REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 442 OF 2019

JOSEPH MWANGI MBOTE ……..……..……..……1ST PETITIONER

PETERSON MAINA GATHUA……..……..…..……2ND PETITIONER

SAMSON MWANGI WAIRUGU……..……..…..…….....3RD PETITIONER

VERSUS

KENYA TEA DEVELOPMENT AGENCY (HOLDINGS) LTD

a.k.a. KTDA HOLDINGS.……..……..……..….1ST RESPONDENT

KENYA TEA DEVELOPMENT AGENCY

(MANAGEMENT SERVICES) LTD a.k.a. KTDA MS LTD.....2nd RESPONDENT

AND

KIRU TEA FACTORY LIMITED.....PROPOSED CO-PETITIONER

JUDGEMENT

1. Joseph Mwangi Mbote (the 1st Petitioner), Peterson Maina Gathua (the 2nd Petitioner), Samson Mwangi Wairugu (the 3rd Petitioner) are tea growers in Muranga County and shareholders of Makomboki Tea Factory Ltd, Njunu Tea Factory Ltd and Kiru Tea Factory Ltd respectively. The 1st Respondent, Kenya Tea Development Agency (Holdings) Ltd ("KTDA Holdings"), and the 2nd Respondent, Kenya Tea Development Agency (Management Services) Ltd ("KTDA MS"), are limited liability companies established under the provisions of the Companies Act.

2. Kiru Tea Factory Company Limited (hereinafter "KTFC"), a limited liability company established under the Companies Act, through an application dated 25th November, 2019 applied to join these proceedings as a Co-Petitioner. The application is based on the grounds that the 3rd Petitioner is a shareholder of KTFC, which is in turn a shareholder of KTDA Holdings. When the matter came up for directions, the parties agreed that the application for joinder be considered in this judgement and if allowed the court would then take into account KTFC's already filed pleadings and submissions in making its decision.

3. The petitioners' case is that the respondents have violated their rights and those of hundreds of thousands of small-scale tea growers as guaranteed under Article 47(1) of the Constitution. It is the petitioners' case that the violations have prompted them to approach this court in their own interest and in the interest of all shareholders in the 54 tea factory companies managed by the respondents.

4. It is the petitioners' case that the law governing the election of directors of the 1st Respondent is set out under the Companies Act, 2015 and its Articles and Memorandum of Association while the election of the directors of its shareholders (the tea factories) are governed by both the Companies Act and the articles and memorandum of association of each of the tea factories.

5. The petitioners averred that the Company Secretary of the respondents has prepared an election manual for the election of the directors of the tea factories managed by KTDA Holdings. According to the petitioners, the said election manual is inimical to Article 47 of the

Constitution and ought to be declared null and void for that inconsistency. Further, that the Company Secretary and the management in carrying out elections are conflicted, biased and incapable of rendering credible results.

6. The petitioners deposed that small-scale tea farmers who number over 560,000 own shares in 54 tea factory companies which in turn own shares in KTDA Holdings. KTDA Holdings has in turn set up several subsidiaries namely Chai Trading Company Ltd, Majani Insurance Brokers, Green Land Fedha, KTDA MS, KETEPA, KTDA Foundation and KTDA Temec. The petitioners further stated that the 2nd Respondent has entered into management agreements with each of the 54 tea factory companies which it manages. It is the petitioners' case that under Article 86 of the Articles of Association (AOA) of the 1st Respondent the factories have been grouped into 12 zones. One director is elected to represent each of the 12 zones in the 1st Respondent's Board.

7. The petitioners contended that over the years, the management by the respondents has not been beneficial to the farmers and shareholders due to mismanagement, lack of good corporate governance of the respondents and illegality in the framework for electing the directors among other reasons. The petitioners further averred that the directors of the respondents as well as the Office of the Company Secretary of the two entities have transformed themselves into an exclusive cartel that determines the outcome of the elections of both the factory directors and the zonal directors. This, according to the petitioners, explains why there are directors who have eternally remained on the Board of the 1st Respondent and it has become extremely difficult for other shareholders to have an opportunity to serve in the 1st Respondent's Board.

8. The petitioners' case is that previously there was an established and logical practice that required zonal elections to be held after the factory elections so that the directors of the factories once elected could have the opportunity of seeking election in the head office. Their averment is that this practice prevented an awkward situation where a retiring director is elected a director of the 1st Respondent and then fails to clinch factory directorship leaving him as a director without a constituency.

9. The petitioners contended that in the month of October 2019, the 2nd Respondent held zonal elections prior to factory elections with the ulterior motive of shielding national directors from losing their national positions in the event that they were not elected. As a result of the said irregular and premature zonal elections Erastus Gakuya, Peter Kanyago, Paul Ringera and Philip Ng'etich were elected for zones 2, 4, 7 and 8 respectively.

10. According to the petitioners, the election rules prepared by the Company Secretary of the 1st & 2nd respondents and christened as Election of Tea Factory Companies Directors Nominees and Buying Centre Committee Members – Procedures – November 2019 (hereinafter "Elections Procedure Manual 2019") are an illegality. They averred that the said rules have been made unilaterally by the Company Secretary without authority, and without any participation or approval of the stakeholders at a general meeting at either level of the structure. It is also the petitioners' case that the management agreements between the various tea factories and the 2nd Respondent have no provision for the management of elections and the 2nd Respondent is therefore acting *ultra vires* and in excess of jurisdiction in purporting to offer election management as a service.

11. The petitioners deposed that the Company Secretary who is an employee of the 1st Respondent is subject to the direction of the 1st Respondent's directors and also sits on the Board of the 1st Respondent in his capacity as a Secretary and is biased or likely to be biased.

12. The petitioners further averred that the Company Secretary plays several roles in the elections at both levels, including publication of the election regulations, appointment of the officers to preside over the elections, verification of the proxies, issuance of nomination notices, appointment of members of the verification committee, deciding whether there has been any breach of good governance, determination of the nomination fees payable and also acts as an election coordinator. They accused the Company Secretary of placing conditions that are not in the AOA in the election rules.

13. According to the petitioners, the immense powers of the Company Secretary have ended up creating colossal powers in matters of elections, which powers are devoid of accountability, checks and balances, impartiality, and independence. Further, that the Company Secretary and the management have in the past exhibited impunity and the Company Secretary has even been found in contempt of court. They also averred that the Company Secretary despite the existence of a court order barring elections at Kiru Tea Factory had included the said factory among the factories that were to hold elections.

14. It is also the petitioners' averment that the election rules mandates the Company Secretary of the 1st Respondent to appoint members of dispute resolution committees which committees were expected to handle disputes involving the Company Secretary's bosses.

15. It is the petitioners' case that the 1st Respondent made a decision to hold zonal elections in October 2019 prior to the factory elections that were to be held in November 2019. This action, in the petitioners' view, denied the candidates who were vying for the factory directorships an opportunity to seek positions in the national office. Further, that the holding of the zonal elections prior to the factory elections had disenfranchised the tea growers. They contended that it was absurd, illogical, unreasonable and procedurally unfair to conduct zonal elections prior to the factory elections.

16. The petitioners stated that in the past years a custom and practice had been established where zonal elections would be held subsequent to the factory elections. They averred that they therefore legitimately expected that the zonal elections would be held subsequent to the factory elections. They asserted that the respondents had breached their legitimate expectations by conducting elections contrary to the said tradition.

17. The petitioners additionally averred that the holding of zonal elections prior to factory elections was driven by ulterior motive, bad faith and abuse of power with a view to having Erastus Gakuya, Peter Kanyago, Paul Ringera and Philip Ng'etich, who have been longstanding directors re-elected and that they were indeed re-elected.

18. The petitioners' final averment was that it is in the public interest to have a credible election process at both levels considering the importance of the tea sector and the number of persons affected. Further, that public interest is aptly captured in the preamble as well as the national values and principles of governance as laid out in the Constitution.

19. The petitioners therefore prayed for orders as follows:-

a) A Declaration that the Election of Tea Factory Companies Directors Nominees and Buying Centre Committee Members – Procedures – November 2019 are illegal, null and void.

b) A declaration that the zonal elections held in October 2019 were illegal, null and void.

c) An order quashing Election of Tea Factory Companies Directors Nominees and Buying Centre Committee Members – Procedures – November 2019.

d) An order quashing the results of the zonal elections held in October 2019 were illegal, null and void.

e) An order be issued compelling the 1st & 2nd Respondent to conduct both levels of elections strictly in accordance with the Companies Act and the respective Articles of Associations.

f) Costs of this Petition.

g) Any other relief that this Honourable Court may deem just to grant.

20. KTFC filed an affidavit sworn by Geoffrey Chege Kirundi on 9th December, 2019 in support of the petition. He deposed that the core issue before this court is the question of the governance of the 1st Respondent and the voting process by which shareholders determine who sits at the apex of the 1st Respondent, a fact that has ramifications on hundreds of thousands of citizens. Further, that KTFC is in fact a victim of the respondents' efforts to seize control of the KTFC's affairs, a fact that has led to litigation in the High Court, the Court of Appeal and the Supreme Court.

