REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

JUDICIAL REVIEW

MISC. APPLICATION NO. 5 0F 2017

IN THE MATTER OF:

THE CONSTITUTION OF KENYA, 2010,

THE FAIR ADMINISTRATIVE ACTION ACT, THE COMPANIES ACT, 2015, AND THE ARTICLES OF ASSOCIATION OF KENYA TEA DEVELOPMENT AGENCY-HOLDINGS LTD.

IN THE MATTER OF: KENYA TEA DEVELOPMENT AGENCY–HOLDINGS ("KTDA-HL")

IN THE MATTER OF: THE ELECTIONS OF ZONAL REPRESENTATIVES TO THE BOARD OF DIRECTORS OF KTDA-HL FOR ZONE 3 OF THE COMPANY'S ELECTORAL ZONES COMPRISING GITHAMBO, KANYENYAINI, GATUNGURU AND KIRU SCHEDULED TO BE HELD ON 24TH OCTOBER, 2017.

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW OF AN ADMINISTRATIVE ACTION BEING THE DECISION OF THE DISPUTE RESOLUTION COMMITTEE OF KTDA-HL DATED 18TH OCTOBER 2017 DISMISSING THE APPLICANT'S APPEAL AGAINST THE DECISION OF 'THE ZONAL REPRESENTATIVE ELECTIONS VERFICIATION COMMITTEE" OF 10TH OCTOBER 2017.

IN THE MATTER OF: THE APPLICANT'S DISQUALIFICATION AS A CANDIDATE IN THE ELECTIONS OF ZONAL REPRESENTATIVES TO THE BOARD OF DIRECOTRS OF KTDA-HL FOR ZONE 3 OF THE COMPANY'S ECLECTORAL ZONES COMPRISING GITHAMBO, KANYENYAINI, GATUNGURU AND KIRU ON THE GRUNDS THAT HE IS NOT IN GOOD STANDING IN SOCIETY.

IN THE MATTER OF: THE INTEREST OF OVER 8,000 SHARE- HOLDERS OF KIRU TEA FACTORY COMPANY LIMTED (KTFC LIMITED)

GEOFFREY CHEGE KIRUNDI……...APPLICANT

- V E R S U S –

THE DISPUTE RESOLUTION COMMITTEE OF KENYA TEA DEVELOPMENT

AGENCY HOLDINGS LTD…….....1ST RESPONDENT

KENYA TEA DEVELOPMENT AGENCY HOLDINGS LTD…2ND RESPONDENT

R U L I N G

On 23/10/2017 the application, a chamber summons seeking among other orders, leave to apply for Judicial Review orders of certiorari, prohibition and mandamus against the respondents, – and that leave to stay the decision made by the 2nd respondent dated 13/10/17 and elections for the Zonal Representatives to KTDA –HL's Board of Directors in Zone 3 of the Company's electoral Zones scheduled for 24/10/17, was filed by way of certificate of urgency,

The application was supported by the affidavit of Geoffrey Chege Kirundi sworn on 23/10/17 and the grounds on the face of the application. Upon perusal of the certificate of urgency and the Chamber Summons, and the affidavit and annexures, I granted the leave sought by the applicant. I gave directions and pursuant to the proviso to Order 53, set a date for the parties to address me, on the issue of the leave

operating as stay.

Upon being served with the orders the respondents filed preliminary objections through the firm of Milimo Muthomi & Co. Advocates.

The 1st respondent's preliminary objection is that it is not a legal person capable of being sued/suing but an adhoc committee established under the Election Rules & Regulations of the 2nd respondent and whose term expired on 18/10/2017 when it was dissolved. That the suit, the prayers and orders sought against it are a "monumental procedural and substantive legal nullity, fatally and irredeemably incompetent, and an abuse of the court process- a proper candidate for dismissal and /or striking out with costs."

The 2nd respondent's preliminary objection is premised on existence of another suit **High Court Milimani Civil Case No.106/2017**

Stephen Main Githiga vs. Kiru Tea Factory Company Ltd and 3 others. The 2nd respondent's position is that the subject matter in that case is similar/substantially similar to the subject matter in the instant suit, rendering the applicant's suit herein and the interlocutory orders/prayers sought *sub judice*, frivolous, an abuse of the court process and only good for dismissal and/striking out with costs. This is because the High Court at Milimani is a court of competent jurisdiction capable of adjudicating all issues as submitted before this court by the applicant, hence this court is *bereft of jurisdiction* to preside over and determine a matter that is pending before another court of such competent and concurrent jurisdiction.

