



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 3 OF 2016**

**NYANG'ERA AMOTA NYASAE.....PLAINTIFF**

**=VRS=**

**1. TOMBE TEA FACTORY COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**2. KENYA TEA DEVELOPMENT AGENCY LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

By the plaint dated 26<sup>th</sup> February 2016 filed herein on 4<sup>th</sup> March 2016 the plaintiff seeks judgement against the defendants as follows: -

**“(i) Declaration that the Removal of the Plaintiff as the Company’s Auditor of the 1<sup>st</sup> Defendant for the years 2015/2016, was contrary to the laid down provisions and in particular, the provisions of Section 159 (2) as read together with Section 160 (1) of the Company’s Act, Chapter 486, Laws of Kenya.**

**(ii) Payment of the sum of Kshs. 250,000/= only, being the Annual Professional Fees, which would have been payable to the Plaintiff for Professional services, in line and/or in accordance with the automatic reappointment envisioned by the provision of the Company’s Act, Chapter 486, Laws of Kenya.**

**(iii) Interest on (ii) above at Court rates.**

**(iv) Costs of this suit be borne by the Defendants.**

**(v) Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.”**

In the plaint he avers that: -

**“5. On or about the 13<sup>th</sup> day of June 2012, the Defendants herein, admitted and/or contracted the Plaintiff as a duly appointed Auditor for the 1<sup>st</sup> Defendant, whereby the Plaintiff was mandated and/or authorized to examine and/or audit the various Books of Accounts of the 1<sup>st</sup> Defendant for the Financial year 2012/2013, (details whereof are well within the knowledge of the Defendants).**

**6. Pursuant to the appointment and/or admission of the Plaintiff as the Auditor of the 1<sup>st</sup> Defendant, the Plaintiff herein duly executed his mandate and same was then after authorized and/or re-appointed as the Company’s Auditor, for the year following, that is, 2013/2014 and also 2014/2015, respectively.**

**7. Owing to the fact that the Plaintiff had been duly appointment and re-appointed as the Company Auditor, for the 1<sup>st</sup> Defendant, the Plaintiff was eligible for re-appointment as such for the period 2015/2016, subject to compliance with the provisions of Section 159 (2) of the Company’s Act, Chapter 486, Laws of Kenya.**

**8. However, on or about the 8<sup>th</sup> day of January 2016, the 2<sup>nd</sup> Defendant herein called and/or convened the Annual General Meeting of the 1<sup>st</sup> Defendant herein, whereby various issues, were to be addressed and/or deliberated upon, inter-alia passing resolutions relating to the appointment and/or re-appointment of the Company's Auditor for the period 2015/2016.**

**9. The Plaintiff contends that during the Annual General Meeting held on the 8<sup>th</sup> day of January 2016, the Defendants herein, removed the Plaintiff as the Company’s Auditor, notwithstanding the provisions of Sections 159(2) of the Company’s Act, Chapter 486, Laws of Kenya, which envisaged and/or envisioned the automatic re-appointment of the Plaintiff as the**

**Auditor.**

**10. As a result of the actions and/or omissions of the Defendants herein, the Plaintiff was Removed as the Company's Auditor for the period 2015/2016, albeit without compliance and/or observance of the applicable and relevant law. Consequently, the Removal of the Plaintiff as the Company's duly appointed Auditor, was not only Irregular, but Illegal and Unlawful....."**

The defendants responded to the claim by filing a joint statement of defence in which they averred that: -

**"3. Any Tea Grower, including small scale Tea Growers, must by law be registered with a Tea Factory, within his/her Catchment Area, to which the person delivers green leaf refer to Section 14(i) (b) of the Crops Act, No. 16 of 2013.**

**4. THAT prior to the year 1999, the Tea Factory Companies were managed by Kenya Tea Development Authority, a wholly owned Government Parastatal established under the Agriculture Act, Cap 318 (repealed), and more particularly Kenya Tea Development Authority Order, Legal Notice N042 of 1964 as amended from time to time and the said Legal Notice attests as much).**

**5. The Legal Notice cited as the Kenya Tea Development Authority (Revocation) Order, 1999 and that came into force on 1<sup>st</sup> January, made drastic changes to the structure of the Tea Industry in Kenya and relevance to this suit, is as hereunder.**