21. In Mr. Chege's view, the effect of the impugned Elections Procedure Manual 2019 has been to prevent eligible candidates from presenting themselves for election and has paved the way for persons who curry favour with the 1st Respondent, in disregard of the tenets of independence and impartiality that are the hallmark of any electoral process. As result of the foregoing, the rights of shareholders to determine the composition of the respective companies' boards of directors have been subjugated and defeated.

22. It was further his disposition that the issues are not *res judicata* or *sub judice* as contended by the respondents because the validity of the Elections Procedure Manual 2019 has not been considered in any other court or litigated over by the parties in the present petition. He deposed that KTFC fully associates itself with the averments of the petitioners in their respective affidavits.

23. He further averred that tea farming is a socio-economic undertaking by which small-scale farmers pursue economic advancement and hence it is a socio-economic right which enjoys the constitutional protection under Article 43 of the Constitution. Therefore, there is a legitimate expectation of the over 600, 000 small-scale tea farmers that their constitutional socio-economic rights would be met. Accordingly, a just, transparent, independent, credible and verifiable electoral system within the respondent companies effectively translates to better and positive returns by which the tea farmers' socio-economic rights would readily be met.

24. It was the Proposed Co-Petitioner's case that the interests of the over 600,000 shareholders who are tea farmers, and in particular the over 9,000 shareholders of KTFC, in the subject constitutional petition cannot be gainsaid because as a shareholder of a tea company such as KTFC one is entitled to elect the tea buying centre committee members and directors; to offer oneself as a candidate for election as a director, a chairperson or vice-chairperson or a sub-committee member of the Board of Directors; to elect the chairperson of the Board of Directors, the vice-chairperson of the Board of Directors and sub-committee members of the Board of Directors; or to offer oneself as a candidate for election as the chairperson vice-chairperson or a sub-committee member of the Board of Directors.

25. It was further his averment that KTFC is one of the 54 corporate shareholders of the 1st Respondent with over 9,000 shareholders being part of the over 600,000 shareholders under the aforesaid 54 corporate shareholders. That each of the 54 shareholders of the 1st Respondent has 6 elected non-executive directors and 2 co-opted management directors, one from the 1st Respondent and the other from the 2nd Respondent. This gives a total of 378 directors. Further, that all the 6 elected directors of each of the 54 shareholders of the 1st Respondent do not participate in the day to day operations of the tea companies. As such, the operations of the respective shareholders of the 1st Respondent would not be affected by any orders as they wound continue running smoothly. Further, that 1/3 of the 378 directors retire by rotation annually in accordance with the memorandum and articles of each shareholder tea factory of the 1st Respondent.

26. It was his averment that the Board of Directors of the 1st Respondent is made up of twelve directors from the twelve electoral zones. On the other hand, the Board of Directors of the 2nd Respondent which is a subsidiary of the 1st Respondent is made up of the Chief Executive Officer (CEO) and the Strategy and Finance Director of the 1st Respondent, the Operational Director of the 2nd Respondent and two co-opted independent directors. It is the Proposed Co-Petitioner's position therefore that the Elections Procedure Manual 2019 is at the heart of the electoral system by which tea farmers exercise their franchise and have their say over the affairs of the 1st Respondent which they own through the tea factory companies.

27. According to the Proposed Co-Petitioner, the Elections Procedure Manual 2019 affects the rights of its shareholders to the extent that it

purports to dictate how they shall exercise their franchise in determining the leadership of the respondents and must also conform to the 1st Respondent's AOA and the dictates of the Constitution of Kenya. KTFC therefore supported the petitioners' contention that the Elections Procedure Manual 2019 subjugates and breaches the dictates of the Constitution of Kenya and is *ultra vires* the applicable articles of association of the companies, violates its legitimate expectation and is therefore illegal, null and void. The court was therefore urged to allow the petition.

28. The 1st Respondent answered the petition through a replying affidavit sworn on 14th November, 2019 by its Company Secretary, Dr. John Kennedy Omanga. He confirmed that the 1st Respondent is indeed owned by 54 tea factories spread throughout the Republic of Kenya which are in turn owned by over 600,000 small-scale tea farmers who are individual shareholders in their respective tea factories. It was therefore his disposition that the petitioners herein are neither shareholders nor members of the 1st Respondent and consequently lack *locus standi* to bring the petition, institute or maintain these proceedings.

29. Further, that in instituting this petition, the 1st Petitioner was in blatant breach of Court orders issued on 29th September, 2015 in **Nyeri High Court Civil Suit No. 147 of 2010 in Makomboki Tea Factory Company Limited v Joseph Mwangi Mbote & 5 others** which permanently barred him from interfering with the management and operations of Makomboki Tea Factory Limited. It is the 1st Respondent's case that the order has never been varied or set aside.

30. It is the 1st Respondent's further averment that the petitioners' failure to enjoin the 54 tea factories in these proceedings is fatal to their case as any orders issued herein will have detrimental effects on the small-scale farmers who depend on the functionality of the tea factories.

31. Turning to the petitioners' averments on the Elections Procedure Manual 2019, Dr. Omanga deposed that the appointment and election of the directors of the 1st Respondent is provided under Article 86 as read together with Articles 90 and 91 of the Memorandum and Articles of Association (MAA). Further, that the 1st Respondent's 54 corporate shareholders are divided into twelve zones which are distributed as provided in Article 86(c) of the MAA, and at all times, each zone is represented by one director on the Board of the 1st Respondent who is elected by the directors from the constituent tea factories.

32. It is the 1st Respondent's case that as provided by Article 86 (b)(v) of the 1st Respondent's MAA, one has to be a sitting director of a member tea factory company to be eligible to vie for directorship. Further, that Article 89(b) provides that at the Annual General Meeting, one third of the directors appointed at the election under Article 86(c) for the time being in the office shall be deemed to have retired and shall be eligible for re-election. Dr. Omanga deposed that in compliance with the stated provisions, the 1st Respondent has an electoral cycle in place that ensures 1/3 of the directors retire at the end of every financial year and this cycle ensures that at all material times the twelve zones are represented in the Board.

33. It was Dr. Omanga's further averment that in line with the rules and regulations outlined in the Elections Procedure Manual 2019 and the MAA, the 1st Respondent carried out elections on 25th October 2019 for zones 2, 4, 7 and 8 whose directors were set to retire. Consequently, and in compliance with Article 89(b) of MAA, the shareholders were notified of the Annual General Meeting, in which one item of the agenda was the appointment of the elected directors.

34. It was also the 1st Respondent's deposition that on 5th November, 2019, the election of the directors of the 54 tea factories were carried out in accordance with their respective articles and memorandum of association and the Companies Act, 2015. Consequently, through a schedule published in the Standard newspaper on 11th October, 2019, annual general meetings were called for the various tea factories in which one of the items in the agenda was confirmation or appointment of the elected directors.

35. Dr. Omanga stated that the elections held on 25th October, 2019 and 5th November, 2019 were conducted in a fair, credible and transparent manner. Further, that the election procedures provide for an internal dispute resolution mechanism and no complaint of irregularity or anomaly was lodged. He therefore asserted that the election of the said nominees was valid. He also averred that the zonal elections for the directors of the 1st Respondent's Board and those for the directors of the boards of individual tea factories are separate, independent and distinct and as such conducted at different times.

36. It was further the 1st Respondent's deposition that the petitioners had failed to enjoin the four elected zonal directors despite the fact that any orders that are issued will affect them. This petition, in the 1st Respondent's view is an abuse of the court process and is likely to embarrass the court were it to issue orders against parties who are not before the court.

37. According to Dr. Omanga, Article 2 of the 1st Respondent's MAA establishes the validity of the election regulations. Further, that the regulations have previously been challenged in various courts without success. He cited the court cases that have upheld the election regulations as **Kericho HCCC No. 102 of 2009 Robert K. Bett & another v FUM Mogosiek TFC & 2 others; Kisii HCCC No. 26 of 2014 Moraa Juma v Ogembo TFC & 2 others; Kerugoya Election Petition No. 1 of 2015 William Njiraini Nguru v Mununga TFC;** and **Kakamega HCCC No. 01 of 2010 Peter Adams Ludaava & another v Gideon Mbagaya & 2 others** and stated that no appeal or review has been preferred against the findings in those cases.

38. Dr. Omanga further averred that failure to enjoin the Company Secretary and the elected directors is a deliberate violation of the rules of natural justice and their fundamental right to fair hearing. Moreover, the authority to administer the 1st Respondent's elections is bestowed upon the Company Secretary under Article 86(g) of the MAA while under Article 89, one third of the directors appointed and elected under Article 86(c) retire on rotation and are eligible for re-election. It was therefore his averment that the Company Secretary would not be biased to individuals already on the Board.

