



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO. 26 OF 2014

MORAA JUMA.....PLAINTIFF

VERSUS

OGEMBO TEA FACTORY COMPANY LIMITED....1ST DEFENDANT

KENYA TEA DEVELOPMENT AGENCY.....2ND DEFENDANT

LABAN ATUTA ATUTA.....3RD DEFENDANT

JUDGMENT

Introduction

1. The plaintiff is a female adult and a registered shareholder of the 1st Defendant Company. The 1st Defendant is a Limited Liability Company with its registered office in the Republic of Kenya in whose factory Tea Growers, including the plaintiff, deliver green tea leaf.
2. The 2nd Defendant is a limited liability company and an agency with its registered offices situated at Nairobi while the 3rd Defendant is an adult male and the incumbent director of the 1st defendant representing Machoge Chache electoral area.

Pleadings

3. In her amended plaint dated 29th December 2014, the plaintiff sought the following orders:

- a) **An Order declaring that the Defendants' decision to reject the Plaintiff's application to contest election of directorship of the 1st defendant scheduled for January 2015, in respect to Machoge Chache, electoral area, was/is illegal, unconstitutional, null and void and of no legal consequence.**
- b) **An Order declaring that the Election Manual, Procedure and rules formulated by the Defendants and dated the 19th day of November 2014, inclusive of the unlawful terms of notice dated the 19th day of November 2014, are illegal, null and void and thus, of no legal effect.**
- c) **An Order of injunction prohibiting the Defendants, their servants, agents, employees and/or anybody acting under them, howsoever and/or in whatsoever manner, confirming and/or swearing in and/or dealing with one Laban Atuta Atuta, as a director/director elect of**

Ogembo Tea Factory Company Limited in respect of Machoge Chache, Electoral area, during and/or at the 1st Defendant's annual General meeting scheduled for 9th day of January 2015, or any other date, until the Defendants have complied with all the requisite laws in place, and in particular, laws prescribing qualification of applicants seeking to vie for directorship of 1st defendant company and/or further orders of this court.

d) An Order of mandatory injunction compelling the Defendants to accept and/or approve the plaintiff's/Applicant's application to contest the 1st Defendant's elections, for directorship of Machoge Chache, electoral area, for the election of directorship scheduled for 6th day of January 2015, or any other rescheduled date, for the new tenure of directorship, now due and conduct the said elections a fresh while complying with the laws and in particular, Constitution of Kenya, 2010 the Provisions of Section 182-204 of the Company Act, Cap 284 Laws of Kenya, as read together with Regulation 14 & 14 of the Tea (Election) Regulation, 2000 and Clause 87-91 of the Article of Association of Ogembo Tea factory Ltd which must be in tandem and consonance with the mandatory Provisions of the Companies Act and in Particular, Section 2 (4) and 22 of the Companies Act.

e) Costs of the suit be borne by the Defendants.

f) Interests.

4. The plaintiff's claim was that as a shareholder in the 1st defendant's company, she was seized with all the requisite qualification and competence to participate in and offer herself as a candidate to contest for the position of a director in line with the provisions of the Companies act Cap 284 Laws of Kenya as read with tea (Election) Regulation 2000 and the 1st defendant's Articles of Association.

5. The plaintiff states that following the 2nd defendant's publication of a notice dated 19th November 2014, calling for submission of application for candidacy for directorship in the 1st defendant's company in elections scheduled to take place on 6th January 2015, she on 8th December 2014 tendered her handwritten application for the said position in which application she also attached all the requisite documents specified in the said notice calling for submission of applications.

6. She adds that on 12th December 2014, she received the 1st defendant's letter dated 10th December 2014 rejecting her application on the basis that she had not submitted a valid certificate of good conduct which, according to the 1st defendant, was a pre-requisite for qualification to be a candidate in the said directorship elections.

7. The plaintiff's case is that the purported requirement that a candidate submits a valid certificate of good conduct as a precondition for contesting as a director in the 1st defendant's company was unlawful as it contravened the laws and regulations governing such elections, the provisions of the Companies act (hereinafter "**the Act**") and the 1st defendant's Memorandum and Articles of Association (hereinafter "MAA")

8. The plaintiff contends that she nonetheless submitted a valid certificate of good conduct serial no. 070922 dated 27th May 2013, but the 1st defendant still rejected her application in a move that she says was unconstitutional and contrary to the relevant statutory requirements.

9. The plaintiff further contends that on 12th December 2014 and 16th December 2014 she appealed against the rejection of her application to contest in the elections to the 1st defendant which appeal was not acted upon by the 1st defendant thereby precipitating the filing of this case on 17th December 2014. She adds that in an attempt to defeat the instant case, the 1st defendant mischievously issued a circular which was backdated as having been issued on 10th December 2014 in which it declared the 3rd defendant, who was the incumbent director for the contested Machoge Chache Electoral area, as having

been nominated un-opposed thereby locking out the plaintiff from the said contest.