**(a) Kenya Tea Development Authority was revoked and replaced with Kenya Tea development Agency which was incorporated by the Authority under the Companies Act as a public company (refer to order No.3 (i) as read together with Order No. 1 1 thereof).**

**As a successor of the Kenya Tea Development Authority (hereinafter referred to as the "Authority"), Kenya Tea Development Agency (hereinafter referred to as "the Agency") by law took over all the rights, duties and obligations of the Authority (refer to Order No. 3 (2) of the Revocation Order). One such statutorily transferred duty from the Authority to the Agency was managing of small sale Tea Grower Factory Companies within the Republic of Kenya (refer to the duties of the Authority as stipulated under Kenya Tea Development Authority Order under Legal Notice No.42 of 1964, Order No. 19 (5) thereof.**

**6. The Agency was incorporated on 1<sup>5th</sup> May, 2000 and whose name was changed from Kenya Tea Development Agency Limited to Kenya Tea Development Agency Holdings Limited on 14<sup>th</sup> December, 2009 vide the Certificate of Incorporation and change of name.**

**7. The Agency has as its shareholders the 69 Tea Factory Companies spread Across the Republic of Kenya, the Respondent herein. Tombe Tea Factory Company limited included.**

**8. All the small scale tea factory companies revisited their incorporation documents with a view to causing the necessary amendments to align with and or in compliance with the above cited law, same being the Legal Notice No.44 of 1999. In the case of Tombe Tea Factory Company Limited, just as was all the other registered small scale tea factory companies, there was an introduction of Articles 115 to 117 in the Articles Association (hereinafter referred to as "Article Of Association") titled managing Agents.**

**9. THAT pursuant to article 115 of the Articles of Association of Tombe Tea Factory Company Limited, the Board, without discretion, was directed to appoint a managing agent. Under the same Article, the Board of Directors was directed to enter into an agreement with a managing agent to stipulate the terms of engagement. It was further stipulated that the managing agent's appointment could only be revoked or terminated subject to the management agreement.**

**10. THAT under Article 117 of the Articles Of Association of Tombe Tea Factory Company Limited, the Board was authorized to entrust and confer any of its powers to the managing agent except as excluded therein. The three exclusions are expressly stated as borrowing money, charging of assets and payment of dividends. The entrusted and conferred powers to the managing agent were stated to be capable of being revoked, withdrawn, altered or varied in strict compliance with the management agreement.**

**11. THAT Tombe Tea Factory Company Limited Board of directors in compliance with Articles 115 to 117 of the Articles Of Association of Tombe Tea Factory Company Limited, did enter into a Management Agreement with the Agency appointing the Agency as its exclusive managing agent, latest such agreement (herein referred to as" the Management Agreement") as read together with an addendum thereto. This Management Agreements rights, duties and responsibilities on the part of the Agency were assigned to Kenya Tea Development Agency Management Services Limited on 26<sup>th</sup> June,2010 and communicated vide an assignment instrument dated 7<sup>th</sup> July, 2010.The said management agreement is still in force to date.**

**12. THAT Kenya Tea Development Agency Management Services Limited (hereinafter referred to as "Kenya Tea Development Agency Management Service") is a wholly owned subsidiary company of the Agency. Reference to the Agency in the Management Agreement shall, in compliance with the assignment, be deemed as reference to Kenya Tea Development Agency Management Service.**

**B. The duties of Kenya Tea Development Agency Management Service under the law and Management Agreement relevant to the issue before this court.**

i) **Oversee the entire chain of growing, delivery, processing and or manufacturing of tea.**

- i. The management, administration, supervision and control of agricultural activities undertaken by the farmers within the catchment area to ensure that good quality green leaf is grown and delivered to the factory for processing into manufactured tea.**
- ii. The arrangement for collection and transportation of green leaf from buying centres to the factory and manage diversion of green tea leaf for processing when necessary;**
- iii. The day to day management of the factory including but not limited to, receiving of green leaf from buying centres, production of tea, storage, warehousing and transportation of manufactured tea to settling outlets;**
- iv. The sale and marketing of manufactures tea and undertaking product diversification and value addition;**
- v. The payment on behalf of the factory of tea farmers for all good green leaf delivered and used to manufacture tea.**
- vi. Provision of professional services, company secretarial and legal services.”**