39. Dr. Omanga further averred that for one to vie for directorship in the KTDA Holdings, he/she must be a sitting director in one of the tea

factory companies and it therefore defeats logic for the petitioners to allege that a director can sit in the Board of the 1st Respondent and not be a director in one of the tea factories. Accordingly, any director of the 1st Respondent not elected by his tea factory will lose his slot on the Board. He therefore posited that the petitioners have failed to demonstrate how the zonal elections carried out on 25th October, 2019 prejudiced any of the directors elected on 5th November, 2019.

40. According to Dr. Omanga there was no impropriety in the conduct of the elections by the 1st Respondent. Further, that the orders sought are unwarranted and are meant to frustrate and cripple the running of the affairs of the 1st Respondent and its eight subsidiary companies which will not meet the minimum quorum to carry out business. In conclusion, the 2nd Respondent asked for the dismissal of the petition with costs.

41. In response to the petition, the 2nd Respondent filed a replying affidavit sworn on 6th November, 2019 by Dr. John Kennedy Omanga, who apart from serving as the Company Secretary of the 1st Respondent also serves as the company secretary for each of the 54 tea factories as well as the 2nd Respondent. He generally restated the contents of the affidavit he swore in support of the 1st Respondent's case.

42. The additional averments made in the affidavit are that the issue of the constitutionality and legality of the Elections Procedure Manual 2019 having been litigated before is now *res judicata*; that the election of directors of a company is an issue of internal management of a company as regulated by the rules and regulations and any dispute should be resolved through the dispute resolution mechanisms provided in the rules and regulations and this court therefore lacks jurisdiction to entertain the matter; that the 2nd Petitioner contested as a director and had committed himself to abide by the elections rules and he is blowing hot and cold by instituting this petition; that the powers of the Company Secretary to manage the election process are donated by the MAA of each of the 54 tea factories and none of the documents is under challenge herein; and that the Company Secretary only acts in the best interests of the companies and does not vote in the election of directors and is therefore not conflicted.

43. On the allegation that the respondents were barred from conducting elections of KTFC, Dr. Omanga averred that the order that the petitioners have relied upon was vacated on the 20th December, 2017 by a ruling of the Court of Appeal in **Nyeri Civil Application No. 132 of 2017** which allowed KTFC to pass resolutions on how it wanted its affairs conducted by the respondents.

44. According to Dr. Omanga, the petition has not met the threshold of a constitutional petition as it does not elaborate the constitutional provisions violated. He concluded his averment by terming the petition frivolous, vexatious, devoid of merit and an abuse of court process and urged the court to dismiss it with costs.

45. The petitioners replied to the respondents through the affidavit of Joseph Mwangi Mbote sworn on 28th November, 2019. He deposed that the respondents' objections to the petition are premised on technicalities as they had brushed off the substantive complaints lodged regarding the respondents' electoral process. Further, that the respondents had not denied that previously zonal elections were held after the tea factory elections.

46. It is the petitioners' averment that Peter Kanyago and Mr. Gakuya were retiring both from the Board of the 1st Respondent and the boards of their respective tea factories and they were therefore not qualified to contest the zonal elections. They termed the election of the two directors irregular and an abuse of office aimed at achieving ulterior motives. Further, that the directors elected in the zonal elections had an edge and undue advantage over their competitors in the factory elections making the entire process unfair.

47. According to the petitioners, as shareholders of tea factories managed by the 1st and 2nd respondents, they had the necessary *locus standi* to institute the proceedings herein. In their view, the matters raised in this petition permeate through the entire tea sector in the country and cannot be taken so casually and categorised simply as a dispute between shareholders and their company. Further, that pursuant to Article 47 of the Constitution as well as the Fair Administrative Action Act, 2015, public law remedies are now available against private entities such as the respondents.

48. The petitioners dismissed the 1st Respondent's contention that the orders sought are set to cripple the eight subsidiaries stating that the averment is devoid of any supporting evidence or merit. According to the petitioners, only 1/3 of the directors of the 1st Respondent and the tea factories retire with the option of re-election every year hence the quorum of the 1st Respondent and tea factories shall still be met pending proper elections if this court is to quash the regulations.

49. Further, that the requirement under the Fair Administrative Action Act, 2015 for exhaustion of internal dispute resolution mechanisms is not absolute and is excusable where justice so demands. That in this case the internal dispute resolution mechanism is spearheaded by the person whose powers are under challenge in these proceedings.

50. The petitioners specifically referred to **Nyeri Civil Case No. 147 of 2010** and averred that the 1st Petitioner's co-petitioners herein were not parties to that case and this petition should therefore be sustained. Further, that the order issued in that case only barred the 1st Petitioner from claiming to be a director of Makomboki Tea Factory Company Ltd or interfering with the operations of that factory as a purported director, which he has not done in the present petition.

51. The petitioners averred that the plaintiff in **Kisii HCCC No. 26 of 2014, Moraa Juma v Ogembo Tea Factory Ltd** (hereinafter the Moraa Juma case), sought a declaration that the Elections Procedure Manual of 19th November 2014 was illegal and this petition which challenges the Elections Procedure Manual of November 2019 cannot be said to be *sub judice* the cited case. Further, that the other cases cited by the 1st Respondent all related to rulings in applications for interim orders and do not contain binding findings.

52. With regard to parties to this petition, the petitioners deposed that the 1st Respondent was a necessary party as the election of its directors

was underway whereas the 2nd Respondent was a necessary party as it was conducting the elections of the directors of the tea factories. Furthermore, that the 2nd Respondent performs the secretarial work for all the tea factory companies and its joinder was sufficient without naming every tea factory as a respondent.

53. Lastly, the petitioners indicated that they were not opposed to the application by KTFC to be enjoined as a Co-Petitioner and urged the court to allow the petition.

54. The petitioners through their submissions dated 29th November, 2019 submitted on both the procedural and substantive issues arising in the petition. On whether the petitioners are entitled to institute the proceedings herein, counsel for the petitioners submitted that the respondents have taken a very narrow view of the standing of the petitioners and the manner of accessing justice from the courts considering that they have not contested that the petitioners are tea growers and shareholders of their respective tea factories. It is the petitioners' case that as farmers and shareholders in the set up for small-scale tea growers, they hold sufficient stake which allows them to access justice under Article 48 of the Constitution when their interests are threatened or violated. As such, it cannot be said that they lack *locus standi*.

55. Counsel for the petitioners urged that every person has a right to defend the Constitution and the defence of *locus standi* cannot hold under the present constitutional dispensation. He supported this position by citing the decisions in **Abdalla A Miraji v Coast Water Services Board & another Ex parte Republic & another [2017] eKLR** and **Thuranira Salesio Mutuma & another v County Government of Meru & another [2019] eKLR.** He therefore asked the court to be similarly persuaded and dismiss the objection to the petition on the ground that the petitioners lacked standing to institute the proceedings.

56. On the respondents' assertion that the 1st Petitioner had in **Nyeri Civil Case No. 147 of 2010 Makomboki Tea Factory Company Ltd v Joseph Mwangi Mbote & others** been restrained from interfering with the affairs of Makomboki Tea Factory and hence should not have brought this petition as it amounts to disobeying the said order, counsel submitted that the same was against the six defendants as a faction of the leadership of the factory rather than 1st Petitioner as an individual. Also that the defendants were only restrained from holding themselves out as directors of Makomboki Tea Factory which did not bar 1st Petitioner from accessing justice against the respondents herein who in any event were not parties in that case.

57. In response to the averment that the 2nd Petitioner participated in the elections for Njunu Tea Factory and cannot therefore turn around and claim that the election process was flawed or that the election manual was void, counsel submitted that the validity of the election process is not sanitized by the participation of the 2nd Petitioner in the process.

58. On the objection raised by the respondents that the dispute should not have been filed in court in the first instance and that a constitutional petition was not the proper procedure, counsel submitted that there was no internal mechanism that would give the remedies sought in the petition. Further, that the Elections Procedure Manual 2019 which the petitioners impugn creates the alleged dispute resolution mechanism and resorting to it would have amounted to recognising the manual as valid. Additionally, that in any case Articles 22 and 258 allow any person to institute proceedings to enforce the Constitution. To buttress his argument, counsel cited the case of **Baobab Beach Resort and Spa Limited v Duncan Muriuki Kaguuru & another [2017] eKLR,** where the Court of Appeal affirmed that the provisions of the current Constitution are to be applied both vertically and horizontally more particularly, in respect to the Bill of Rights. Counsel also referred to the decision in **Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others [2014] eKLR** where it was stated the respondents could not be allowed to wave a private entity card to bar the court, when properly moved, from assuming jurisdiction where there are allegations of breach of fundamental rights and freedoms.

