



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 1 OF 2017**

**JAMES ONWONGA MAKORI.....1ST PLAINTIFF**

**DAVID ANUNDA NYAKERIGA.....2ND PLAINTIFF**

**JAMES ONGERI.....3RD PLAINTIFF**

**ELIZABETH MORAA RATEMO.....4THPLAINTIFF**

**VERSUS**

**KIAMOKAMA TEA FACTORY LIMITED.....1ST DEFENDANT**

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

**BENJAMIN MATONDA NYAMWEA.....3RD DEFENDANT**

**RULING**

1. The applicants herein filed a Notice of Motion dated 17th January 2017 under order 1 rules 1 and 10, order 51 rule 1, order 40 rule 1,2 & 3 of the Civil Procedure Rules, Article 159 of the Constitution, part XXXVIII of the Companies Act, schedule 5 and 6 of the Companies Act for orders that: -

**2. Spent**

**3. Spent**

**4. Spent**

**5. The honourable court be pleased to issue an order of temporary injunction to restrain the respondents from conducting elections for directors of the 1st respondent company in respect of Masaba zone and conditioning the respondents to suspend the said elections pending the hearing and determination of the suit herein.**

**6. That the honourable court be pleased to issue an order directing the respondents to avail a comprehensive register of all founder shareholders of the 1st respondent's company at all buying centres in respect of Masaba Zone for purposes of an open and transparent review of the said register by share holders for a period of 14 days for purposes of removing all deceased share holders from the register that shall be used for purposes of an election of the directors of the 1st respondent company.**

**7. The honourable court be pleased to direct the respondents to avail a comprehensive list of**

**shareholders who have executed a power of attorney for purposes of verification of the said share holders for a period of at least 14 days before elections are conducted and to proceed to cancel the powers of attorney whose donors denounce as having been forged or fraudulently obtained.**

**8. Costs of the application be provided for.**

2. The application was supported by 4<sup>th</sup> plaintiff's affidavit in which she avers that she is a founder shareholder of the 1st respondent company and also a nominee contesting the director position in the Masaba Zone of the 1st respondent company. She refers to a circular issued by the 2<sup>nd</sup> respondent in November 2016 which clearly indicated that the founder shareholders were to cast their votes to the extent of the shares they held. She attached a copy of the said circular which was marked as "**EMRI**".

3. She contends that upon obtaining copies of the shareholders register she noted that it contained the names of many members who were deceased yet they still appeared in the said register and were therefore potential 'voters'. She attached a copy of the said register wherein she had highlighted the names of deceased voters which she marked as "**EMR2**". She further avers that the 1<sup>st</sup> respondent's head office is not easily accessible to all the potential voters for purposes of inspection of the voters' register owing to the age of some of the founder shareholders, the distance involved and the poor condition of the road network in the area. She therefore suggests that for the sake of ease and a transparent review of the register, it will be absolutely necessary that those registers be availed at all the various tea buying centres so that shareholders can be given sufficient time to scrutinize them before elections are conducted. She was of the view that an open and transparent electoral process would require the removal of all dead voters from the register which should thereafter be availed for fresh scrutiny at least 7 days to the election.

4. She further avers that since the election manual published by the 2nd respondent makes provision for voting assistance or shareholders who are unable to write or see which manual also provides for voting on behalf of another shareholder who is unable to reach the polling station on the appointed date through the granting a special power of attorney, the said power of attorney should be obtained legally and donated freely as opposed to the use of fraud or deceit. In this regard, she claimed that she had received credible information to the effect that the respondents had, with the intention of assisting the incumbent director win the elections, circulated pre-commissioned drafts of power of attorney to shareholders to sign while hoodwinking them that the forms were for fertilizer application. It was thus the 4th respondents case that for the sake of a transparent exercise, the respondents do avail a comprehensive list of all shareholders who have donated those powers of attorney at all tea buying centres within Masaba Zone, together with copies of those powers of attorney for purposes of scrutiny by the said shareholders so as to clean up the election exercise.

