



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CIVIL SUIT NO. 5 OF 2017**

**REBECCA ELAINE NYAANGA.....PLAINTIFF**

**=VRS=**

**1. NYANSIONGO TEA FACTORY CO. LTD.....1<sup>ST</sup> DEFENDANT**

**2. MARGARET GACHINGA –**

**RETURNING OFFICER.....2<sup>ND</sup> DEFENDANT**

**3. THOMAS NYAGETARI –**

**PRESIDING OFFICER.....3<sup>RD</sup> DEFENDANT**

**4. ROBINSON MOKAYA OTWORI.....4<sup>TH</sup> DEFENDANT**

**RULING**

This is a ruling on the plaintiff/applicant's Notice of Motion dated 10<sup>th</sup> November 2017 filed herein on even date. The application seeks orders that: -

**“1. Spent**

**2. Spent**

**3. That pending the hearing and determination of this suit an order of temporary injunction do issue restraining the defendants by themselves, servants, agents or any person acting under their instructions from presenting the name of the 4<sup>th</sup> defendant respondent for appointment and/or confirmation as a nominee director following the nomination exercise held on 7<sup>th</sup> day of November 2017 at Nyansiongo Electoral Area.**

**4. The costs of this application be provided.**

The application is premised on grounds that: -

**“1. The nomination exercise of the position of directorship of the 1<sup>st</sup> Defendant held on 7<sup>th</sup> day of November 2017 was a sham.**

**2. The said nomination exercise was not free, fair and transparent.**

**3. The nomination was marred by several irregularities and illegalities.**

**4. The acts of forgery were committed by the 4<sup>th</sup> Respondent and condoned or acquiesced by 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent.**

**5. The Respondent abused the meaning and use of the special Power of Attorney during the nomination exercise.**

**6. The nomination exercise did not comply with election procedure Rules November 2017 issued by the Kenya Tea Development Agency limited.**

## 7. It is in the interest of justice that this application be allowed.”

The application is supported by the affidavit of the plaintiff/applicant sworn on 10<sup>th</sup> November 2017 in which she deposes inter alia that on 4<sup>th</sup> October 2017 she was issued with a certificate of her candidature for nomination in the election and that she duly complied with all the requirements and conditions that were required of the candidates; that contrary to the rules although she requested the Factory Unit Manager to supply her with the list of her opponents special power of attorney, which list was one of the prerequisites for the election, that was not done; that the list was only given to her after she complained to the Regional Manager; she also deposes that the Notice advertising the candidates for the nomination was pinned at the tea buying center only 5 days to the election instead of the 14 days and that her last name was misspelt and there was a duplication of the donors in that the person who had donated to her a special power of attorney had also donated a power of attorney to her opponent; that she suspected there was fraud as the donor denied having given the power of attorney to her opponent. However, her complaint to the Regional Manager fell on deaf ears. She deposed that her agents at Kijauri and Riensune Polling Stations raised the issue of the suspect power of attorney to the presiding officers but no action was taken. She deposes therefore that the nomination exercise was a sham and it was not free, fair and transparent. Further, that she was greatly prejudiced by the declaration of the 4<sup>th</sup> respondent as the duly nominated director by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, and should this application be refused his name is likely to be presented to the 1<sup>st</sup> respondent’s General Meeting of 13<sup>th</sup> November 2017.

The application is vehemently opposed and all the four respondents have filed replying affidavits with the 1<sup>st</sup> respondent also having a preliminary objection dated 23<sup>rd</sup> November 2017 which questions the jurisdiction of this court to hear this dispute. The 2<sup>nd</sup> respondent also filed a preliminary objection dated 23<sup>rd</sup> November 2017 which raises an issue of misjoinder in the proceedings.

On 4<sup>th</sup> October 2018, this court granted a prayer by Counsel for the respondents to expunge the affidavits of Charles Manani Nyaachi, Rebecca Elaine Nyaanga (the applicant) and David Nyang’au (a process server) all filed on 11<sup>th</sup> July 2018 as they were further affidavits filed without the leave of the court.

The application proceeded by way of written submissions which Counsel highlighted on 4<sup>th</sup> October 2018.

I have considered the notice of motion, the grounds thereof, the supporting and replying affidavits and the submissions by Counsel both oral and written. It is my finding that this matter is not properly before this court. The disputed nomination elections were governed by a set of rules which the parties herein refer to as the election manual. The rules in the said manual are very elaborate and give timelines for every activity and envisaging that complaints or disputes were likely to arise. The manual provides a dispute resolution mechanism for disputes that could arise prior to the election and those that were likely to be raised on election day. The applicant correctly states that the mandate of the Dispute Resolutions Committee ended on 13<sup>th</sup> October 2017. Rule 8 of the Dispute Resolution Committee Rules provided that the committee would sit between 12<sup>th</sup> and 13<sup>th</sup> October 2017 and conclude its business within the two days to enable the preparation and printing of the ballots for the nomination elections. It is therefore evident that the mandate of that committee was to hear and determine disputes that arose prior to the election date itself.

However, the rules also had a mechanism for disputes on the day of the election such as are raised by the applicant. She has not explained why she did not resort to that mechanism. The courts are enjoined, under **Article 159 of the Constitution**, to promote **Alternative Dispute Resolution (ADR)** and where mechanism for dispute resolution is provided, the courts now insist that the same be exhausted before coming to court. Authorities on this are legion. In **International Center for Policy and Conflict and 4 others Vs. Hon. Uhuru Kenyatta & others Pet. 552 of 2012** a five judge bench of the High Court underlined this as did the Court of Appeal in **Michael Wachira Nderitu & others Vs. Mary Wambui & others [2013] eKLR**.

In **William Njiraini Nguru Vs. Mununga Tea Factory & 3 others [2015] eKLR** and **Job Fellis Ndereba & Another Vs. Nyamache Tea Factory [2016] eKLR** where an issue similar to the one before me arose, the courts declined to grant an injunction as the dispute resolution mechanism provided for in the manual had been bypassed. Likewise, the applicant in this case should have resorted to the dispute resolution mechanism in the manual as for as long as bypassed it this court would have no jurisdiction to hear her application.

To make matters worse, by the time she served the order obtained from the court to restrain the respondents from presenting the 4<sup>th</sup> respondent at the General Meeting, the meeting had long taken place. The minutes for that meeting are at page 179 and 180 of the 1<sup>st</sup> respondent’s replying affidavit. Time the meeting ended is 11.30am but the applicant concedes that she served the order at 11.46am. Her allegation that the minutes are a fraud is not supported by evidence.

Accordingly, not only is this court devoid of jurisdiction but the application was overtaken by events and as this court cannot issue orders in vain, the application is dismissed.

Costs follow the event and in this case I order that the applicant shall bear the costs of the application. It is so ordered.

**Dated, signed and delivered at Nyamira this 25<sup>th</sup> day of January 2019.**

**E. N. MAINA**

**JUDGE**