10. The plaintiff accuses the 1st defendant of fraudulently authoring fake minutes, inserting irregular amendments to the MAA and using whimsical powers in a bid to impose directors on the shareholders without conducting any elections.

11. It is for the above reasons that the plaintiff sought the orders mentioned hereinabove.

12. In response to the plaintiff's plaint, the 1st and 2nd defendants filed a joint statement of defence on 12th January 2015 in which they admitted the description of the parties to the suit and narrated the chronology of the events that led to the filing of the suit but denied that the plaintiff met the requisite pre-conditions to be prequalified to vie in the said directorship elections and further that the appeals Dispute Resolution Committee that sat on 15th December 2014 found that the plaintiff's appeal was without merit as the plaintiff had not submitted a Certificate of Good Conduct.

13. The 1st and 2nd defendants contend that the plaintiff was the author of her own misfortune for failing to submit her Certificate of Good Conduct in time or at all and add that the plaintiff has come to court with unclean hands.

14. The defendants' case was that the plaintiff's disqualification from vying for the position of director in the 1st defendant's company was justified in view of the fact that she did not meet the Election Rules and Regulations which she had undertaken to comply with in writing. The defendant sought the dismissal of the plaintiff's case with costs.

15. The 3rd defendant did not enter appearance or file a defence. The plaintiff did not apply for or obtain interlocutory judgment against the 3rd defendant and therefore this court will not make any findings or orders against him.

Evidence

16. At the hearing of the case, the plaintiff repeated the chronology of events that led to her application to contest for directorship in the 1st defendant's company up to the time of her disqualification. She stated that directorship elections of the 1st defendant's company are held every 3 years and that she expressed her interest in the said elections when she saw an advertisement dated 19th November 2014 calling for interested applicants to apply. She produced a copy of the notice as Pexhibit P1. She also produced a copy of her application letter dated 8th December 2014 as Pexhibit P2 and a payment receipt for the application for Kshs. 3000/= together with an acceptance form as Exhibit P3a and 3b respectively. She also submitted the following documents to accompany her application to the 1st defendant.

a) Tax compliance Certificate- Pexhibit P4

b) Certificate of Good Conduct dated 27th May 2013 Exhibit P5.

c) Application to renew Certificate of good Conduct dated 21st November 2014 – exhibit P6.

d) Copy of National identity card exhibit P7.

e) Receipt in respect to application for certificate of good conduct- exhibit P9.

17. She insisted that she was qualified to vie for the directorship position in view of the fact that she was a bachelors degree holder, a high teacher by profession and the principal of Getuki Secondary School. She added that it was her firm belief that she was a person of good standing in the society by virtue of her profession and position in the society.

18. The plaintiff stated that to her total dismay and disappointment, she, on 12th December 2014 at about 2 p.m. she received a regret letter from the 1st defendant informing her that her application was not successful for lack of a Certificate of Good Conduct yet the 1st defendant's MAA, which are the supreme documents governing the 1st defendant's operations, had no provision for the requirement of a Certificate of Good Conduct as a precondition for contesting for directorship. She produced a copy of the said letter of regret dated 10/12/2014 as Pexhibit 10.

19. The plaintiff informed the court that on 15th December 2014, she lodged an appeal at the 2nd defendant's Nairobi Office to challenge her disqualification through a letter dated 12th December 2014 which she produced as exhibit P11- and that while she was in Nairobi, she was able to collect her, then current, Certificate of Good Conduct dated 11th December 2014 which she then submitted to the defendants, but that she did not receive any feedback on her appeal thereby prompting her to instruct her advocate to file this suit. The plaintiff's lawyer then wrote a letter dated 16/12/2014 demanding that the plaintiff be allowed to participate in the said up-coming directorship elections – see exhibit P13.

20. The plaintiff's case was that despite having satisfied all the requirements for contesting in the directorship elections and while her appeal against her disqualification was still pending, the defendants on 23rd December 2014 issued a circular backdated to 10th December 2014 declaring the 3rd defendant as the unopposed winner of the said director's elections. The plaintiff added that the said declaration of the 3rd defendant as the winner was done despite the existence of a court order issued by this court on 17th December 2014 stopping the declaration or swearing of any director for Bomachoge Chache Electoral Area.

21. The plaintiff contended that the declaration of the 3rd defendant as the winner of the elections was stage-managed with the sole intention of locking her out of the contest. She stated that a letter dated 15th December 2014 purporting to be a rejection of her appeal was never served on her and that she only came to learn about it in court when the defendants produced it as an annexure to their replying affidavit. She produced the said letter as exhibit P. 15. She also produced the letter dated 10th December 2014 declaring the 3rd defendant as the elected director, unopposed as Pexhibit 14.