59. Counsel submitted that the present petition is not an election petition against any particular successful nominee as what is on trial are the processes and procedures adopted by the respondents in holding the elections, specifically the Elections Procedure Manual 2019 and the holding of the zonal elections prior to factory elections. In his view, the joinder of the 54 tea factories and the nominees was not necessary as the issues revolve around the acts of the respondents herein and it is only them who can account for their actions in this court. To that end counsel cited the case of **Japthet Muroko & another v Independent Electoral and Boundaries Commission (IEBC) & 2 others [2017] eKLR**, where it was observed that since there was not a single accusation against the deputy governor in the election petition, the failure to enjoin the deputy governor did not breach his right to a fair trial.

60. Counsel submitted that all the tea factories were aware of the proceedings having appointed counsel to appeal against the conservatory orders issued in this petition and they could have filed an application for joinder if they so desired. Counsel also urged that as was held by the Court of Appeal in **Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR,** a suit, more so a constitutional petition, should not be dismissed nor should non-joinder render the petition fatal.

61. As regards the substantive issues raised in the petition, counsel commenced by submitting that this court has jurisdiction to determine the legality of the Elections Procedure Manual 2019. Counsel relied on the case of **Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others [2014] eKLR** in support of his contention that this court has jurisdiction to enquire into the respondents' electoral processes.

62. According to the petitioners, the Court had held in the **Moraa Juma case** that the defendants' conduct was "**suspect, wanting and mischievous"** and **"it would appear that the defendants were determined to lock out the plaintiff from the elections."** Further, that the respondents and its directors are rogues who had been certified as such by the Court of Appeal in **Nyeri Civil Application No. 137 of 2017 Kiru Tea Factory Company Ltd v Stephen Maina Githiga & others**, which found them to be in contempt of court and ordered them to pay Kshs. 400,000/- each.

63. Turning specifically to the Elections Procedure Manual 2019, counsel submitted that the same was prepared by the Company Secretary without any directive from the respondents and was never ratified by any organ of the respondents. It is therefore counsel's position that in so far as the Company Secretary was not bestowed with powers to make the manual, the publication of the Elections Procedure Manual 2019 is therefore *ultra vires*, illegal, null and void. Further, that any electoral process based on the manual is likewise tainted with the original sin and cannot therefore stand the test of legality.

64. According to counsel for the petitioners, the respondents have not bothered to shed light on the validity of the Elections Procedure Manual 2019 but have simply relied on the **Moraa Juma case** to assert its validity. However, counsel pointed out that what was in contention in that case was the Election Procedure Manual dated 19th November 2014 and not the Elections Procedure Manual 2019 which is the subject of this case. In addition, counsel submitted that the main reason the plaintiff failed in that case is expressed at paragraph 65 of that judgment to be that having participated in the election and submitted to be bound by the manual she could not then turn back and question the rules. Counsel pointed out that in this case, the 1st & 3rd petitioners did not contest the elections and the **Moraa Juma case** is thus distinguishable to that extent. Additionally, that the decision in the cited case was made *per incuriam* as the Judge or the parties did not discuss the source of the power of the Company Secretary to make election rules.

65. Pointing to what he terms as immense powers reserved for the Company Secretary by the Elections Procedure Manual 2019, counsel proffered that any elections held under the manual are devoid of accountability, impartiality, independence, and checks and balances. The decisions in the cases of **Beatrice Wanjiru Kimani v Evanson Kimani Njoroge [1997] eKLR** and **Alnashir Popat & 8 others v Capital Markets Authority [2016] eKLR** were cited as providing the test of impartiality. Counsel urged that the duty to act fairly and in a manner that does not give rise to an apprehension of partiality or bias applies to the decision-making process from the beginning to the end. Counsel also submitted that in the case of **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2013] eKLR** it was held that disqualification of the decision-maker was imperative even in the absence of a real likelihood of bias or actual bias if a reasonable man would reasonably suspect bias.

66. It was counsel's submission that given the totality of the powers possessed by the Company Secretary and the manner in which the same had been used or abused in calling for zonal elections prior to factory elections, there would be no doubt in the mind of a reasonable person that the Company Secretary is not partial, independent or free from bias. Accordingly, counsel urged that the elections be quashed and the respondents directed to run the elections in a manner consistent with Article 10 of the Constitution.

67. In conclusion, counsel submitted that the petitioners have demonstrated their claim to the required standard and asked for grant of the orders sought in the petition.

68. The Proposed Co-Petitioner filed submissions dated 9th December, 2019. Counsel for the Proposed Co-Petitioner cited **Nyeri Court of Appeal Case No. 137 of 2017 Kiru Tea Factory Company Limited v Stephen Maina Githiga & others; Supreme Court App. No. 12 of 2019 Stephen Maina Githiga & others v Kiru Tea Factory Limited;** and **Supreme Court Petition (App.) No. 13 of 2019 Stephen Maina Githiga & others v Kiru Factory Limited** to ward off any challenge to the representation of KTFC by counsel other than that appointed by the respondents.

69. Counsel urged the court to allow the application by KTFC to join these proceedings as a party. He relied on the decisions in the cases of **Mbeere Elders Advisory Welfare Group (Ngome) & 4 others v Attorney General & 55 others [2019] eKLR** and **Micheal Bett Siror v National Land Commission & another; Stephen Sugut & 12 others (Interested Parties); Betham Investment Co. Ltd (Proposed Interested Party/Applicant) [2019] eKLR** where the courts considered the circumstances when joinder should be allowed.

70. On the respondents' claim that the petitioners lacked legal authority to commence the proceedings, counsel submitted that the petition is premised on violation and infringement of constitutional rights and not negligence, default, breach of duty or trust by the directors of a company, which causes of action are the qualification for bringing a derivative claim under the Companies Act. Counsel placed reliance on the decision of the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** for the proposition that the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 ("the Mutunga Rules") facilitate application of the right of standing in constitutional petitions. He further argued that even if this was a commercial dispute as pleaded by the respondents, the leave contemplated under sections 238 and 239 of the Companies Act is not a condition precedent to filing of a case as was held in **Stephen Maina Githiga v Kiru Tea Factory Limited & another [2017] eKLR**.

71. On the issue of non-joinder of the shareholders of the 1st Respondent, counsel submitted that the issue in dispute in this petition is the constitutionality of the Elections Procedure Manual 2019 and Rule 5(b) of the Mutunga Rules provides that a petition shall not be defeated on account of misjoinder or non-joinder of parties. Further, that there is on record a Notice of Appointment of Advocates dated 8th November, 2019 by M/s Milimo on behalf of the shareholders of the 1st Respondent.

72. On the allegation that the petition is *res judicata*, it was submitted that the Elections Procedure Manual 2019 has not been constitutionally challenged in any court of law and therefore the doctrine of *res judicata* cannot apply to these proceedings.

73. On the failure to exhaust the internal dispute resolution mechanism, counsel submitted that the Dispute Resolution Committee is a creature of the unilaterally prepared Elections Procedure Manual 2019 and the petitioners have no basis challenging the constitutionality of the said manual at that forum.

74. It was also KTFC's submission that as was held in **Jessee Kamau Kinuthia v Teresia Wanjiku Kamande [2008] eKLR**, jurisdiction cannot be conferred merely because a party acquiesces to some proceedings hence the contention by the respondents that the petitioners should be estopped from challenging the constitutionality of the Elections Procedure Manual 2019 because they participated in the elections cannot hold.

75. On the issue whether the Company Secretary had power to make the Elections Procedure Manual 2019, it was submitted that the MAA of the respondents does not donate any such powers to the Company Secretary neither does the management agreement between the 2nd Respondent and the tea factories. Counsel urged that such arrogation of non-existent and unauthorized power is an affront to Article 47(1) of the Constitution. To that end counsel cited the case of **Macfoy v United Africa Co. Ltd [1961] 3 All E.R. 1169** where the court stated that if an act is void, then it is in law a nullity.

76. Counsel cited the decision in **Sam Nyamweya v Sports Tribunal & 2 others [2017] eKLR** and submitted that a company makes its

decisions in an annual general meeting or through board resolutions which was not the case in respect of the Elections Procedure Manual 2019. It counsel's view therefore that the impugned document is illegal. He relied on the holding in **Republic v Nairobi City county Ex parte Registered Trustees of Sir Ali Muslim Club [2017] eKLR** that orders by way of judicial review remain the only legal practicable remedies for the control of administrative decisions, and urged the court to allow the petition with costs.

77. The 1st Respondent relied on submissions dated 5th December, 2019. Counsel for the 1st Respondent submitted that the petitioners have no *locus standi* as they are neither members nor shareholders of the 1st Respondent. Reliance was placed on the principle of law which states that claims against the wrongs committed to a company can only be commenced by the company itself and not by an individual shareholder with the exception of actions brought by way of a derivative action which is a remedy available to shareholders who are able to bring themselves within the exceptions set out in the case of **Foss v Harbottle [1843] 67 ER 189.**

78. Consequently, counsel argued that the petitioners lack the requisite *locus standi* to bring this petition, maintain these proceedings or seek any orders before this court. Reliance was also placed on the decision in the case of **Jacob Juma v Evans Kidero, The Governor, Nairobi County Government [2016] eKLR** in support of the proposition that it is a cardinal principle in company law that it is the company and not the individual shareholder to enforce rights of action vested in the company and sue for wrongs done to it and in the absence of illegality, a shareholder cannot bring proceedings in respect of irregularities in the conduct of the company's internal affairs in circumstances where the majority are entitled to bring an action in relation to such matters.

