



**REPUBLIC OF KENYA**

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

**PETITION NO. 4 OF 2015**

**PAUL MOGAKA MAGOMA.....PETITIONER/APPLICANT**

**VERSUS**

**GIANCHORE TEA FACTORY CO.....1<sup>ST</sup> RESPONDENT/RESPONDENT**

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

**SAMWEL MAKWAE.....3<sup>RD</sup> RESPONDENT/RESPONDENT**

**RULING**

1. This ruling relates to the Petitioner's application dated 20<sup>th</sup> July, 2015 brought under Order 51 Rules 1 and 2 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Section 82 of the Election Act 2011 and Articles 81, 86, and 159 (2) (d) of the Constitution.
2. In the said application the applicant seeks orders as follows:
  - a. "Spent
  - b. **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to properly tally and verify the votes cast for the position of director in Timi electoral area.**
  - c. **The 3<sup>rd</sup> Respondent was not validly elected as director of Timi electoral area of Gianchore Tea Factory Company Limited at the elections held on 6<sup>th</sup> January, 2015.**
  - d. **An order that a fresh election for director of Timi electoral area of Gianchore Tea Factory Company Limited in compliance with the constitution and Laws of Kenya.**
  - e. **An order that the costs of this Petition be borne by the Respondents.**
  - f. **Such other or further relief as this Honourable Court may consider fit and proper in the circumstance."**
3. The application is premised on the grounds that the elections were not held in compliance with the provisions of the constitution and that the methods employed by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in conducting the elections were riddled with inconsistencies, were opaque and fraught, with miscalculations, deletion and errors.
4. The applicant contends that as a result of the errors, it has now become imperative that an independent audit of the votes, be conducted so as to ascertain the validity, correctness and verifiability of the votes cast through a re-count. It is the applicant's case that an order for a re-count or scrutiny of the votes cast will not prejudice the respondents in any way.
5. The application is supported by the affidavit of the applicant herein **PAUL MOGAKA MOGOMA** sworn on 20<sup>th</sup> July, 2015.

### **Applicant's affidavit.**

6. The applicant depones that he participated in the election for the position of director in the 1<sup>st</sup> respondent's company alongside 6 other contestants in which the 3<sup>rd</sup> respondent was declared the winner in an election that was marred with irregularities including multiple voting by individuals and dead (ghost) voters casting ballots.
7. The applicant states that the manner in which the 1<sup>st</sup> and 2<sup>nd</sup> Respondents conducted the elections constituted a gross violation of the constitution, the Companies Act and the Articles and memorandum of Association of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
8. The applicant contends that the elections were not free and fair, was marred with corruption thereby rendering the declaration of the 3<sup>rd</sup> respondent as the winner thereof null, void and of no legal effect.
9. In the applicant's affidavit he narrates numerous instances of irregularities in the said elections which include manipulation of results, the opening of some polling stations late, none declaration of the votes garnered by all the contestants, and inconsistencies in the tallies.
10. The applicant contends that the apparent irregularities and discrepancies can only be resolved through an independent audit, scrutiny and recount of the votes cast in order to ascertain the true winner.

### **Respondents replying affidavit**

11. The respondents replying affidavit is sworn on 12<sup>th</sup> February 2016 by **FLORENCE MITEY** who describes herself as the Head of Legal and Regulatory affairs of the 2<sup>nd</sup> respondent.
12. She depones that the elections for the 1<sup>st</sup> respondents company were conducted as scheduled and upon the requisite notices being made in accordance with the elections manual and that the entire process was fair to all the contestants.
13. She further depones that according to the Elections manual any complaint arising out of the election process was to be presented to the Company Secretary or the Returning Officer, yet the applicant decided to ignore that rule, and rushed to the court.
14. She further states that the Elections Manual provides that any disputes arising from the elections be resolved by a committee set up to deal with such disputes but the applicant chose to ignore the rules and procedures provided for in the manual and filed this matter in court before exhausting all the remedies set out in the Elections Manual.
15. The 2<sup>nd</sup> Respondent's deponent further states that the Articles and Memorandum of association of the 2<sup>nd</sup> respondent herein provide that all disputes arising out of elections be referred to arbitration under the confines of the Arbitration Act.
16. She contends that the applicant herein has not made any complaints to the 2<sup>nd</sup> respondent, and neither has he sought any investigations into his allegations or referred his case to arbitration.
17. She adds that the applicant is guilty of non-disclosure of material facts and has not shown that he has genuine grounds to warrant the issuance of the orders sought.
18. She maintains that the elections were free and fair with no irregularities reported to the 2<sup>nd</sup> respondent before, during or after the said elections.
19. The 2<sup>nd</sup> respondents' deponent has attached the following documents as annexures to the said affidavit.

