REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CONSTITUTIONAL PETITION NO. 31 OF 2016

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE COMPANIES ACT (CAP 486), LAWS OF KENYA

AND

MOSES NYANDUSI NYAKERAMBA.....PETITIONER

VERSUS

KIAMOKAMA TEA FACTORY CO. LTD.....RESPONDENT

RULING

Background

1. The applicant herein, Moses Nyandusi Nyakeremba was an elected director of the respondent company in the Central Electoral Area. In a resolution passed at the respondent's special board meeting held on 3rd October 2016, the applicant was suspended from his directorship position thereby precipitating the instant petition in which he has challenged his said suspension among other reliefs.

2. Concurrent with the petition, the applicant also filed a notice of motion application dated 1st November, 2016 seeking orders of temporary injunction to restrain the respondent from preventing him from attending company board meetings and an order that the respondent supplies him with minutes of the meeting that led to his suspension. The applicant also sought orders to lift his said suspension from board membership/director and for his reinstatement as a director of the respondent. The said application dated 1st November 2016 (hereinafter "first application") was heard on its merits by Karanjah J. who in his ruling delivered on 24th November 2016 found that it was not merited and dismissed it with costs.

3. On 7th February 2017, the applicant filed the Notice of Motion application which is the subject of this ruling.

Application

4. The application dated 7th February, 2017 is brought under order 40 Rules 1 and 2 of the Civil Procedure Rules. The applicant seeks orders of temporary injunction to restrain the respondents form nominating or conducting elections for directorship of Central Zone Electoral Area of the respondent company. He also seeks orders to compel the respondent to pay him all the benefits due to him as a

director including Quarter Fees, Directors Christmas Voucher and the reinstatement of his medical insurance pending the hearing and determination of the petition.

5. The application is anchored on the grounds in support of the application in which the applicant states that he was unlawfully suspended by the respondent which suspension he has challenged through this petition. He states that the main petition has been listed for hearing on 27th February 2017 and that despite the pendency of the petition, the respondents have advertised a vacancy in his position of director with a view to replacing him.

6. The applicant further contends that the respondent has withdrawn all benefits due to him by virtue of his position as a director thereby causing him great prejudice and loss. He accuses the respondent of committing acts that amount to gross violation of the Constitution, the Companies Act and the Respondent's Articles and Memorandum of Association.

7. The respondent opposed the application through the replying affidavit of JOHN KENNEDY OMANGA, the Group Company Secretary of Kenya Tea Development Authority (KTDA) Holding Company Ltd. He avers that the application flies in the face of the doctrines of res judicata and sub judice as it raises the same issues that were raised in the first application. He further states that election of a nominee director or appointment of a casual director does not amount to replacing an incumbent director, but is intended to fill up a casual vacancy created by the suspension of a director as provided for by the Company's Articles of Association. It is the respondent's contention that a suspended director is not entitled to any benefits during the period of his suspension as he is, during the said period, not engaged in any company–related business.

8. When the application came up for hearing before me on 20th February 2017, the advocates for both parties canvassed it through their oral submissions in which they repeated the contents of the parties' respective affidavits and highlighted the relevant provisions of the respondent's Memorandum and Articles of Association.

Determination

9. I have considered the application dated 7th February 207, the respondent's replying affidavit and the submissions made by the parties' advocates. I note that the issues that require this court's determination are as follows:

a. **Whether the application is *res judicata* and *sub judice.***

b. **Whether the application is merited.**

10. On *res-judicata*, the respondent submitted that the first application that gave rise to the ruling delivered on 24th November, 2016 dealt with the same issues revolving around the applicant's suspension as a director and therefore it was wrong for the applicant to attempt to have a second bite at the application on matters that had already been determined. The applicant, on his part, argued that the prayers sought in the instant application were different even if the facts were the same and therefore the issue of *res judicata* did not arise.

11. Section 7 of the Civil Procedure Act provides as follows on *res judicata*.

> **"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the**
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> **same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.**
>
> ***Explanation*. —(1) The expression "former suit" means a suit which has been decided before**

the suit in question whether or not it was instituted before it.

***Explanation*. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the**

decision of that court.

***Explanation*. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly,**

by the other.