79. On the requirement for exhaustion of the internal dispute resolution mechanisms prior to court action, counsel cited the case of **Maggie Mwauki Mtalaki v Housing Finance Company of Kenya [2015] eKLR** and urged that the court will be reluctant to entertain a petition where the dispute involves private parties or there is a procedure in place to address the same. It is therefore his submission that this court should not entertain this matter since the Elections Procedure Manual 2019 establishes the dispute resolution committee and further provides a clear procedure and mechanism for electoral dispute resolution. He posited that the petitioners ought to have directed their claim before the provided dispute resolution body first rather than approaching court directly.

80. Counsel for the 1st Respondent also relied on the decision in **Job Fellis Ndarera & another v Nyamache Tea Factory Company Limited & 2 others [2016] eKLR** where the Court while declining jurisdiction held that the rules contained in the election manual were binding on the applicants in so far as the elections dispute resolution forum is concerned as they are derived from the company law, the company's articles of association and the management agreement. Counsel therefore urged this court not to entertain this petition for to do so would defeat and undermine the mechanisms and the institutions provided by law, which are underpinned in the 1st Respondent's MAA.

81. On the issue whether the court should interfere with the management of the domestic affairs of the 1st Respondent, counsel cited the case of **William Njiraini Nguru v Mununga Tea Factory & 3 others [2015] eKLR** where the Court observed that the management of companies whether private or public is governed by the Companies Act Cap 486 Laws of Kenya (now repealed). Also cited is the case of **Zaburi Musa Hamisi & 3 others v Ishmael Hillon & 4 others [2015] eKLR** in which the Court similarly held that the general principle is that courts are very reluctant to interfere with the internal management of an association unless the constitution of the association is breached or there is contravention of the rules of natural justice.

82. Still on the same issue, counsel cited the case of **Shiawase Limited and Another v Pianesi Gino [2012] eKLR** where the Court reiterated that the rationale behind the rule in **Foss v Harbottle** is that courts are reluctant to interfere with the internal management of companies acting within their power, and will interfere only where *ultra vires* or fraudulent acts not amenable to rectification are complained of. Further, that the rule in **Foss v Harbottle** was also explained in **Edwards and another v Halliwell and others [1950] 2 All ER 1064** where it was held that courts shall not interfere with the domestic affairs of a company or association on the ground of mere irregularity in the conduct of those affairs except where an illegality is seen to have been done. Counsel also relied on the decision in **Dadani v Manji & 3 others HCCC No. 913 of 2002** to stress the same point.

83. In counsel's view, the petitioners failed to demonstrate any illegality that was occasioned by 1st Respondent and its Company Secretary in publishing the Elections Procedure Manual 2019 and the conduct of the October 2019 elections to warrant the orders sought in the petition. It was counsel's submission that the petitioners have not proved that the 1st Respondent acted *ultra vires.* Further, that they have not proved any element of fraud on the part of the 1st Respondent to warrant this court's interference and the petition must therefore fail on this score.

84. On the issue whether the petition has raised any constitutional issues for determination through a constitutional petition, counsel submitted that the petitioners have made a mockery of the court process by disguising a claim challenging the internal management affairs of the 1st Respondent as a constitutional petition in order to garb themselves with *locus standi*. It was his submission that it is trite law that he who alleges that a fundamental freedom or right has been violated must set out with reasonable precision the violation complained of and the manner in which it has been violated as held in the case of **Anarita Karimi Njeru v Republic [1979] eKLR.** Other cases relied on as enunciating this legal principle are: (a) **Anne Njoki Kinyanjui v Barclays Bank of Kenya Ltd [2015] eKLR**, as cited in **David Kenyanya Magare & another v Luthafal Jiwa Ranjwani & 4 others; Diamond Trust Bank Limited [Interested party] [2019] eKLR;** (b) **Jacob Juma v Evans Kidero, The Governor, Nairobi County Government [2016] eKLR;** (c) **Maggie Mwauki Mtalaki v Housing Finance Company of Kenya [2015] eKLR:** and (d) **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.**

85. On the issue whether the Elections Procedure Manual 2019 is an illegality, counsel cited the provisions of Article 86 (g) of the 1st Respondent's MAA as clothing the Company Secretary with the powers to appoint and mandate presiding officers and returning officers with general power or as directed to oversee elections. It was therefore submitted that the Company Secretary in exercising his official mandate has to breathe life to the said provision through the development of election guidelines.

86. Further, that Section 20 of the Companies Act, 2015 establishes the articles and memorandum of association as the constitution of companies. Counsel opined that through the constituting documents, companies have a free hand in developing their own rules of engagement and for that reason, the election manual has a proper legal backing. According to counsel, the Company Secretary did not act

ultra vires his powers and neither did he usurp powers in formulating the election manual.

87. Still urging the court to find that there is nothing irregular about the Elections Procedure Manual 2019, counsel submitted that the petitioners have not demonstrated that efficacy, legality, reasonableness and fairness is lacking in the manual or singled out any provision that is discriminative or illegal or one that is made in contravention of the 1st Respondent's MAA. Additionally, counsel contended that the constitutionality and legality of the election rules of the 1st Respondent was determined in the affirmative in the **Moraa Juma case** among other cases. Further, that no appeal or review has been preferred against any of the decisions. He therefore urged the court to find that the Elections Procedure Manual 2019 was formulated and drawn in strict adherence to the Companies Act, 2015 and the 1st Respondent's MAA.

88. On the issue whether the elections held in October 2019 were lawful, counsel submitted that the elections of the 1st Respondent were carried out in strict compliance to Article 86 of its MAA. Further, that in anticipation of a scenario where the zonal elections are conducted before the elections for the tea factories, Article 106(g) of the 1st Respondent's MAA provides that a person elected as a director is disqualified upon ceasing to be qualified in accordance with Article 86(c). Accordingly, counsel submitted that taking into account the provisions of the MAA, the rotation cycle, the election procedures and criterion put in place, the outcome of the elections guarantee free expression of the will of the shareholders. Further, that with the elaborate checks and balances, it is impossible for the 1st Respondent or the Company Secretary or any other person to dictate or control who stays on the 1st Respondent's Board of Directors.

89. Counsel in urging the court to dismiss the petition cited the case of **Solomon M. Choti v Joseph Nyagaka Bwana & 2 others [2016] eKLR** where the Court stated that the standard of proof in election cases is higher than that applicable in ordinary civil cases. Further, that in determining whether the plaintiff had met the standard of proof, the court would need to evaluate the evidence tendered on the subject of irregularities to determine whether the election was free and fair.

90. Counsel further submitted that the petitioners have not demonstrated any violation in the electoral process, any malpractices or any right violated in the process of the election or lack of integrity in the election that would render the election devoid of fairness or credibility. According to counsel, the petitioners have also not demonstrated before this court that any director was prejudiced because the zonal elections were carried out before the tea factory elections and their complaints about the elections are therefore frivolous. The subject elections, he submitted, are legitimate, credible and a manifestation of the 1st Respondent's MAA and the outcome should not be interfered with as it is a true reflection of the will of the shareholders.

91. On the issue of joinder of KTFC as a Co-Petitioner, counsel submitted that sections 238 and 239 of the Companies Act, 2015 are quite clear that derivative action is the mode to be used by the shareholders to institute a claim involving their company. To buttress his argument, he relied on the case of **Jacob Juma** (supra) where the Court held that before a derivative action is filed, *ex parte* leave should be sought supported by a detailed affidavit demonstrating *locus standi* and a *prima facie* case. Counsel therefore urged that KTFC's application is defective, flawed and an abuse of the court process and the court should dismiss it at the first instance.

92. Turning to the merits of the application for joinder, counsel for the 1st Respondent submitted that the application fails the test of joinder in constitutional petitions as outlined in Rule 5(d)(ii) of the Mutunga Rules. Counsel submitted that KTFC does not fall into zones 2, 4, 7 and 8, whose elections were held on 25th October, 2019 and are the core subject of this petition. It is therefore urged that KTFC has not established any interest in this petition as it was not affected by the impugned elections.

93. According to counsel, in order for an application for joinder to succeed, an applicant should demonstrate that he has an identifiable interest in the subject matter in the litigation and that he is a party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. The decision in the case of **Shirvling Supermarket Limited v Jimmy Ondicho Nyabuti & 2 others [2018] eKLR** was identified as stating the principles of joinder of parties. According to counsel, KTFC having not participated in the zonal elections has not demonstrated how its presence in the petition is necessary to enable this court adjudicate upon and arrive at complete settlement of all the questions raised in the proceedings. Further, that it has failed to show how it would be affected by the decision of this court in the present petition. According to counsel, the joinder of KTFC will only serve to delay these proceedings.