The issue of jurisdiction having been raised, and guided by the words of Nyarangi JA in **Lilian 'S' [1989] KLR 1**, that

> "…Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction",

it was only proper that before doing anything else in the matter I make a determination as to whether or not, in the circumstances of this case, I have jurisdiction.

The issue of what amounts to a preliminary objection was settled in **Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Limited (1969) EA. 696**

> "A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

Two issues are raised. The legal personality of the 1st respondent, and the jurisdiction of this court to deal with the issues

The 1st respondent's preliminary objection

Is the 1st respondent a legal entity capable of suing/being sued?

Mr. Milimo submitted that the Dispute Resolution Committee is not an entity capable of being sued/suing. He referred me to the case of **Football Kenya Federation Vs. Kenyan Premier League Limited and 4 others [2015] eKLR** where my sister Hon. Lady Justice Aburili dealt with that issue extensibly. He specifically referred me to pages 12-14 of the judgment. I was also referred to order 1 of the Civil Procedure Rules and Article 260 of the Constitution.

In response Mr. Marete submitted that the issue before this court was the decision of the Dispute Resolution Committee in the light of the provisions of the Fair Administrative Actions Act and that in itself was not a pure point of law.

I have carefully considered the submissions in this issue. I have perused the authority cited. I have also perused the KTDA Holdings (Board Members) Election Procedures – October 2017.

The Dispute Resolution Committee is a creature of those rules, and all the appointments to the committee are made by the Managing Director KTDA Holdings. The life of that committee and the rules governing its functions are determined by the Election Procedure Rules. It goes without saying that the Dispute Resolution Committee is not a legal entity, it is a committee made up of individuals to perform a specific function.

It's lack of legal persona also goes to the issue of jurisdiction and I agree entirely with the finding of Justice Aburili in the FKF case on who is a suable person in a court of law. After reviewing a host of authorities the Judge stated,

> "It is my humble view that the presence of proper parties before the court is *sine quo non* exercise of jurisdiction of the court. I am fortified on this point by the holding in **Appex International Ltd &Anglo Leasing &Finance International Ltd vs Kenya Anti-Corruption Commission [2012] eKLR** citing with approval **Goodwill &Trust Investments Ltd &Another vs Will &Bush Ltd (Supreme Court of Nigeria),** the court held
>
> > "it is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed. The parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit *in limine*. When proper

parties are not before the court the court lacks jurisdiction to hear the suit, and where the court purports to exercise jurisdiction which it does not have, the proceedings before it and its judgment will amount to a nullity no matter how well reasoned."

I need not say more but find that there is no suable person in the name of the 1st respondent. Hence the 1st respondent's preliminary objection succeeds.

The 2nd respondent's preliminary objection

This one is based on whether the sub judice rule applies to the matter before me. The respondent argues that the issues raised by the plaintiff applicant in this matter, and what is before Mbogholi J, are substantially the same. Mr. Milimo's argument is that the applicant herein, by a Notice of Motion dated 20/9/2017 raised the issue of elections, which is the subject matter of this Judicial Review.

Mr. Marete submitted, and Mr. Milimo agreed, that the two prayers were withdrawn. Mr. Marete's submission was that upon withdrawal two prayers are no consequence with regard to the matter before me.

The notice of withdrawal stated;

"(ORDER 25 RULE 1 OF THE CIVIL PROCEDURE RULES, 2010)

Take Notice that pursuant to the above order, the 1st defendant herein, Kiru Tea Factory Company Limited has wholly withdrawn and discontinued the prosecution of prayer No.2 and 3 of the Notice of Motion application dated and filed on 20th September, 2017;"

The two prayers that were withdrawn were;

2. That pending the *inter partes* hearing and determination of this application this court be pleased to accord 1st defendant/applicant an interim measure of protection restraining the 3rd and 4th defendants/respondents acting through their officers and/or employees from interfering in the affairs of the 1st defendant/respondent's Corporate Board of Directors and its individual Directors and/or in any manner whatsoever visiting any sanction upon the following Directors of 1st defendant/applicant including but not limited to preventing them from presenting themselves for nomination as candidates for election to the office of Directors of KTFC or its affiliates, and/or declining to verify their candidature and/or excluding their names from the list of candidates for election or re-election to the office of Directors of KTFC or its affiliates including the 3rd defendant/respondent to be held in November 2017 or any other date thereafter. Viz:

a. John Ngaii Kariri

b. David Gatu Waithaka

c. Eston Gakungu Gikoreh

d. Florence Wacuka Wanderi

e. Geoffrey Chege Kirundi

3. That pending the reference of the dispute between the 1st defendant/applicant and the 3rd and 4th defendant/respondent to arbitration, and the hearing and determination of the reference this court be pleased to accord the 1st defendant/applicant an interim measure of protection restraining the 3rd and 4th defendants/respondents acting through their officers and/or employees from interfering in the affairs of the 1st defendant/respondent 's Corporate Board of Directors and its individual directors and/or in any manner whatsoever visiting any sanction upon the following directors of 1st defendant/applicant including but not limited to preventing them from presenting themselves for nomination as candidates for election to the office of Directors of KTFC or its affiliates, and/or declining to verify their candidature and/or excluding their names from the list of candidates for election or re-election to the office of directors of KTFC or its affiliates including the 3rd defendant/respondent to be held in November 2017 or any other date thereafter Viz:

a. AJohn Ngaii Kairi

b. David Gatu Waithaka

c. Joseph Maina Gathonjia

d. Eston Gakungu Gikoreh

e. Florence Wacuka Wanderi

f. Geoffrey Chege Kirundi

That this court be pleased to restrain the plaintiff and the 3rd and 4th defendants whether by themselves or by their agents and/or employees from interfering in any manner whatsoever, with KTFC's Board of Directors right, to convene a special or extra ordinary general meeting of KTFC's shareholders to consider and; make a determination on the question in dispute between the plaintiff and the 1st defendant/applicant being whether there is a conflict of interest between the plaintiff's dual and concurrent directorship in the 1st defendant/applicant and in Sasini Limited.

Mr. Milimo referred me to

- S. 6 of the Civil Procedure Act as read together with s.5 and s.1B(c),
- **Livingstone Orina & 2 others vs. Kenya Tea Development Agency & anor. Kisii HC Petition No. 6/15(UR)** at page 10-11
- **M/S Commercial Spares Limited vs. AI Nakhul Enterprises Ltd. and Anor. NBI HCC 388/2002 UR)** at pg. 10-11 on abuse of the court process.
- **In Re United Insurance Co. Ltd. (under statutory management) [2017] eKLR**

He argued that the judicial review application was not only *sub judice* but also an abuse of the court process, a waste of limited judicial time and resources where two different judges would be dealing with similar issues that could easily be dealt with by one judge in one matter.

In his response Mr. Marete referred me to **Edward R. Ouko vs. Speaker of the National Assembly & 4 others [2017] eKLR** at page. 4 paragraph 18.

I have carefully considered the foregoing authorities and the weighty submissions by each counsel.

I must state on the onset that at some point Mr. Marete appeared to be arguing on the merits of the judicial review and urging this court to do justice by hearing the judicial review.

Before I proceed further there is an issue that may sound petty but which in my humble view needs to be addressed. The emerging trend of parties filing voluminous materials some of which they themselves do not even make reference to. Reading through all of them is sometimes humanly not possible considering the time limits and the caseloads. Why can't parties be precise and to the point? Should we have a law/or regulations to guide counsel and parties on this issue? Some of these voluminous materials placed before a judge to determine an issue are beginning to make a mockery of the whole justice system. Parties ought to summarise their cases, make reference to specifics and not over load the court with materials which they sometimes do not make reference to.

Be that as it may, I have perused through Milimani HCC No. 106/2017. In my mind, there is no way one can separate the issues raised in the judicial review and the matters in HCC 106/2017, to do so is to split hairs. Even if the applicant therein withdrew the two prayers in the Notice of Motion of 20/9/2017 that specifically referred to the applicant herein, the rest of the Notice of Motion still bears matters related to elections. That withdrawal in my view was mischievous. Apparently that court did not see the need to grant interim orders. The withdrawal would create a stand -alone issue with respect to the elections and the actions of the DRC, and then find another court where the now apparently stand-alone issue would be dealt with. It is has not escaped the notice of this court that the events complained of happened during the pending of the suit 106/2017. In my view that was the right forum to deal with those issues.

This point is borne out by the contents of that applications that are still before the court in Milimani HCC 106 of 2017.

For example,

Paragraph 2 of Counsel's certificate of urgency in support of the application of 20/9/17 states;

> "The directors of KTFC are reasonably apprehensive that the 3rd, 4th defendants in abuse of their designated role in the election of KTFC's directors shall disqualify and bar some of KTFC's directors from presenting themselves as candidates in the elections of KTFC's directors scheduled for November 2017."

Further, one of the grounds for the Chamber Summons is the ground No.2 –

> "That pursuant to the Election Manual governing the nomination of persons as candidates for the office of the Director of the 1st defendant/applicant, the 3rd and 4th defendants' Group Company Secretary plays an integral role in the verification, nomination, and presentation as a candidate for election to the office of director."