***Explanation*. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

***Explanation*. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.**

***Explanation*. —(6) Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."**

12. Res judicata is a subject that was captured many centuries ago in the case of **Henderson v Henderson [1843] 67 ER 313 wherein it was held:-**

"…..where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time….."

13. Simply put *res judicata* essentially bars subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives. The Court of Appeal had the following to say on the doctrine of *res judicata* in the case of **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**:

"The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably." See also **Kamunye & others v Pioneer General Assurance Society Ltd [1971] E.A. 263**.

14. In the instant case, as I have already noted in this ruling, this court, differently constituted, had on 24th November 2016 made a determination on a similar application filed by the applicant herein in which

he had sought inter alia, orders on temporary and mandatory injunction against the respondent following his suspension from the position of the respondent's director. It was incumbent upon the applicant, at the time he filed the first application, to exercise diligence and bring forward his whole case before the court then as it is not allowed for him to *open the same subject of litigation in respect of matter which might have been brought forward.* I therefore find that the doctrine of *res judicata* is applicable in this case to bar the applicant from instituting repetitive applications over the same matter.

15. Turning to the question of res *sub judice,* Section 6 of the Civil Procedure Act stipulates as follows:

> ***6. Stay of suit***
>
> ***No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.***

16. The respondent contended that the instant application also falls foul of the cardinal principle of ***sub judice*** rule under section 6 of the Civil Procedure Act as the orders sought therein are the same orders that the applicant seeks in the main petition that is still pending hearing. I have perused the petition filed by the applicant herein and I note that the orders sought are as follows:

> a. **The suspension of the petitioner by the Respondent in his capacity as Director of Kiamokama Area Factory Company Limited Central Electoral Area was in breach of articles 27, 47 and 35 (2) of the constitution.**
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> b. **A declaration that the actions of the Respondents in this cause violated the petitioner's constitutional rights under articles 27, 35 91) (b) and (2) 36 (1), 47, 50 (1) and (2) of the constitution of republic of Kenya.**
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> c. **By way of mandatory injunction directed at the respondents, the suspension of the petitioner as a board member and as a Director of Kiamokama tea factory company limited central electoral area be revoked and lifted immediately and unconditionally.**
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> d. **A declaration that to the extent that the decision reached by the board of directors of the Respondent on the 3rd of October 2016 is discriminatory, malicious, baseless and malevolent and is a violation of Article 35 (1) (b) and Article 50 (1) of the constitution therefore null and void *ab initio*.**
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> e. **A declaration that any arbitrary suspension, expulsion and/or removal of the petition from his position as Director of the Central Electoral Area without considerations of due process and all the tenets of natural justice is a violation of Article 27 and Article 47 of the constitution, therefore, null and void *ab initio*.**
>
> f. **An order quashes the purported suspension of the Petitioner form the membership and leadership of the Respondent and reinstating him to the membership and leadership of the Respondent**
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> g. **An order directing the Respondent to reinstate the Petitioner to his former position in the company.**
>
> h. **The honourable Court do order that the costs of this petition be borne by the respondent in any event.**
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> i. **Such other orders as this honourable court shall deem fit and just to grant in the circumstances.**

17. As I have already stated in this ruling, the petition is still pending hearing and determination and had in fact already been slated for hearing on 27th February 2017. In my humble view, granting the orders sought in this application before or pending the hearing of the petition will be tantamount to determining the petition prematurely thereby making the eventual hearing of the petition superfluous and an exercise in futility.

18. Turning to the merits of the application the prayers sought are, firstly, for injunction to restrain the respondent from conducting elections for directorship of the Central Zone Electoral Area of the respondent company. To my mind, company elections are internal affairs of a company management in which courts have held over time, that they should not interfere. In **Foss vs Harbottle (1843), 2 Hare 261**, it was stated:

> ***"...an elementary principle is that court does not interfere with the internal management of companies acting within their powers."***

19. In the same Foss case (supra) it was held:

> ***"Courts will interfere only where the act complained of is ultra vires or is of a fraudulent character or not rectifiable by ordinary resolution. It is really very important to companies and to the economy of the country in general, that the court should not, unless a very strong case is made out on the facts pleaded and proved or admitted, take upon itself to interfere with the domestic forum which has been established for the management of the affairs of a company ....."***