5. The 3<sup>rd</sup> defendant filed a replying affidavit in opposition to the application wherein he avers that the respondents had fulfilled all the election requirements as enumerated in the 1<sup>st</sup> respondent's election manual after which he applied to contest for the position of a director but that before the said elections could take place, an order of injunction stopping the elections was issued by the Chief Magistrates Court at Kisii. He attached a copy of the said order of injunction to the replying affidavit which was marked as "**BOM2**".

6. He contends that thereafter on 17/01/2016 the lower court suit was dismissed with costs to the 1st and 2nd defendants and that on the 18/1/2017, the 1st and 2nd respondents conducted elections wherein he was duly elected and a certificate of election issued. He attached a copy of the certificate that was marked as "**BOM 4(a) and (b)**". He contends that the elections were held in a free and fair manner and that only the 4th plaintiff contested and lost. It was his case that the plaintiff's application had been overtaken by events as it seeks to stop the elections that have already been conducted.

7. The 4th plaintiff filed a supplementary affidavit dated 21st February 2017 in answer to the 3rd defendant's affidavit in which she reiterates that no elections were held on 18th January 2017 as all the

farmers went about their usual businesses in their farms on the said date as shown in the copies of affidavits of several farmers which she attached to her supplementary affidavit and marked as "EMR2." She contends that the document exhibited by the 3<sup>rd</sup> defendant as a certificate of confirmation of elections is a self declaration that does not in any way confirm that elections were ever conducted.

8. The 3<sup>rd</sup> plaintiff also filed an affidavit dated 24<sup>th</sup> February 2017 in reply to the 3<sup>rd</sup> defendant's replying affidavit wherein he confirmed that no elections were conducted in the Masaba Zone owing to an order of court issued on 3<sup>rd</sup> January 2017. In order to prove that no elections were conducted, he exhibited a newspaper advertisement posted by the 1<sup>st</sup> and 2<sup>nd</sup> defendants on 12<sup>th</sup> January 2017 wherein they indicated that elections were not conducted in Masaba Zone. He attached a copy of the newspaper advertisement which was marked as "JO3". He contested the 3<sup>rd</sup> defendant's document annexed and marked as "BM 4(a)" for not constituting proof that elections were conducted as the source of the said information is not disclosed. He maintained that no elections were conducted in view of the fact that the defendants only attached a certificate of results which is a primary document from the polling centre but did not attached the invitation notice to the farmers, the certificate of the winner and a Gazette Notice notification of the Director of Masaba Zone who was elected.

9. Lastly, he stated that he was supposed to vote at Masimba Tea Buying Centre (KK007 polling station) and that there were no elections held in the said centre on 18<sup>th</sup> January, 2017 as alleged and therefore, any results produced and annexed were fraudulent, null and void.

10. The 3<sup>rd</sup> defendant also filed a further affidavit dated 13<sup>th</sup> March, 2017 in which he claimed that the 1<sup>st</sup> and 2<sup>nd</sup> defendants held elections for Masaba electoral area on 18<sup>th</sup> January 2017. He further deposed that the 1<sup>st</sup> and 2<sup>nd</sup> respondents issued a notice informing the farmers that elections were to be conducted on 18<sup>th</sup> January 2017. He attached a copy of the said notice which was marked as "BM1". It was therefore the 3<sup>rd</sup> defendant's case that all requirements and procedures for the elections were duly followed according to provisions contained in the Election Manual and the Articles and Memorandum of Association of the 1<sup>st</sup> defendant.

### **Analysis and determination**

11. After considering all the pleadings filed by the parties herein, I note that at the centre of the 4<sup>th</sup> plaintiff's application is the election of directors in the 1<sup>st</sup> respondents Company's Masaba Zone. It was stated that the 2<sup>nd</sup> defendant conducts elections on behalf of the 1<sup>st</sup> defendant while the 4<sup>th</sup> plaintiff was a nominee and contestant for the said elections. From the grounds of the application, this court can easily deduce that what the 4<sup>th</sup> plaintiff seeks are orders that will enable the 1<sup>st</sup> and 2<sup>nd</sup> defendants deliver credible and transparent elections. This court also notes that the 1<sup>st</sup> and 2<sup>nd</sup> defendants did not file any affidavit in opposition to the 4<sup>th</sup> plaintiff's application.