22. According to the plaintiff, the requirements of the 1st defendant's MAA is that a contestant of the directorship position must be a person of good standing which requirement she had fulfilled, but that the defendants decided to enforce unfair election rules that were crafted and implemented with the sole aim of locking her out of the elections. She prayed for the nullification of the 3rd defendant's shambolic elections and for the calling of fresh elections in which she should be allowed to contest without any barriers.

23. On cross examination, the plaintiff stated that the defendant has 6 electoral areas one of which she intended to vie for in the director's elections. She stated that the 2nd defendant is the managing agent of KTDA tasked with the responsibility of overseeing the 1st defendant's directors' elections. She reiterated that the 1st defendant's Elections Manual contained the nomination rules for the said elections and that one of the requirements for one to be a director was that the candidate had to be a person of good standing in the society. According to the plaintiff, she was a person of good standing in the society by virtue of her position as a principal of a high school. She contended that the requirement in the 1st defendant's elections manual that a candidate for director's position must have a certificate of good conduct contradicted the provisions of 1st defendant's MAA that merely stated that an applicant for the position must be a person of good standing in the society.

24. The plaintiff's case was that she was unfairly disqualified from vying for the position of a director in the 1st defendant's company despite having fulfilled all the requisite conditions for the nomination in view of the fact that she had a certificate of good conduct dated 27th May 2014 whose renewal she had duly applied for on 21st November 2014. She reiterated that she had attached proof of her application for

the certificate of good conduct to her appeal to the 2nd defendant's dispute resolution committee but that she was neither informed of the date of the hearing of the appeal nor the outcome thereof.

25. According to the plaintiff the 3rd defendant was irregularly and unfairly declared the sole candidate for the director's position unopposed on 10th December 2014 even before she could be served with the letter rejecting her application on 12th December 214 and further even before the period of appeal to the dispute resolution committee had lapsed. She insisted that the 1st defendant's MAA were contravened in an election nomination process that was a sham and a hoax.

26. On re-examination, she singled out the provisions of Article 38 of the 1st defendant's MAA which stipulates the requirements/qualifications for contestants of directors' position as the qualifications had fulfilled. She added that the manner in which she was notified of the rejection of her application for nomination contravened the provisions of Articles 136 to 138 of the 1st defendant's Memorandum and Articles of Association which provide for personal service or by registered mail.

27. In their defence, the 1st and 2nd defendants presented the testimony of DW1, JOHN KENNEDY OMANGA, the 2nd defendant's group company secretary who gave a detailed testimony on the establishment, composition and registration of the 1st defendant, and the role of the 2nd defendant as the managing agent of 1st defendant and other tea companies.

28. He stated that the 1st defendant has 6 electoral areas and explained the electoral process and cycle undertaken for directors in those electoral areas including the circumstances under which a candidate for the director's position could be disqualified from vying for the position. He explained, in detail, the establishment and the functions of Kenya Tea Development Authority (KTDA), the 2nd defendant herein, as the 1st defendant's managing agent and the neutral arbiter in the 1st defendant's elections of directors. He emphasized that the 2nd defendant managed the director's elections as envisioned under Article 90 of the 1st defendant's Articles of Association. He reiterated that the elections are managed through the preparation of an Elections Manual which guides the entire election process from the notification of candidacy, the notice of elections and the dispute resolution appeals mechanism. He referred the court to the 2nd defendant's bundle of documents showing the elections manual, notification and submission of candidacy dispute resolution committee rules.

29. He stated that the reason for the plaintiff's disqualification from the said elections was the lack of valid documents and most specifically, the valid certificate of good conduct which was a requirement for participation in the said elections. He stated that all candidates to the elections including the plaintiff signed a document known as "elections conditions acceptance form" on 9th December 2014 in which she agreed to be bound by all the terms and conditions obtaining to her participation in the said elections. He added that the plaintiff did not challenge any of the conditions including the condition the all candidates must possess a valid certificate of good conduct. He stated that upon her disqualification from the elections on grounds that she did not have a certificate of good conduct, the plaintiff lodged an appeal with the company's appeals tribunal and that the said tribunal found that her appeal had no merit and dismissed it. According to DW1, the decision of the appeals tribunal was justified as the plaintiff did not present the certificate of good conduct which only came to his attention during the proceedings in this case. He contended that only one candidate, 3rd defendant herein, was prequalified for the elections but was not confirmed as director due to orders issued by this court that stopped his confirmation agenda during the 1st Defendant's General Meeting. DW1 stated that the plaintiff's case lacked merit and prayed for its dismissal.

30. On cross-examination, DW1 conceded that the supreme documents governing the operations of the 1st and 2nd defendants are the Companies Act and the 1st defendant's Memorandum and Articles of Association.