94. The 1st Respondent also challenged the authority to sue placed before the court by KTFC's Board of Directors in support of the application for joinder. Counsel asserted that the persons who signed the board resolution authorizing KTFC to apply to join these proceedings ceased to be directors of KTFC and vacated office on diverse dates, pursuant to the company's Memorandum and Articles of Association. According to counsel, the said board resolution is therefore invalid rendering the application a nullity at the first instance.

95. In particular, counsel for the 1st Respondent submitted that three-year term of Mr. Geoffrey Chege Kirundi who swore the affidavit in support of the application and represents himself as a director and the chairman of the Board of Directors of KTFC lapsed on 22nd November, 2019. Counsel therefore urged that the entire application is improper, void and an abuse of the court process and ought to be dismissed with costs. The case of **Bugerere Coffee Growers Ltd v Seraduka & another [1970] EA 147** is cited as outlining the legal principle that a board resolution is required before a company can commence court proceedings.

96. Counsel for the 2nd Respondent highlighted the written submissions dated 3rd December, 2019. The 2nd Respondent's case is that the petition has not met the threshold of a constitutional petition as set in **Anarita Karimi** (supra) and affirmed by the Court of Appeal in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.** The test, the 2nd Respondent contends, requires a petitioner to plead the particular constitutional provisions that he alleges have been breached, the manner in which the said provisions have been breached and the injury suffered as a result of the breach.

97. Counsel for the 2nd Respondent submitted that the issues raised in the petition involve the process of election of directors of companies which is regulated by the memorandum and articles of association of those companies. It is consequently urged that this is therefore not a matter for this court. Relying on the decisions in the cases of **Revital Healthcare (Epz) Limited & another v Ministry of Health & 5**

others [2015] eKLR; Maggie Mwauki Mtalaki v Housing Finance Company of Kenya [2015] eKLR; John Harun Mwau v Peter Gastrow & 3 others [2014] eKLR; and **Leonard Jefwa Kalama and another v Consolidated Bank of Kenya Ltd and 3 others [2014] eKLR**, counsel submitted that the petition does not disclose any constitutional issue, which issue was defined in the cited cases as one which directly arises from the court's interpretation of the Constitution.

98. Counsel submitted that this court cannot entertain this matter in so far as it relates to necessary parties who have not been enjoined to this suit. The case of **Salim Seif Ambunya Andanje & another v Alex Jepkoech Yano & another [2019] eKLR** is cited in support of the proposition that a court cannot issue orders against a person that is not a party to a suit. Counsel argued that the petitioners are attempting to impugn the election of directors conducted by tea factories yet none of those tea factories are parties to this petition. According to counsel, any orders issued against the parties not before this court will result in their being condemned unheard hence violating the right to a fair hearing. The court was therefore urged to strike out the petition on that basis.

99. Turning to the issue of *res judicata*, counsel for the 2nd Respondent submitted that based on the principle of *res judicata* this court is bereft of jurisdiction to entertain this petition. The decisions in the cases of **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** and **Kamunye & others v Pioneer General Assurance Society Ltd [1971] E.A. 263** are identified as stating that *res judicata* essentially bars the institution of subsequent proceedings involving the same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

100. Counsel for the 2nd Respondent submitted that the constitutionality of the respondents' election rules was litigated in the **Moraa Juma case** where it was held that the plaintiff did not claim that the requirements of the election manual were unattainable, oppressive or discriminative so as to justify her claim that the rules were illegal or unconstitutional and the election rules were therefore valid, lawful, reasonable and justified. Further reliance was placed on the decisions of **Job Fellis Ndarera & another v Nyamache Tea Factory Company Limited & 2 others [2016] eKLR** and **Abdirahman Affi Abdalla v Osupuko Service Station Ltd & another [2012] eKLR** for the holding that the Companies Act gives a free hand to companies to develop their own rules of engagement in the memorandum and articles of association. Counsel urged that entertaining this petition will amount to sitting on appeal over the decision made by this Court (Okwany, J) in the **Moraa Juma case**. Based on this submission, counsel for the 2nd Respondent termed the petition frivolous and an abuse of the court process and asked for its dismissal.

101. On the issue whether this court should interfere with the internal management of the respondents and the 54 tea factory companies, counsel relied on the case of **William Njiraini Nguru v Mununga Tea Factory & 3 others [2015] eKLR,** where it was held that election of directors of companies and other management issues are internal issues that are usually regulated by rules and regulations embedded in the articles of association and memorandum of association. Reliance was also placed on the case of **Paul Mogaka Magoma v Gianchore Tea Factory Co & 2 others [2016] eKLR** where the court held that companies, be they private or public, are governed by the provisions of the Companies Act and the election of directors are internal affairs of companies that are usually regulated by the rules embedded in the articles and memorandum of association. In that regard, counsel submitted that the court can only interfere with the internal management of the respondents if it is shown that they acted *ultra vires* or there is an element of fraud, which in his view, the petitioners had failed to demonstrate.

102. Counsel for the 2nd Respondent also took issue with the petitioners' failure to enjoin the 54 tea factory companies, stating that it is the zonal elections of the said companies which are impugned in these proceedings. Failing to join them according to the 2nd Respondent's counsel would deny the said companies an opportunity to be heard on issues that affect their internal management and this goes against the principle of fair hearing as elucidated under Articles 48 and 50 of the Constitution.

103. On the issue whether this court should entertain this petition prior to the exhaustion of the internal dispute resolution mechanisms, counsel relied on the decisions in **Paul Mogaka Magoma** (supra), **Job Fellis Ndarera** (supra) and **Rebecca Elaine Nyaanga v Nyansiongo Tea Factory Co. Ltd & 3 others [2019] eKLR** for the proposition that before one approaches the court, they should first clear with the internal dispute resolution mechanisms. Further, that even where the internal alternative dispute resolution process is in question, one should exhaust the same before approaching court. Counsel submits that the petitioners have failed to adhere to the said principle in this case and their petition should therefore fail.

104. On the issue whether the 2nd Respondent is in breach of Article 47 among other provisions of the Constitution, counsel submitted that the role of the management of the elections having been left to the Company Secretary, that function cannot be interfered with by any other organ of the said company. This position was supported by reference to the case of **Affordable Homes Africa Limited v Ian Henderson & 2 others HCCC No. 524 of 2004** where it was observed that as an artificial body, a company can take decisions only through the agency of its organs, the Board of Directors and the shareholders; and that where a company's powers of management are, by the articles, vested in the Board of Directors, the general meeting cannot interfere in the exercise of those powers.

105. In line with the above submission, counsel stated that the role of management of the directors' election having been assigned by the respective companies' constituting documents upon the Company Secretary, did not need the involvement of the shareholders at the annual general meetings of the respondents. According to counsel, the formulation of the Elections Procedure Manual 2019 was therefore not an administrative function but the discharge of a role assigned by the memorandum and articles of association of each of the tea factory companies and there was therefore no breach of Article 47 of the Constitution.

106. Counsel for the 2nd Respondent further submitted that the principles of governance of companies is not contained in Article 10 of the Constitution but in the "Principles of Good Corporate Governance" as found in the Capital Markets (Corporate Governance) (Market Intermediaries) Regulations, 2011 which regulations the 2nd Respondent has fully complied with.

107. It was also the submission of counsel that as was held in the case of **Humphrey Makokha Nyongesa & another v Communications Authority of Kenya & 2 others [2018] eKLR**, the making of election rules for guiding the process of electing directors is a private decision that does not fall under the purview of Article 47 of the Constitution and the Fair Administrative Action Act, 2015. In conclusion, the 2nd

Respondent urged the court to dismiss the petition with costs.

108. A perusal of the pleadings and the submissions of the parties shows that the first issue to be considered is whether the application for joinder by KTFC should be allowed. The second issue is whether this court has jurisdiction to entertain the petition, and if so, whether the petition is merited.

109. The first order of business is to dispense with the application of KTFC through which it seeks to be enjoined to these proceedings as a Co-Petitioner. The rules governing addition, joinder, substitution and striking out of parties in constitutional petitions are found in Rule 5 of the Mutunga Rules which provides that:

> **"Addition, joinder, substitution and striking out of parties.**
>
> **5. The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—**
>
> **(a) Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.**
>
> **(b) A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.**
>
> **(c) Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.**
>
> **(d) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—**
>
> **(i) order that the name of any party improperly joined, be struck out; and**
>
> **(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.**
>
> **(e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents."**

110. Rule 5(d)(ii) provides the guide to the court in deciding whether to allow an application for joinder. For an application for joinder to succeed, it should be demonstrated that the addition is necessary in order to enable the court adjudicate upon and settle the matter. In order for parties to be joined together in a claim either as plaintiffs or defendants, it must be demonstrated that they share similar rights or liabilities.