12. The 1<sup>st</sup> and 2<sup>nd</sup> defendants issued rules and regulations for conducting elections as seen in the attachment to the 3<sup>rd</sup> defendant's affidavit marked as "BMO1." The said rules provide that the voters in the said elections are founder shareholders who cast their votes on the strength of their shares. The plaintiffs took issue with the placing the voters register at the factory managers office which they contended was not a place that all shareholders could access contrary to the company policy that the polling stations be easily accessible. One of the prayers the plaintiffs sought in the application is that the list /register of founder shareholders be availed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants at all tea buying centres within Masaba Zone for purposes of a transparent review by all the shareholders so as to enable them establish their respective shareholding and identify the deceased shareholders for purposes of their removal from the register. According to the plaintiffs, this is a prayer that will not injure anyone but will ensure transparency for the purposes of voting. I find that the prayer that the voters register be availed at the tea buying centres was justified and achievable as the respondents did not state that they would encounter any difficulty in availing the said register to their shareholders who are in any event the real owners of the 1<sup>st</sup> defendant company.

13. On the issue of whether or not elections had been conducted, I find that a scrutiny of all the material

placed before this court by both parties point to an irresistible conclusion that the elections were not conducted in the Masaba Zone for the following reasons:

14. Firstly, I find that no elections could have been conducted as at 24<sup>th</sup> January, 2017 as it is the date that both parties appeared before the court and an order was issued restraining the defendants from conducting the elections. Secondly, the 1<sup>st</sup> respondent's Election Manual, under election notices, provides that the notice of elections shall be issued from the office of the Company Secretary who shall give 14 days' notice to the elections date. In this court's observation, the notice annexed to the further affidavit as "**BMI**" was issued on 17<sup>th</sup> January, 2017 yet at paragraph 8 of the replying affidavit, the 3<sup>rd</sup> defendant states that elections were conducted on 18/1/2017. This brings in the question on when, if at all, the notice of elections was issued. Moreover, as seen in annexure, "**BOM4 (a)**", which is the certificate of results, it is indicated that the elections were in fact conducted on 10/1/2017. This in itself introduces another date for the elections in the mix and further casts doubt on whether the purported elections were actually held.

15. In addition to the above discrepancies, this court notes that after elections are held, a certificate is normally issued by the returning officer to indicate the winner of the said elections. In the instant case, this court observes that the 3<sup>rd</sup> defendant did not attach any certificate of results in any of his documents filed before this court. I note that the certificate in the 3<sup>rd</sup> defendant's documents does not contain the list of winners.

16. From the above facts, findings and observations, this court can safely conclude that no elections, for Masaba electoral zone, were held by the 1<sup>st</sup> and 2<sup>nd</sup> defendants on the 18/01/2017 or on any other date for that matter.

17. In conclusion, I find that the plaintiff's application is merited and I allow it in the following terms: -

**1. An order is hereby issued directing the defendants to avail a comprehensive register of all founder shareholders of the 1st respondent's company at all tea buying centres in respect of Masaba Zone for purposes of an open and transparent review of the said register by shareholders for a period of 14 days, before the date of the elections, for purposes of removing all deceased shareholders from the register that shall be used for purposes of an election of the directors of the 1st respondent company.**

**2. An order is hereby issued directing the respondents to avail a comprehensive list of shareholders who have executed a power of attorney for purposes of verification of the said shareholders within a period of at least 14 days before elections are conducted, and to proceed to cancel the powers of attorney which are denounced by their respective donors as having been forged or fraudulently obtained.**

**3. Upon the compliance with orders 1 and 2 hereinabove, the 1st and 2nd defendant are granted a period of 30 days, from the date of the said compliance, to hold the elections for Masaba Zone.**

**4. Each party shall bear their own costs.**

**Dated, signed and delivered in open court this 28<sup>th</sup> day of June, 2017**

**HON. W. A OKWANY**

**JUDGE**

**In the presence of:**

- N/A for the plaintiff
- N/A for the Defendants

- Omwoyo: court clerk