31. On prequalification for the elections, he stated that only the 3rd defendant, who was then he incumbent director of Machoge Chache Electoral Area, qualified for the said elections as seen in a letter to that effect dated 10th December 2014, being the same date that the letter disqualifying the plaintiff was written. He emphasized that the plaintiff was not qualified because she lacked the certificate of good conduct, but that Article 86 of the 1st defendant's Articles of Association did not expressly specify that a certificate of good conduct was a requirement for the elections. He also conceded that the plaintiff had not violated any bylaws of the 1st defendant and did not have any on-going litigation against the 1st defendant.

32. He insisted that contrary to the plaintiff's claim that her letter of disqualification was delivered to her on 12th December 2014, the same was delivered to her on 10th December 2014 even though he did not have any proof of service of the said letter on the plaintiff. He also insisted that the outcome of the plaintiff's appeal at the appeals tribunal was also delivered to her personally without showing any proof of service with the appeal outcome even though Article 136 of the 1st Defendant's Articles of Association specifies that notices be sent to the affected persons personally or through registered mail.

33. He conceded that the pinning of notices at the 1st defendant's notice boards at the tea buying centres was not prescribed in the 1st defendant's Articles of Association, but that it was a practice that they had adopted over the years and had therefore become a traditional mode of communication.

34. On re-examination, DW1 stated that the 3rd defendant's term had not ended after 3 years as scheduled because of a court order issued on 7th March 2015 that barred the company from discussing the issue of Machoge Chache Electoral Area. He clarified that since, Article 88 of the 1st defendant's Articles of Association does not prescribe what good standing in the society means, the 1st and 2nd defendant went ahead to require a Certificate of Good Conduct to establish the meaning of good standing.

35. At the close of the plaintiff's and defendants' cases the parties agreed to file written submissions before judgment which I have perused and wish to summarize as hereunder.

Plaintiff's submissions

36. The plaintiff isolated the issues for determination as follows:

- i) Whether the plaintiff met the requisite qualification to contest the position of directorship of the 1st Defendant and thus entitled to prequalification and nomination for election.**
- ii) Whether the rejection of the plaintiff's candidature was unlawful and amounted to violation of the plaintiff's rights.**
- iii) Whether this court has jurisdiction to hear and determine this dispute.**
- iv) What orders should issue.**
- v) Who should bear the costs.**

37. On the first issue of her qualification to contest in the director's elections, the plaintiff submitted that she met all the requirements for the said position as set out in Article 88 of the 1st defendant's MAA which does not include a certificate of good conduct as one of the conditions precedent to the nomination. The plaintiff argued that it is a well settled law that all agents of a company must act within the confines of the MAA and further that any rules that contravene the said MAA are null and void. She cited the case of **Pioneer General Assurance Society Ltd & 4 others vs Aulfikarali Nimaji Javer & 3 others [2008] eKLR** in which it was held that activities conducted outside the Memorandum and Articles of Association are null and void *ab initio*. It was thus the plaintiff's submission that the conditions touted by the defendants as Elections Manual and procedure which provide for the requirement that a candidate

submits a certificate of good conduct as a condition precedent for acceptance of candidature are ultra vires the 1st defendant's MAA.

38. It was the plaintiff's contention that she met the condition to be prequalified as a contestant for the office of a director of the 1st defendant company and it was therefore unlawful and unjust for the defendant to disqualify on the basis of extraneous conditions not prescribed by the 1st defendant MAA.

39. On the 2nd issue, the plaintiff reiterated that her disqualification was illegal, null and void.

40. On the court's jurisdiction to entertain and determine the dispute, the plaintiff stated that she had presented her case to the defendants' internal dispute resolution mechanism where she was denied justice since her fate was already pre-determined by the defendants who had already declared the 3rd defendant the unopposed nominee for the director's slot. The plaintiff argued that she had exhausted the defendant's dispute resolution process with no success and therefore, the court was her last port of call in view of the fact that the court has unlimited jurisdiction to hear and determine the dispute. The plaintiff cited the case of **Okiya Omtatah Okoiti & Another vs National Transport & Safety authority & 2 others [2016] eKLR** in which it was held:

“The courts have recognized that unlawful interference with a citizen's rights give rise to a right to claim redress and if the petitioners have a right they must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it: and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. Whether or not they will be able to prove that their rights have been contravened or infringed is another matter altogether.”

41. Finally, it was the plaintiff's submission that she had proved her case against the defendants on a balance of probabilities and she was therefore entitled to the orders sought together with costs of the suit.