20. In the instant case, the respondent explained that the advertised elections were intended to fill a casual vacancy created by the suspension of the applicant for the 6 quarter meetings as stated in the respondent's resolution. According to the respondent, the act of filling a casual vacancy does not amount to a replacement but is merely a stop-gap or temporary measure in the period of suspension and is subject to a reversal the moment the suspension is lifted. I have perused Article 91 (2) of the respondent's Memorandum and Articles of Association which stipulates as follows on the filling of a casual vacancy:

> **"The Company may, by Ordinary Resolution, appoint another person in place of a director removed from office under Article 89 and, without prejudice to the powers of the Directors under Article 91 (1), the Company may, by Ordinary Resolution, appoint any person to be a Director either to fill a casual vacancy or as an additional Director."**

21. A reading of the above article confirms to me that the respondent is well within its rights to fill the vacancy created by the applicant's suspension and therefore, the prayer sought to restrain the respondent from filling the vacancy cannot stand. In any event, I find that the applicant did not satisfy the mandatory conditions for granting of orders of interlocutory injunctions as were laid down in the celebrated case of **Giella Vs Cassman Brown & Co Ltd [1973] E.A 358** as he did not demonstrate that he would suffer irreparable loss that cannot be compensated in monetary terms should the elections to fill in the vacancy created by his suspension be held considering that the director's position is one that attracts remuneration that can be quantified in monetary terms.

22. On the prayer to compel the respondent to pay the applicant all his benefits as a director, including quarter fees, Directors Christmas vouchers and the reinstatement of medical insurance, once again, I find that these are matters that are res sub-judice in view of the pending petition that replicates the same prayers. Be that as it may, the prayers are also for mandatory orders of injunction intended to compel the respondent to perform some action.

23. The considerations for granting mandatory injunctions were well articulated by the Court of Appeal in the case of **Kenya Breweries Ltd & Another vs Washington O. Okeyo [2002] eKLR** when it was held: ***"The test whether to grant a mandatory injunction or not is correctly started in Vol.24 Halsbury's Laws of England 4th Edition paragraph 948 which read:-***

> ***'A mandatory injunction can be granted on an interlocutory application as well as at the***

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

24. The Court of Appeal quoted with approval an English decision in the case of ***Locabail International Finance Ltd vs Agroexport and others*** **(1986) 1 ALLER 901** where it was stated:-

"A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly be granted, that being a different and higher standard than was required for a prohibitory injunction."

25. In the recent case of ***Nation Media Group & 2 others vs John Harun Mwau*** **[2014] eKLR** the Court of Appeal said:-

"It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases."

26. The main principle that can be discerned from the above decisions is that a court, when considering an application for interlocutory mandatory injunction, must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear which brings me to the scenario in the instant case. It has not been disputed that the applicant herein was suspended from his position as a director which suspension is still a subject of a process within the respondent company and also the subject of a challenge through the petition filed before this court. Under the above circumstances, it is not very clear, at this point in time, whether or not the respondent will eventually prove that they were justified in suspending the applicant. In a nutshell, it is not clear if the applicant will eventually be vindicated of the accusations levelled against him by the respondent that resulted in his suspension. In any event, the applicant has not demonstrated that there is anything exceptional or unique about his said suspension so as to warrant the issuance of the mandatory injunction orders sought. To my mind, the suspension of a person form a job or a position is a normal occurrence in most organisations from which a party may be reinstated should he be found to be blameless at the end of the investigations process or even a hearing/trial.

27. Furthermore, the applicant will still be able to claim all the directors' benefits that he seeks through the interim order of mandatory injunction at the hearing of the main petition or should the company clear him of the allegations that led to his suspension.

28. Under the above circumstances, I find that the applicant's prayer for mandatory injunction at this stage is not merited. Having found that the application dated 7th February 2017 is both *res judicata* and *res subjudice* and having found that the prayers for interlocutory mandatory and prohibitory injunction are not merited, the order that commends itself to me is the order to dismiss the said application with costs to the respondent.

Dated, signed and delivered in open court this 12th day of April, 2017

HON. W. OKWANY

JUDGE

In the presence of:

- Mr. Nyamweya holding brief for Ochoki for the Applicant
- N/A the Respondent
- Omwoyo: court clerk