant and the 2nd and 3rd respondents concede that the impugned elections were held under **Regulation 18** of the **TEA (TEA FACTORY LIMITED COMPANY ELECTIONS) REGULATIONS, 2021** and none of them have contested the validity of the said regulation and the election dispute resolution mechanism thereat. Whereas the plaintiff/applicant alleges to have pointed out the election irregularities to the Election Committee which in turn referred it to the 5th defendant/respondent he does not explain why he came to this court before exhausting the internal dispute resolution mechanism provided in **Regulation 18**. The **Regulation** was clearly not exhausted as he did not wait for the complaints to be determined. As a shareholder, the plaintiff/applicant is bound by the rules and regulations laid down by the company unless of course the same have been set aside through a legitimate process. There is now a long line of cases to the effect that a court has no jurisdiction to try a matter where there exists an internal dispute resolution mechanism and the same has not been exhausted. I have already referred to some of those cases but just to add the case of **Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR** where the Court of Appeal stated: -

> ***"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 of last resort and not the first port of call the moment a storm brews……The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponent 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."***

This court may have unlimited jurisdiction in civil and criminal matters as provided in **Article 165 (3) (a)** of the **Constitution** but it is also obligated by **Article 159** of the **Constitution** to **encourage Alternative Dispute Resolution methods** such as the one available to the parties herein and it would be an affront of the Constitution to proceed to hear and determine this application.

In the upshot I find that this application and indeed the entire suit are not properly before this court as they were filed before the plaintiff/applicant exhausted the internal elections dispute resolution mechanism provided in **Regulation 18**. The **preliminary objection is therefore upheld and the application and the suit are hereby struck out with costs to the 1st defendant/respondent and the 5th defendant/respondent**. The 4th defendant/respondent did not participate in the proceedings and is therefore not entitled to costs and as the 2nd and 3rd defendant/respondents were in support of the application which has been dismissed cannot therefore get costs of the same. It is so ordered.

Ruling signed, dated and delivered (Electronically via Microsoft Teams) at Nyamira on this 29th day of July 2021.

E. N. MAINA

JUDGE