At the hearing the plaintiff, a Certified Public Accountant (CPAK) and Advocate of the High Court of Kenya testified that sometimes in the year 2012 the 2<sup>nd</sup> defendant who are managing agents of the 1<sup>st</sup> defendant advertised the position of an auditor for the 1<sup>st</sup> defendant and he applied. He was subsequently invited for an interview by a letter dated 24<sup>th</sup> May 2012 and was by a letter dated 13<sup>th</sup> June 2012 appointed as auditor for the 1<sup>st</sup> defendant for the year 2012/2013. He stated that thereafter his appointment was renewed for a further period of three years which ended in June 2016. This despite the fact that he was entitled to be re-appointed. He stated that the Annual General Meeting of the 1<sup>st</sup> defendant would endorse his appointment and that under **Section 159 (2) of the Companies Act (now repealed)** as the retiring auditor he was presumed to have been re-appointed with or without his indication on whether he wanted to continue. He stated further that **Section 160 (1) of the Act** required the 1<sup>st</sup> defendant to issue a special notice to the auditor if it was desirous of retiring him and that the notice needed not to have given reasons for doing so. He contended that no such special notice was served upon him and as such his retirement was unlawful. He told the court that as a result he suffered financial loss this being his fees per year which was Kshs. 250,000/- excluding disbursements. He contended that he was in good standing with the Institute of Certified Public Accountants of Kenya (ICPAK) his professional body, and disputed the allegation that the reason for his retirement was the disciplinary case he had at the professional body. He also denied that his work was below standard and contended that if it was then that should have been contained in the special notice to retire him but which was never served upon him. In cross examination he admitted that there were disciplinary proceedings between him and Kiamokama Tea Factory, a sister company of the 1<sup>st</sup> defendant, but denied that anything had come out of those proceedings that could have formed the basis to remove him as an auditor for the 1<sup>st</sup> defendant. He however admitted that the letter dated 7<sup>th</sup> January 2018 of his good standing with Institute of Certified Public Accountants of Kenya (ICPAK) was recanted by that body. He also conceded that Minute 5 of the Minutes of the Meeting held on 8<sup>th</sup> January 2016 referred to his lack of a letter of good standing and the disciplinary proceedings at Institute of Certified Public Accountants of Kenya (ICPAK). He contended that after the initial appointment he was re-appointed by default as set out in **Section 159 (1) of the Companies Act** and that he was under **Sections 159 (2), 160 (1) and 160 (3)** entitled to the sum of Kshs. 250,000/- he claims as remuneration much as he did not render any services. He also stated that the letter regarding his good standing had no effect on what would have been his reappointment on 8<sup>th</sup> January 2016 as it only reached him on 13<sup>th</sup> January 2016. He contended that there was no dispute between him and the 1<sup>st</sup> defendant.

The defendants called two witnesses. Thomas Nyangera Nyagetari (Dw1), testified that he was the Manager of the 1<sup>st</sup> defendant; that on 8<sup>th</sup> January 2016 the shareholders met to deliberate on the appointment of auditors among other issues and that ordinarily auditors serve for one year and that the plaintiff was replaced by Omanwa & Associates and the 1<sup>st</sup> defendant cannot pay two auditors since it had appointed another auditor at the Meeting. Dw1 contended that the decision to remove the plaintiff was informed by his lack of good standing with Institute of Certified Public Accountants of Kenya (ICPAK). He contended that the notice of the Annual General Meeting sent to the plaintiff sufficed and there was no necessity to serve the plaintiff with any other notice. He further stated that the matter pertaining to the plaintiff's removal was common knowledge between them as they had discussed it with him although there was no written correspondence on the subject either between him and them or the 2<sup>nd</sup> defendant. Dw1 disputed that the plaintiff was ambushed and stated that an advertisement was made for the position and interviews conducted on 15<sup>th</sup> January. He stated that the problem between the plaintiff and ICPAK came to the 1<sup>st</sup> defendant's knowledge as they moved towards the Annual General Meeting but admitted that as at 8<sup>th</sup> January 2016 the 1<sup>st</sup> defendant had not received ICPAK's letter dated 12<sup>th</sup> January 2016 which informed the decision not to reappoint the plaintiff. Dw1 further stated that in any case the plaintiff never indicated his willingness to continue.