Defendants submissions

42. The defendants stated the issues for determination to be:

- i) Whether the 2nd defendant was properly enjoined and or sued in this case.**
- ii) Whether the 1st defendant's election process and applicable Rules thereon are ultra vires the 1st Defendant's Memorandum and Articles of Association and thus null and void.**
- iii) Whether the Respondent's Election process and applicable Rules thereon are illegal and unconstitutional.**
- iv) Whether the decisions made against the plaintiff are justified and valid?**

43. On the first issue of whether the 2nd defendant was properly enjoined in the suit, the defendants submitted that the plaintiff did not demonstrate that she had a cause of action against the 2nd defendant who acted in the impugned elections as an agent of the 1st defendant in view of the uncontested fact that the 2nd defendant had a management agreement with the 1st defendant. The defendants insist that under the above circumstances, if the plaintiff was aggrieved by the acts or omissions of the 2nd defendant, her recourse lay in suing the disclosed principal as it was not open for her to sue an agent (2nd defendant) who was only discharging its contractual agency mandate.

44. The defendants cited the holding in the case of **Victor Ombachi vs Nurtun Bates Ltd [2013] eKLR** wherein it was held:

“(21) it remains now to consider the second issue whether the enjoinder of the appellant in the

suit in the High Court breach the principle of law that an agent cannot be sued where there is a disclosed principle. In Anthony Francis Wareheim t/a Wareheim & 2 others vs Kenya Post Office savings bank, civil application Nos. NAI 5 & 48 of 2002, at page 10, this court unanimously held as follows,

“it was also prima facie imperative that the court should have dismissed the respondents claim against the second and third appellants for they were impleaded as agents of a disclosed principle is contrary to the clear principle of common law that where the principle is disclosed the agent is not to be sued...”

45. On the issue of the legality of the election process and the rules governing the said elections, the defendants submitted that the Memorandum and Articles of Association provides for the manner in which directors of the 1st defendant’s Company could come into office, either by appointment or by elections.

46. They added that appointment of directors could be under **Article 87 of MAA** by subscribers under **Article 91 (1) of MAA**, by the Board and by the company itself (shareholders) under **Article 91 (2) of the MAA**. If directors were not appointed as stated above, they would assume office by way of elections. The defendants then explained, in detail, the establishment of the 1st defendant 6 Electoral areas under **Article 2 of the MAA**, the circumstances under which the position of a director could fall vacant and the powers of the Board of Directors.

47. The defendants also highlighted the existence of a management Agreement dated 28th April, 2009 between the 1st and 2nd defendant in which the 2nd defendant was given the mandate to provide professional services and ensure that the 1st defendant complies with its obligations under the **MAA** and the Company’s Act- which obligations include the holding of the Annual general Meeting (AGM), election of directors and the filing of returns.

48. On the election of directors, the defendants submitted that it was not in dispute that the 2nd defendant had the delegated authority to conduct the defendant’s elections of Board of Directors but that such an election could not be conducted in a vacuum in the absence of the rules and regulations to govern the said elections and this led to formulation of the following regulations:

a) Directors Nomination rules/Election Manual which provided that the election manual conditions would apply to all the candidates without exception.

b) Nomination requirement/Notification submission which gives the mandatory requirements to be submitted by every candidate.

c) Dispute resolution Committee Rules which provide for rules to be adhered to in presenting complaints arising from the election.

49. According to the defendants, the power to conduct directors elections is exercisable expressly by the 1st defendant’s board of directors who delegated the same to the 2nd defendant as its managing agent and that the 2nd defendant then formulated elections regulations that have previously been invoked and continue to be invoked across the board in all the directors elections for all the 54 Tea Factory Companies managed by the 2nd defendant in line with Article 2 of the MAA. The defendant’s contention was that once management powers were vested on the 2nd respondent, it meant that the 2nd respondent had powers to formulate rules and oversee the conduct of the elections.

50. It was argued while Article 88 of the MAA merely provides that a candidate for the director elections must be a person of good standing in the society, it was a general principle which did not define the criteria for determining what a person of good standing in the society was and therefore it was necessary for the defendants to come up with the definition and guidelines of what would qualify a person to be of good standing in the society. The defendant’s position was therefore that a certificate of good conduct is

anchored on the defendants MAA as it is one such criteria/definition of a person of good standing.

51. The defendants defended the electoral process deadlines, by stating that all electoral processes have deadlines, are not open ended and therefore it was not peculiar for the defendants to set deadlines for submission of nomination papers and for the appeal process.