111. In **Rubina Ahmed & 3 others v Guardian Bank Ltd (Sued in its capacity as a successor in Title to First National Finance Bank Ltd) [2019] eKLR,** the Court of Appeal discussed the application of Rule 10(2) of Order 1 of the Civil Procedure Rules, 2010 which provides for joinder of parties in civil cases and held that:-

> **"Numerous court decisions have construed the application of that Rule and we need only refer, for emphasis, to this Court's decision in J M K vs M W M & Another [2015] eKLR where it stated thus:-**
>
> **"Commenting on this provision, the learned authors of Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), state that:**
>
> **"The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties"**
>
> **……..**
>
> **We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar's Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10 (2) of our Civil Procedure Rules, in Tang Gas Distributors Ltd vs Said & Others [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.""**

112. It is noted that the purpose of joinder in civil proceedings is to ensure that parties who are necessary to the proceedings are added to the case in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. The words used are similar to those used in the provisions for joinder of parties in the Mutunga Rules.

113. Another important provision on joinder is found in Rule 7 of the Mutunga Rules which provides that:-

> **"Interested party.**
>
> **7. (1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.**
>
> **(2) A court may on its own motion join any interested party to the proceedings before it."**

Rule 2 defines an interested party as **"a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation."**

114. In **Communications Commission of Kenya and 4 others v Royal Media Services Limited & 7 others [2014] eKLR,** the Supreme Court addressed the role of an interested party in litigation and held that:-

> **"[22] In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court's Ruling in the Mumo Matemo case where the Court (at paragraphs 14 and 18) held:**
>
> > **"[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause…"**
>
> **[23] Similarly, in the case of Meme v. Republic,[2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:**
>
> **"(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;**
>
> **(ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;**
>
> **(iii) joinder to prevent a likely course of proliferated litigation.""**

115. In **Shirvling Supermarket Limited** (supra) the test for joinder was stated as follows:-

> **"The test in applications for joinder is firstly, whether an applicant can demonstrate he has an identifiable interest in the subject matter in the litigation though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative it must be shown that the applicant is a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit."**

116. From a reading of the cited legal provisions and decided cases, it becomes clear that an applicant who desires to join a case either as a party or an interested party must demonstrate an identifiable stake in the matter and also show that his or her presence in the proceedings will enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.

117. KTFC is a limited liability company and a shareholder of the 1st Respondent. The petition before this court primarily challenges the conduct of the elections held on 25th October, 2019 for directors to represent zones 2, 4, 7 and 8 in the Board of Directors of the 1st Respondent. The respondents averred that KTFC did not fall into any of the four zones and did not therefore participate in the elections. The averment, which was not rebutted by KTFC, pushes any interest KTFC may have in these proceedings to the periphery. It is noted that one of the major complaints by the petitioners is that the holding of zonal elections before the factory elections adversely affected candidates at the factory level. Considering that KTFC did not fall into any of the four zones in which elections were conducted, it follows that KTFC has no identifiable stake in these proceedings. It was therefore not affected by the outcome of the elections being questioned in this case. KTFC has therefore not shown that it has an identifiable stake in these proceedings and neither has it demonstrated that this court cannot effectually and completely adjudicate upon and settle all questions involved in the suit in its absence. In short, KTFC is not a necessary party in these proceedings.

118. There is also the undisputed averment by the respondents that the three-year term of Geoffrey Chege Kirundi who swore the affidavit in support of KTFC's application for joinder lapsed in November, 2019. Without going into the ongoing disputes between KTFC and the respondents pending before other courts, it follows that there is no valid authority for dragging KTFC into these proceedings. In light of my findings above, I no longer deem it necessary to address the question as to who is the proper counsel on record for KTFC.

119. For the stated reasons, I find no merit in KTFC's application for joinder. The application is dismissed. As for the question of costs, I find that KTFC should not be ordered to pay costs. Asking KTFC to pay costs will only result in an unnecessary burden on the small-scale tea growers who are the shareholders of the company.

120. The next issue is the respondents' contention that this petition violates the orders issued by Ngaah, J in **Nyeri HCCC No. 147 of 2010, Makomboki Tea Factory Company Limited v Joseph Mwangi Mbote & 5 others** which permanently barred the 1st Petitioner herein who was the 1st Defendant in that case from interfering with the management and operations of Makomboki Tea Factory Limited. The respondents submitted that the order has never been varied or set aside. The petitioners' position is that the order was against the six defendants as a faction of the management of the factory rather than 1st Petitioner as an individual. Further, that the defendants in that case were only restrained from presenting themselves as directors of Makomboki Tea Factory Limited and the order did not bar the 1st Petitioner herein from accessing justice against the respondents herein who in any event were not parties to the stated case.

121. The order which is found at paragraph 65 of the judgement dated 29th September, 2015 states:

> **"Permanent injunction is hereby issued against the defendant restraining them from holding themselves out as directors and or other officers of the plaintiff company and from interfering with the management operations assets and business of the company plaintiff."** (sic)

122. As correctly pointed out by the petitioners, the said order is limited to Makomboki Tea Factory Company Limited. It has nothing to do with the respondents, who were in any case not parties to that matter. The right to access justice guaranteed by Article 48 of the Constitution and the right to a fair hearing provided by Article 50 of the Constitution are important constitutional rights which cannot be taken away easily. A judgement that attempts to take away those rights should be read narrowly. My reading of the said order tallies with that of the petitioners. The Court did not in any way block the defendants from accessing courts generally. Even if the objection has a legitimate foundation, and I have found it does not, I find that the petition can still be sustained by the 2nd and 3rd petitioners. In conclusion therefore, I hold that the respondents' objection to the petition on this particular ground is without merit.

123. In my view, the main issue is whether this court has jurisdiction to entertain the instant petition, and if so, whether the petition is merited. The many and varied objections raised by the respondents against the petition fall under this head. The respondents have argued that this court does not have jurisdiction to entertain the petition because it does not raise constitutional questions but is instead a commercial dispute between the shareholders and their companies; that this court lacks jurisdiction because the petitioners have not exhausted the internal dispute resolution mechanism provided in the Elections Procedure Manual 2019 before approaching the court; that the petition is defective for failure to enjoin the 54 tea factory companies as parties to the petition; and that the election of the 1st Respondent's directors is an internal affair of the company and this court cannot adjudicate on the matter.

124. The respondents mainly base their arguments on the decision in the famous case of **Foss v Harbottle (1843) 2 Hare 461.** In that case, two shareholders commenced legal action against the directors of the company alleging that they had misapplied the company's assets. The claim was rejected by the court which held that a breach of duty by the directors of the company was a wrong done to the company and it is only the company alone that could sue.

125. The exceptions to the rule in **Foss v Harbottle** were clearly stated in the case of **Edwards v Halliwell [1950] 2 All ER 1064** as follows:-

> **"The rule in Foss vs Harbottle, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio.* No wrong has been done to the company or the association and there is nothing in respect of which anyone can sue. If, on the other hand, a simple majority of members of the company or association is against what has been done, then there is no reason why the company itself or the association cannot sue. In my judgment, it is implicit in the rule that the matter relied on as constituting the cause of action should be a cause of action properly belonging to the general body of corporators or members of the company or association as opposed to a cause of action which some individual member can assert in his own right.**
>
> **The cases falling within the general ambit of the rule are subject to certain exceptions. It has been noted in the course of argument that in cases where the act complained of is wholly ultra vires the company or association, the rule has no application because there is no question of the transaction being confirmed by any majority. It has been further pointed out that where what has been done amounts to what is generally called in these cases, a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who is allowed to bring what is known as a Minority Shareholder's action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance would never reach the court because the wrongdoers being themselves in control would not allow the company to sue. Those exceptions are not directly in point in this case, but they show, especially the last one, that the rule is not an inflexible rule and it will be relaxed where necessary in the interests of justice.**
>
> **There is a further exception, which seems to me to touch this case directly. That is the exception noted by Romer J. in *Cotter v National Union of Seamen.* He pointed out that the rule did not prevent an individual member from suing if the matter in respect of which he was suing was one which could validly be done or sanctioned, not by a simple majority of the members of the company or association, but only by some special majority, as, for instance, in the case of a limited company under the Companies Act, a special resolution duly passed as such. As Romer J. pointed out, the reason for that exception is clear, because otherwise, if the rule were applied in its full rigour, a company, which, by its directors, had broken its own regulations by doing something without a special resolution which could only be done validly by a special resolution could assert that it alone was the proper plaintiff in any consequent action and the effect would be to allow a company acting in breach of its articles to do de facto by ordinary resolution that which according to its own regulations could only be done by special resolution. That exception exactly fits the present case inasmuch as here the act complained of is something which**

could only have been validly done, not by a simple majority, but by a two thirds majority obtained by ballot vote. In my judgment, therefore, the reliance on the rule in Foss v Harbottle in the present case may be regarded as misconceived on that ground alone."