Dr. John Kennedy Omanga (Dw2) testified that he is the Group Company Secretary of the 1<sup>st</sup> defendant company and 53 other tea factories that are under the 2<sup>nd</sup> defendant. He conceded that at the material time the plaintiff was an auditor for Kiamokama Tea Factory and the 1<sup>st</sup> defendant. He reiterated that an auditor serves for only one financial year. In regard to this case he stated that the Notice of Annual General Meeting issued on 4<sup>th</sup> December 2015 had in its agenda inter-alia, appointment of auditors of the company as per **Section 159 (1) of the Companies Act** and to authorise the auditors to fix their remuneration but not for reappointment of the plaintiff. He stated that the said agenda was transacted on 8<sup>th</sup> January 2016 as evidenced by the minutes of that meeting. He pointed out that if an auditor was being reappointed then it would have been under **Section 159 (2) of the Companies Act**. He stated however that in the previous years the plaintiff had been reappointed under **Section 159 (2)**. While admitting that **Section 160 (1) of the Act** required a special notice to be sent to an auditor who was not being re-appointed, Dw2 stated that the notice of the Annual General Meeting sufficed and that the same was within the 28 days period provided in **Section 142 of the Act**. He contended therefore that the defendants had met all the requirements required to appoint an auditor. He stated that there was no automatic reappointment of the plaintiff and that he did not render services that would entitle him to the Kshs. 250,000/- claimed. He urged this court to dismiss the plaintiff's suit with costs to the defendants.

Summing up was by way of written submissions. I have considered the evidence and the rival submissions carefully. The issues for determination are whether the resolution of 8<sup>th</sup> January 2016 appointing a person other than the plaintiff as the auditor of the 1<sup>st</sup> defendant was illegal or irregular and whether he is entitled to the reliefs sought in the plaint.

The law applicable at all times material to this case was the **Companies Act, Cap 486 Laws of Kenya, now repealed**. Under the said law the appointment and remuneration of auditors was governed by **Sections 159 to 164**. The first means of appointing an auditor(s) was provided under **Section 159 (1)** which stated: -

**“159. (1) Every company shall at each annual general meeting appoint an auditor or auditors to hold office from the conclusion of that, until the conclusion of the next, annual general meeting.” (Underlining mine).**

**Section 159 (2)** provided for the reappointment of an auditor(s) and the reappointment was deemed automatic without the necessity of a resolution being passed except in the following three instances: -

**“(a) if the auditor was not qualified for reappointment; or**

**(b) a resolution was passed at that meeting appointing somebody instead of him or providing expressly that he shall not be re-appointed, or**

**(c) he had given the company notice in writing of his unwillingness to be re-appointed.”**

The second means of appointment of an auditor(s) was under **Section 159 (3)** which provided that **in the event that no auditor was appointed at the Annual General Meeting under Section 159 (1) the registrar could appoint a person to fill the vacancy**.

Thirdly, **Subsection 5** provided for appointment of an auditor(s) by the directors of a company. That sub-section states: -

**“(5) Subject as hereinafter provided, the first auditors of a company may be appointed by the directors at any time before the first annual general meeting, and auditors so appointed shall hold office until the conclusion of that meeting.” (Underlining mine).**

**Sub-section 5** made it very clear that any appointment under that sub-section would last until the end of the first Annual General Meeting. **Proviso (i) and (ii)** of that sub-section provided the procedure for removal of an auditor(s) appointed by directors and appointment of the first auditor by the general meeting. Fourthly, **Sub-section 6** gave power to the directors to fill any casual vacancy in the office of auditor and provided that while any such vacancy continued the surviving or continuing auditor(s) if any could act. The distinction between the auditors appointed by the Annual General Meeting under **Section 159 (1)** and those appointed under **sub-sections 3 and 4** was emphasized in **sub-section 7 (a)** which stated:-

**“(7) (a) The remuneration of the auditors of a company—**

**(i) in the case of an auditor appointed by the directors or by the registrar may be fixed by the directors or by the registrar as the case may be;**