52. On the legality and constitutionality of the 1st defendant's election process and rules, the defendants submitted that the tea (Elections) Regulations of 2000 relied upon by the plaintiff in pursuing the illegality theory have no force in law as the said regulations were quashed by the High Court in Nairobi through **High Court Misc. Application No. 621 of 2000** being the case of **Samuel Muchiri W Njuguna & 6 others vs The Minister of Agriculture**. It was the defendants' case that the plaintiff did not cite any provisions of constitution or statute that was contravened by the defendants while conducting the said elections. The defendants argued that the plaintiff's challenge of the elections rules and regulations was an afterthought as she only raised the same when she realized that she was not able to submit the Certificate of Good Conduct and further that she did not claim that the obtaining of the said certificate was not attainable. The defendants did a comparative analysis of their Electoral Nomination Rules with those of the Judiciary in the recruitment of the candidates for the position of the Deputy Registrar where not only were deadlines set on the submission of the application but that a Certificate of Good Conduct was also a requirement. They added that Chapter Six of the Constitution is very clear on the requirement that persons who seek public offices must be of high integrity and therefore, the requirement of Certificate of Good Conduct for aspiring directors was in tandem with the provisions of the Constitution.

53. The defendants maintained that the plaintiff's claim that the defendants' election rules should be declared unconstitutional merely because she was unable to comply with them was a selfish move aimed at destroying the very core of the 1st defendant's MAA which requires that a contestant for directorship be a person of good standing in the society.

54. The defendant's emphasized that the plaintiff had undertaken, in writing, to be bound by the 1st defendant's electoral rules and regulations and could therefore not change her mind on the efficacy or legality of the said rules merely because she had not met all the requirements and had as a result been disqualified.

55. The defendant's case is that both the decisions of the verification and the Appeals Committee were valid and justified in view of the fact that the plaintiff had not submitted a Certificate of Good Conduct.

56. The defendant cited the similar cases of **Robert K. Bett and Another vs Unit Manager, Mogogosiek Tea Factory Limited and 2 others Kericho HCCC NO. 102 of 2009** and **Embu HCCC NO. 10 of 2012 Patrick Maina Kigiru vs Kenya Tea Development Agency Ltd & 2 others** wherein the courts upheld the validity of the requirements contained in a similar Election Manual. The defendants also cited the case of **Maurice Mitios Ngeywa vs Kapsara Tea Factory & Another Kitale HCCC NO. 14 of 2015** in which it was held that the election manual requirement stipulating and setting deadlines for submission of documents was valid. In the said **Maurice Mitios** case (supra) the court further held that documents delivered way past the nomination deadlines could be validly rejected.

57. Lastly, the defendants cited the case of **Paul Mogaka Magoma vs Gianchore Tea Factory Co & 2 others [2016] eKLR** in which this court observed and held that the company's election rules had adequate anchorage in law and therefore valid.

Analysis and determination

58. As I have already observed at the beginning of this judgment, the plaintiff sought a total of 6 prayers in the amended Plaint. Upon considering the pleadings, the evidence tendered by both sides and their respective submissions, I note that the following main issues emerge for determination.

a) Whether the plaintiff proved that she met all the requirements to be nominated to contest

for the position of director in the 1st defendant's company.

b) Whether this court has jurisdiction to hear and determine this matter.

c) Whether the 1st defendant's election rules and regulations are ultra vires the 1st defendant's MAA and are therefore illegal, unconstitutional and null and void.

d) Whether the plaintiff proved her case against the defendants on a balance of probabilities.

59. The first issue for determination is closely tied to the last issue and will be tackled together in this judgment. While the plaintiff maintained that she met all the requirements to be a contestant in the 1st defendant's directorship elections as provided for under **Article 88 of the 1st defendant's MAA**, the 1st and 2nd defendants case was that the plaintiff did not comply with the requirement of the elections manual that laid down the requisite documents to be submitted by every contestant to the said elections. **Articles 88 of the 1st defendants MAA** stipulates as follows:

“(88) unless appointed in accordance with Article 87 no person shall be qualified to hold the office of a director unless:

1) He is of good standing in society and is a holder of

2) Founder shares.

3) He has attained a minimum of “o” level of educational qualification.

4) He is nominated in an electoral area specified by the Company and will assume office on being elected in accordance with article 90’.

5) He delivered to the factory during the preceding year, NOT less than 2,000kgs of green leaf.”

60. The 1st defendant's elections manual on the other hand makes the following provisions:

“In the event of a complaint arising out of the elections process, the complaint should be presented to the Company Secretary in the period after notification of candidacy and before the elections and during/after the elections commence to the Returning officer (within twelve (12) hours) of the declaration of the victor by the Presiding Officer. In the former event, a dispute resolution committee will be created to deliberate on the complaint and a decision made within 48 hours of receipt of the complaint. In the latter event, the Returning officer will make a decision on the same within 24 hours of receipt of the complaint.

The decision of the dispute resolution committee and the Returning Officer in addressing the respective complaints shall be final. A court of competent jurisdiction would be competent to hear a complaint from the decision of Returning Officer.

Where the Articles of a Company refer to Arbitration proceedings before Court process, the same should apply.