See paragraph 19 as well.

Clearly the issue of the decision by the Dispute Resolution Committee of the 2nd defendant cannot be separated from the suit Milimani HCC 106/17. These matters are intertwined and to separate them, I dare repeat is an activity in splitting of hairs.

I take guidance from Justice Odunga in **Edward R. Ouko v Speaker of the National Assembly & 4 others [2017] eKLR** (a case which was relied on by both parties), where he states;

"13. Sub judice, strictly speaking is provided under section 6 of the ***Civil Procedure Act*** which in the preamble to the Act is "*An Act of Parliament to make provision for procedure in civil courts*". It is, however, now well settled that judicial review applications are neither criminal nor civil in nature. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.**

14. In **Commissioner of Lands vs. Hotel Kunste Ltd** (supra) and **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** it was held that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the ***Civil Procedure Act*** does not apply since it is governed by sections 8 and 9 of the ***Law Reform Act*** being the substantive law and Order 53 of the ***Civil Procedure Rules*** being the procedural law. Therefore, strictly speaking section 6 of the ***Civil Procedure Act*** does not apply to judicial review proceedings. See **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209** and **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47.**

15. This, however, does not take away the Court's inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the its process. Whereas *sub judice* may not, pursuant to section 6 aforesaid, be invoked in judicial review proceedings, the Court retains an inherent jurisdiction to make such orders as necessary for the ends of justice including termination of proceedings or stay of the same. One of the principles guiding the exercise of judicial authority as enunciated in Article 159(2)(b) of the Constitution is that justice delayed is justice denied. The effect of filing several proceedings seeking the same or substantially the same orders would be to delay the course of justice and the Court is constitutionally obliged to take actions that would expedite the disposal of matters before it including termination of unnecessary proceedings and staying multiple suits filed by the same partes seeking the same or substantially the same orders. Accordingly, the principle of *sub judice* may well be achieved by applying the constitutional principles.

16. By taking such action the Court would be invoking its inherent jurisdiction which is not a jurisdiction conferred by section 3A of the ***Civil Procedure Act*** as such but merely reserved thereunder…

> **Whereas ordinary jurisdiction stems from the Act of Parliament or statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations. The jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent". For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent the process being obstructed and abused. Such a power is intrinsic in a superior court, its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction, which is inherent in a superior court of law, is that which enables it to fulfil itself as a court of law. The judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner. The need to administer justice in accordance with the Constitution occupies an even higher level due to the supremacy of the constitution and the need to prevent the abuse of the Constitutional provisions and procedure does occupy the apex of the judicial hierarchy of values…**

17. Accordingly the Court may in proper cases invoke its inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of its process and this may be done where the principles of *sub judice* would be applicable. As was held by the High Court of Uganda in **Nyanza Garage vs. Attorney General Kampala HCCS No. 450 of 1993**:

> **"In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits."**

This then leads me to the issue whether the said principles apply to this case. From the above authority, for the doctrine to apply the following principles ought to be present:

> **(1) There must exist two or more suits filed consecutively.**
>
> **(2) The matter in issue in the suits or proceedings must be directly and substantially the same.**
>
> **(3) The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title.**
>
> **(4) The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.**

This case applies on all fours to the matter before me. What is distinguishable about this case and what is before me is that the ex parte applicant, though making efforts to extricate himself from the suit Milimani HCC 106 of 2017, the issues he raises, and the parties involved are well represented in that suit. We have two suits running at the same time. The parties are substantially the same. The issues in these suits are critically intertwined with the issues in that other suit and ought to be dealt before the same judge.

Mr. Marete did argue that one of the key grounds for filing this matter here was the geographical jurisdiction of where the elections were to take place. In my humble view that is of no consequence as it is not an issue for determination.

From the foregoing, I find that this matter is *sub judice*, Milimani HCC 106/17.

The second respondent's preliminary objection must succeed on the foregoing grounds.

I need not go into the issue as to whether a judicial review can be brought against the decision of a private enterprise, that goes to the merit of the judicial review application.

Having found that the 1st respondent is a non-legal entity incapable of being sued or suing, and that this suit is sub judice the suit in Milimani HCC 106 of 2017, the consequence is that I am bereft of jurisdiction, and must down my tools. I will make no further step.

The application is struck out with costs.

Right of Appeal 30 Days.

Dated, delivered and signed at Nyeri this 15th Day of November 2017.

Teresia Matheka

Judge

In the presence of:

Court Assistant Catherine

Mr. Marete for the ex parte applicant

Mr. Milimo for the respondents