**(ii) subject to subparagraph (i), shall be fixed by the company in general meeting or in such manner as the company in general meeting may determine.” (Underlining mine).**

It is not clear why the first appointment of the plaintiff as the auditor for the 1<sup>st</sup> defendant was done by the managing agent whether it was because the 1<sup>st</sup> defendant had not held its first annual general meeting as provided in **Section 159 (5)** or whether the directors were filling a casual vacancy in that office as provided in **Section 159 (6)**. What is clear however is that his appointment was not under **Section 159 (1) of the Companies Act** as it was not by the Annual General Meeting of the company. The plaintiff himself admitted that he was appointed after an interview held on 31<sup>st</sup> May 2012. Be that as it may, his letter of appointment dated 13<sup>th</sup> June 2012 was clear and left no doubt that he was **appointed on a casual/interim basis and then only until the Annual General Meeting of the year 2011/2012**. He was then expected as **part of the assignments of that office to conduct the interim audit of the company for the period July 2011 to March 2012**. As provided under **Section 159 (7) (a) (ii)** the directors fixed his remuneration at Kshs. 250,000/=. Had he been appointed at an Annual General Meeting his remuneration would have been fixed by the shareholders in that meeting as was provided under **Section 159 (7) (a) (i)** but not by the directors. There is no evidence that an Annual General Meeting of the company for the year 2011/2012 was held. I have perused both the plaintiff's and the defendants' bundle of documents for the minutes of that or any other Annual General Meeting held after his initial appointment by the directors to endorse his appointment as provided in **Section 159 (5) of the Act** but I have not come across any. He who asserts must prove and it was incumbent upon the plaintiff to furnish this court with proof of such a meeting. As he did not, to my understanding and that is my finding, his continued filling of that vacancy was pursuant to **sub-section (6)** of the **Act** which provided that a surviving auditor could in the event of a vacancy, continue to act. The word **“act”** in **sub-section (6)** connotes that the auditor held office only until a substantive auditor was appointed to fill the vacancy. It is instructive that unlike in **Section 159 (1)**, **Section 159 (6)** describes such an auditor(s) as **a surviving or continuing auditor** but not a retiring auditor eligible for reappointment under **Section 159 (1)**. Unlike the auditor(s) appointed under **sub-section (1)**, the reappointment of those appointed under **sub-section (5)** was not automatic. As a matter of law the appointment under **sub-section 5** ended immediately after the end of the Annual General Meeting next succeeding their appointment as clearly stipulated in the Act and in the plaintiff's letter of appointment. If no Annual General Meeting was held, then the auditor could be removed by the shareholders at any general meeting – **see sub-section 5 (i)**. It is my finding therefore that having been appointed by the directors and there being no evidence either from himself or the defendants of a resolution of an annual general meeting appointing him then his appointment ended either immediately after the Annual General Meeting for the year 2011/2012 as provided in his

letter or the shareholders could have removed him at a general meeting as provided under **sub-section (5) (i)**. As I have already stated there are no minutes or resolutions evidencing such meeting or meetings and my finding is that he simply continued to act as he could under **Section 159 (6)**. His removal at the Annual General Meeting of 8<sup>th</sup> January 2016 was therefore legitimate because under **Section 159 (5) (i)** he could be removed even in a general meeting. **Section 159 (5) (i)** stated: -

**“(5) Subject as hereinafter provided, the first auditors of a company may be appointed by the directors at any time before the first annual general meeting, and auditors so appointed shall hold office until the conclusion of that meeting:**

**Provided that—**

**(i) the company may at a general meeting remove any such auditors and appoint in their place any other persons who have been nominated for appointment by any member of the company and of whose nomination notice has been given to the members of the company not less than fourteen days before the date of the meeting.”**

My reading of the words **“however appointed”** in **Section 159 (2)** is that the same refer to appointment of an auditor by the company either at an Annual General Meeting or a general meeting but not to appointment of an auditor by a registrar or directors.

In the upshot I find that the plaintiff has not proved his case on a balance of probabilities and proceed to dismiss it with costs to the defendants. It is so ordered.

**Signed, dated and delivered in Nyamira this 28<sup>th</sup> day of November 2019.**

**E. N. MAINA**

**JUDGE**