The Returning officer should however inform the Election Coordinator (Group Company Secretary) at KTDA Limited Head Office of any complaint and the conclusion of the same. The Returning officer would be at liberty to consult the group Company Secretary for clarifications and advice on what action to be taken.”

61. It was also a requirement that every contestant to the 1st defendant's elections commits

himself/herself, in writing to be bound by the requirements and conditions of the elections manual. On 9th December 2014, the plaintiff appended her signature to a document titled “Applicants/Candidate Election Conditions Form in which she accepted to be bound by the 1st defendant’s conditions for the nomination of directors in the Notification and Election Manual. In the said document the plaintiff unreservedly submitted to be bound by the said conditions.

62. It was not disputed by the plaintiff that as at 8th December 2014 when she submitted her application for candidature for the directorship position, she did not submit a copy of her Certificate of Good Conduct which was a requirement for the said elections even though she submitted proof that she had already applied for the said Certificate from the Criminal Investigations Department (seen exhibit 6). The plaintiff’s claim was that the Certificate of Good Conduct had not been released to her as at the time she made her application to be a candidate in the elections.

63. I find that having undertaken, in writing, to be bound by the 1st defendant’s elections rules and regulations contained in the elections manual, the plaintiff could not make an about-turn, after the eleventh hour and after submitting her nomination papers, without one vital document (the Certificate of good Conduct), and claim that the said election rules were invalid, unconstitutional and null and void. The plaintiff ought to have challenged to the said rules, way before submitting her nomination papers and not after the fact. It is my finding that it was dishonest and indeed an afterthought for the plaintiff to purport to challenge the said rules.

64. The election requirement that was contested in this case was in respect the Certificate of Good Conduct which the plaintiff stated was not a requirement in the 1st defendant’s MAA which only states that a contestant be a person of good standing in the society. A perusal of the 1st defendant’s elections manual shows that the rules are derived from 1st defendant’s MAA. The said MAA does not define what makes a person to be of Good standing in the society. According to the defendants, the MAA merely provided general guidelines to the requirements for directorship candidates which guidelines had to be given effect through the development of the elections manual.

65. I find that the provisions of the said Elections Manual applied equally across the board to all the contestants to the election as the plaintiff did not state that the same only applied to her. I further find that the plaintiff did not also claim that the provisions/requirements of the elections manual were unattainable, oppressive or discriminative so as to justify her claim that the rules were illegal or unconstitutional. It is therefore my finding that the 1st defendant’s election rules were valid,, lawful, reasonable and justified. The defendants were justified in setting up rules and guidelines to govern its elections and I find that the rules did not contravene the 1st defendant’s MAA but instead complimented reinforced the provisions contained in the MAA by giving them more meaning and effect.

66. Having found that the defendants’ election rules were valid, I now turn to the most critical question in this case which is whether the plaintiff was unfairly locked out of the directorship elections contest. It was not disputed that the information on the rejection of the plaintiff to candidature was relayed to her on 12th December 2014 which date preceded a weekend that also had Jamhuri Day holiday in the mix, the 1st defendant’s election rules had an appeal window for all those who had not been prequalified as seen in the Director’s Nomination Dispute Resolution Committee Rules at page 110 of the Defendants’ bundle of documents wherein it was states as follows:

1. A petition/dispute/appeal shall be in writing, dated and signed by the person (s) petitioning/disputing/appealing.

2. The petition/dispute/appeal must attach therein the letter communicating the decision of the verification committee (in the event that it emanates from a prospective applicant.

3. The potion/dispute/appeal must state the reason why the Committee should consider reversing the decision of the verification committee.

4. In the event that the issue is in respect of lack of submission of required documents.

- **Original Certificate of Good Conduct (CID) – The petitioner/disputant/appellant must attach proof of having applied for the same before the closing (of submission of candidacy) of 9th December 2014 and attach the Valid Certificate,**
- **Original Tax Compliance Certificate (KRA)- The Petitioner/disputant/appellant must attach proof of having applied for the same before the closing (of submission of candidacy) of 9th December 2014 and attach the valid Certificate,**
- **Original “O” level qualification Certificate- The petitioner/disputant/appellant must attach the original Certificate (Regional Manager will attest and date that he has seen the Original and attach a copy duly stamped with the stamp of the Regional Manger.**

5. A petition/dispute/appeal in respect to (4) above without the documents mentioned therein attached shall not be entertained.

6.A petitioner/disputant/appellant, not being an applicant and in respect to issues raised in (4) above, must provide documentary evidence rebutting the documents therein.

67. It was not disputed that the plaintiff eventually received her certificate of Good Conduct (See Pexhibit 12) dated 11th December 2014 which she states that she submitted to the appeals committee with her appeal but that her appeal was still rejected on basis that she did not have the Certificate of Good Conduct.