126. In summary, the exceptions to the **Foss v Harbottle** rule are that a member can sue if:-

(a) The action is *ultra vires.*

(b) The wrongdoers are in control of the company and there is a "fraud on the minority".

(c) Where a special procedure or majority in the company's articles is bypassed; and

(d) Where there is invasion of a member's personal right.

127. The petitioners appear to suggest that the Elections Procedure Manual 2019 was foisted upon the shareholders without their approval. The respondents' case is that the power to manage elections is granted to the Company Secretary by the MAA and that power extends to the making of rules to guide the conduct of elections. In order to do substantive justice to the parties, I will assume that the petitioners are proceeding under the exceptions to the **Foss v Harbottle** rule.

128. The 1st Respondent's MAA at Article 86(a) provides the conditions to be met by any person who desires to be elected as a director of the company. Article 86(g) empowers the Company Secretary to appoint presiding and returning officers to oversee the elections by providing that:-

"The Company through its Secretary shall appoint and mandate officials as Presiding and Returning officers with general power and/or as directed by the Secretary to oversee elections."

129. A perusal of the Elections Procedure Manual 2019 shows that the same is a detailed document on how the elections are to be conducted. The petitioners, however, appear to conflate the elections of the directors of the 1st Respondent with the elections of the directors of the individual tea factories. I say so because the full title of the Elections Procedure Manual 2019 which they provided to this court reads: **ELECTION OF TEA FACTORY COMPANY DIRECTORS NOMINEES AND BUYING CENTRE COMMITTEE MEMBERS-PROCEDURES-NOVEMBER, 2019.** The purpose for which the rules are made is indicated in the first two paragraphs of the document as follows:

"The above elections will be held in November, 2019. This circular shall form the rules that would apply to the nomination exercise for director of the Factory and the Buying Centre Committee elections.

The Rules draw from the Company Law, the Factory Company Articles of Association and the Management agreement."

130. In the circumstances, the Elections Procedure Manual 2019 is not applicable to the election of the directors of the 1st Respondent. Whatever complaint the petitioners may have had with the election of the 1st Respondent's directors, they cannot hinge that complaint on the Elections Procedure Manual 2019.

131. It is difficult to address the legality or otherwise of the Elections Procedure Manual 2019 in the absence of the owners of that document to wit the 54 tea factory companies. However, a perusal of the Memorandum and Articles of Association of KTFC which was provided to this court by the petitioners shows that the returning officers and presiding officers for purposes of the directors' elections shall be appointed by the Company Secretary. Even assuming that the Elections Procedure Manual 2019 was facing a valid challenge before this court, the petitioners have failed to show why a document that is meant to guide the exercise of the power donated to the Company Secretary by the memorandum and articles of association of the various tea factory companies to oversee election of directors of the tea factory companies can be said to be *ultra vires.* It should be remembered that the Company Secretary of the 1st Respondent is also the Company Secretary of each and every one of the 54 tea factory companies.

132. This then takes me back to the question as to whether this is a matter to which the exceptions to the **Foss v Harbottle** rule is applicable. The answer is in the negative. The petitioners have not established that the respondents acted outside their memorandum and articles of association in conducting the impugned elections. Indeed it appears that the petitioners, who in any case do not hold shares in the sued companies, are trying to impose the will of the minority on the wishes of the majority. The annual general meetings of the various tea factory companies provides the best theatre for expressing displeasure with the election rules.

133. In **Okiya Omtatah Okoiti & 3 others v Nairobi City County and 5 others (2014) eKLR**, the Court held that:-

"The Articles of Association of a company constitute the constitution of any company and play a vital role in defining and distributing powers and functions, and regulate the functioning of the company. It may thus be argued that the articles of association of the 5th respondent prevail over the provisions of the Water Act in relation to the appointment of directors of the 5th respondent."

134. The same point was stressed in **Jacob Juma** (supra) that:-

"It is a cardinal principle in company law that it is for the company and not the individual shareholder to enforce rights of action vested in the company and sue for wrongs done to it… that in the absence of illegality, a shareholder cannot bring proceedings in respect of irregularities in the conduct of the company's internal affairs in circumstances where the majority are entitled to present the bringing of an action in relation to such matters. However, if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such a shareholder can bring an action by way of a derivative suit… (But) mere irregularity in the internal management of a company cannot be a basis for one to bring derivative suit for such can be rectified by a vote/resolution at the company's meeting…"

135. In **William Njiraini Nguru** (supra) the Court observed that the management of companies whether private or public is governed by the Companies Act Cap 486 Laws of Kenya (now repealed). The court held that:-

"Election of directors and other management issues are internal issues that are usually regulated by rules and regulations embedded in the Articles and Memorandum of Association."

136. Also, in **Zaburi Musa Hamisi & 3 others v Ishmael Hillon & 4 others [2015] eKLR** the Court held that:-

"The general principle that has emerged from our jurisprudence with regard to internal management of such associations is that the courts are very reluctant to interfere with their internal management unless the Constitution of the association is breached or there is contravention of the rules of natural justice…In TANUI & 4 OTHERS V BIRECH & 11 OTHERS [1991] KLR 510 the Court of Appeal summarised this principle as follows:

'While it is not the business of the High Court or the Court of Appeal to involve itself in the day to day running of institutions ...yet where it is shown that such an organization is conducting its affairs in a manner contrary to its constitution and to the detriment of its members, then the High Court and the Court of Appeal would not only be entitled to but is under a duty to compel it, either, by injunction or otherwise, to obey its constitution."

137. In the instant case, I find that the matters complained of can be resolved by the company itself. My humble view is that the orders sought by the petitioners in this case, to declare who is or who is not a duly elected director of the company or who should prepare the company's election manual are clearly the company's internal affairs which this court should not interfere with. Furthermore, I am inclined to hold the view that a company is justified in setting up the rules and guidelines to govern its elections. Owners of companies usually run their affairs based on voting. Once the majority decides, their decision should carry the day. Such a decision should not be subjected to court scrutiny where there is no evidence of violation of the country's Constitution.

138. The petitioners are challenging the zonal elections and the election rules used to conduct those elections. Does the petition raise constitutional questions? The question of what constitutes a constitutional question was ably illuminated by Mativo J in the case of **C N M v W M G [2018] eKLR** in which he cited with approval the South African case of ***Fredericks & others v MEC for Education and Training, Eastern Cape & others [2002] 23 ILJ 81 (CC)*** in which Justice O'Regan recalling the Constitutional Court's observations in ***S v Boesak*** **[2001] (1) SA 912 (CC)** notes that:-

"The Constitution provides no definition of "constitutional matter." What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of .....the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State.....,the interpretation, application and upholding of the Constitution are also constitutional matters. So too,.....,is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction."

139. I agree also with Mativo J's views in **CNM v WMG (supra)** that:-

"Courts abhor the practice of parties converting every issue into a constitutional question and filing suits disguised as constitutional Petitions when in fact they do no not fall anywhere close to violation to constitutional Rights.

The Court of Appeal in *Gabriel Mutava & 2 Ors. vs. Managing Director Kenya Ports Authority & Another*[22] underlined the conventional judicial policy as established by the courts over time and now settled that constitutional litigation is not open for every claim which may properly be dealt with under the alternative existing mechanism for redress in civil or criminal law as follows:-

"Then there is the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR, where this Court again emphasized:-

"…In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.…"

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done."

140. In **Maggie Mwauki Mtalaki v Housing Finance Company of Kenya [2015] eKLR,** Emukule, J pronounced himself on the issue thus:-

"The test whether a Petition raises a constitutional issue, and adopted by Tuiyott J in Four Farms Limtied v Agricultural Finance Corporation [2014] eKLR following the decision in Damian Belfonte v The Attorney General of Trinidad and Tobago where it was stated inter….

… where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. <u>As a General rule</u> there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the Court's process."

141. In my view, the petitioners have failed to demonstrate any violation of the Constitution and any injury suffered. They have also failed to indeed establish that this is a constitutional matter. They have not shown that holding zonal elections prior to factory elections was detrimental to any person's right to vie for factory directorship. It is clear that at the time the zonal elections are held, each constituency of a given factory is represented at the board of the tea factory. No constituency is therefore prejudiced by the holding of the zonal elections prior to the factory elections. The conditions to be met before one can be elected as a director for a tea factory company should be found in the memorandum and articles of association of each of the tea factory companies. The court was not told that the Elections Procedure Manual 2019 violated the rules of any of the tea factory companies.

142. I have said enough to show that I agree with the respondents that this petition is indeed unmerited. It therefore fails and is dismissed. As for the issue of costs, I generally hold the view that petitioners in such matters should not be required to meet costs. Although this petition was ill-advised from the beginning, I have not seen any malice in the petitioners' action. For that reason alone, I direct each party to meet own costs of the proceedings.

Dated, signed and delivered at Nairobi this 20th day of February, 2020

W. Korir,

Judge of the High Court