68. From the evidence on record, it is clear that the plaintiff did all that she could, within the limited timelines given for the submission of the nomination papers, to apply and pay for the Certificate of Good Conduct on 21st November 2014 and to submit the said Certificate, albeit at the appeal stage which was procedural, yet the defendants did not find her qualified to contest in the said elections.

69. I find the defendants conduct at the appeal stage to be suspect, wanting and mischievous as they did not come out clearly to acknowledge the receipt of the plaintiff's Certificate of Good Conduct which was clearly availed to them. It would appear that the defendants were determined to lock out the plaintiff from the elections and this lends credence to the plaintiff's claim that the results of the nominations were delivered to her at the last minute on a Friday when she could not get adequate time to prepare and lodge her appeal.

70. The plaintiff's position that there was a spirited scheme to lock her out of the said elections is further demonstrated by the fact that the 1st and 2nd defendants declared the 3rd defendant, who was the incumbent director of the electoral zone under contest, the unopposed nominee of the said zone on 10th December 2014, way before the period of the appeal process allowed by the rules had expired. To my mind, the said declaration of the 3rd defendant as the unopposed candidate, way before time, coupled with the late delivery of the nomination results to the plaintiff are indicators that there was foul play in the nominations process or that the process was tilted in favour of one candidate.

71. Needless to say, in every electoral process, it is of critical importance that all the processes be carried out in an open transparent, verifiable and fair manner so as to avoid suspicion, unnecessary contests and court cases that more often than not, arise when the outcome of such elections are bitterly disputed as was the case in the instant case. Nothing could have been easier and cheaper for the defendants than to allow the plaintiff to participate in the elections upon fulfilling the one requirement that she initially lacked being the submission of the valid Certificate of Good Conduct. I say this because the disputed elections were to be conducted between December 2014 and January 2015, more than 2 years ago. In view of the fact that the 1st defendant's electoral cycle was stated to be after every 3 years, the 1st defendant is at this time already gearing up for the next elections cycle yet this case has been pending determination all this while. The net effect of the above scenario is that even this court finds that the plaintiff was unfairly locked out of the contest, which finding I hereby make, the said finding will in my humble view be pyrrhic victory for the plaintiff since the election in which she intended to be a participant has long been

overtaken by events due to lapse of time. Furthermore, in the event that she seeks to participate in the next elections, she will still be required to adhere to the conditions of 1st defendant's elections manual which means that she will be required to once again secure a current certificate of Good Conduct which brings us to the exact same spot that the parties herein were in during the last election cycle. Needless to say therefore, the over 2 year period that this case has been pending in court is a wasted period for both parties which they shall never recover.

72. On the jurisdiction of this court to hear and determine the instant case, my humble view is that an objection to jurisdiction ought to be raised as a preliminary point at the very beginning of the case so that, as was observed in the case of owners of **Motor Vessel "Lillians" vs Caltex Oil (Kenya) Ltd [1989] IKLR**, this court can down its tools and do no more the moment it makes the finding that it has no jurisdiction to entertain a matter.

73. In the instant case however, even though courts have held time and again, that they will not interfere with the internal affairs of companies especially where there are provision for internal dispute resolution mechanism there are instances when exceptions to the above rule have been observed. See **Foss vs Harbottle (1843) 2 Hare 261** where it was stated that courts will interfere only where acts complained of is ultra vires, or is fraudulent or not rectifiable by an ordinary resolution. The plaintiff's case was that she had exhausted all the internal dispute resolution options provided for in the defendants' elections manual and that the court action was the only remaining option left for her. I have noted that the 1st defendant's elections manual provides as follows on dispute resolution:

74. It is my finding that, in the instant case after failing to get redress at the 1st defendant's appeal tribunal, the plaintiff was justified to present her case before this court, having exhausted at the dispute resolution mechanism provided for in the 1st defendant's election manual.

75. In sum, having found that the 1st defendant's election rules and regulations were not ultra vires the 1st defendant's MAA, and further having found that this court has jurisdiction to hear and determine this dispute and lastly, having found that the plaintiff proved, on a balance of probabilities, that she had qualified to be a candidate for the directorship elections in the 1st defendant's company, I hereby enter judgment for the plaintiff against the 1st and 2nd defendants jointly and severally as follows:

a) A declaration that the defendant's decision to reject the plaintiff's application to contest in the directorship elections of the 1st defendant scheduled for January 2015 in respect to Machoge Chache, electoral area was illegal, null and void.

b) An order of mandatory injunction directing the defendants to accept and/or approve the plaintiff's application to contest in the 1st defendant's next scheduled elections for directorship of Machoge Chache electoral area, subject to the plaintiff's compliance with all the pre-election conditions and requirements.

c) I award the plaintiff the costs of the suit.

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

HON. W. A OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the plaintiff
- N/A for Defendant
- Omwoyo: court clerk