- **Notice marked as "FM1"**
- **Gianchore Tea Factory Company Ltd candidates – Timi Electoral area "FM2"**
- **"FM3" circular No. 40/2014, Election of tea factory Company Directors Nominees and Buying Centre Committee members- Procedures – 2014/2015.**
- **"FM4" Tallying form – Timi Electoral Area.**

20. When the application came up before me for hearing on 17<sup>th</sup> February, 2016, parties agreed to canvass the application by way of written submissions.
21. I have considered the parties respective written submissions. The main prayer in the application is

- for an order for scrutiny and re-count of all the votes cast in favour of all the candidates who contested in the disputed directorship positions elections in respect to the 1<sup>st</sup> respondent's Timi Electoral Area. The respondents main ground of objection to the said application is that the Articles and Memorandum of Association of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents provides for the procedure and mechanism of electoral dispute resolution which includes an arbitration process and contends that the applicant jumped the gun by filing this matter before this court before exhausting the dispute resolution mechanism as envisaged in the companies rules and the Elections Manual.
22. The respondents have in this regard stated in their reply to the petition that this court lacks jurisdiction to hear and determine this matter in view of the clear provision for an arbitration clause in the 1<sup>st</sup> and 2<sup>nd</sup> respondents articles an memorandum of association and the elections manual.
23. My perusal of the respondents' annexure "FM3" to the replying affidavit which was a circular No. 40/2014 containing the rules and procedures to be adopted during the election of company directors, states as follows under the sub-title "Complaints"

**"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.**

**All complaints to the Company Secretary shall be made through the Regional Manager"**

24. The above rules are stated at the beginning of the circular, to be rules drawn from the Factory Company Articles which provides for the respective offices.
25. A reading of the election rules of the 1<sup>st</sup> and 2<sup>nd</sup> respondent clearly shows that they did not intend to have their elections disputes resolved by the court, at least not in the first instance. It is noteworthy, that the applicant, being a shareholder of the 1<sup>st</sup> respondent company, is bound by the rules and regulations set down by the said company in their articles and memorandum of association.
26. I find that the clause in the 1<sup>st</sup> and 2<sup>nd</sup> respondents' rules on settlement of complaints through arbitration and other means is unambiguous, suffers no defects, and leaves no room for doubt on the proper forum for dispute resolution.
27. The clause divests this court of the jurisdiction to hear and determine the dispute; and confers the jurisdiction on an arbiter to hear and determine the election disputes. I find that the clause has adequate anchorage in law.
28. The applicant has not explained why he chose to come to court directly without attempting the dispute resolution machinery provided for by his company's rules and regulations.
29. In **Paul Chemunda Nalyanya Vs 1. Messina Kenya Ltd[2015]eKLR** It was held as follows:

**“Parties cannot ignore a valid arbitration clause in their contract, and rush to court seeking adjudication, in a dispute which is clearly subject to arbitration. The court must uphold the parties positive rejection of its jurisdiction.”**

30. Even though the above quoted case related to an arbitration clause contained in a contract of employment, I find that the reasoning and principle behind the holding that the court lacks jurisdiction is the same and applicable in this case.
31. The arbitration clause specifically deals with complaints arising out of the elections of directors as is the dispute in the instant case. It is my finding that the parties needed to first deal with the matter through arbitration.
32. The impugned elections related to the elections of the 3<sup>rd</sup> respondent as a director of the 1<sup>st</sup> respondent company. Companies, be they private or public, are governed by the provisions of the Companies Act (Cap. 486 Laws of Kenya). The election of directors are internal affairs of companies that are usually regulated by the rules embedded in the articles and memorandum of association. In the instant case, the rules of the company created a dispute resolution committee to deliberate on any complaint within 48 hours of its receipt. The rules further state that a court of competent jurisdiction would hear a complaint from the decision of the Returning Officer.
33. The applicant has not demonstrated to this court that he exhausted the company’s internal mechanism of dispute resolution before coming to court. Furthermore, he did not also demonstrate that he had any difficulties or reservations on exploring the dispute resolution mechanism provided for by the company’s regulations. Courts have severally held the position that they would be reluctant to enter into the arena of disputes arising from the internal management of companies especially where there are provisions for internal mechanisms to deal with such disputes.
34. **In Paolo Murri Vs Gian Battisha Murri & Another(200) eKLR** the court declined to interfere with the internal management of a company and observed as follows:

**“an elementary principle is that a court does not interfere with internal management of companies acting within their powers.”**

35. In the **Paolo Murri case (supra)** the court cited the rule in **Foss vs Harboltle (1843) 2 Hare 261**, where it was stated that courts will interfere only where the acts complained of is ultra vires or is of a fraudulent character or not rectifiable by ordinary resolution.
36. As I have already stated in this ruling, the election rules of the 1<sup>st</sup> respondent envisaged a scenario where disputes arising there from are resolved by the returning officer or the dispute resolution committee.
37. The circumstances or facts of the instant case are distinguishable from the facts in the case of **Symon Philip Koech Vs Litein Tea Factory and 5 others Kericho HCCC No. 1 of 2014**, in the sense that in the instant case, the applicant never lodged a complaint with the company following the impugned elections while in the cited case, the applicant lodged a complaint to the company, through a letter of protest and only filed the case in court when he failed to get a response or assistance from the company.
38. As opposed to the applicant in this instant case, the applicant in the cited case exhausted the company’s internal dispute resolution mechanism before seeking redress from the court.
39. The upshot of my ruling is that this court lacks jurisdiction to deal with the application and grant the orders sought. The said application dated 20<sup>th</sup> July, 2015 is therefore struck out with costs to the respondents.

**Dated, signed and delivered in open court this 20<sup>th</sup> day of April, 2016**

**HON. W. OKWANY**

**JUDGE**

**In the presence of:**

- Miss Gogi for Ochoki for the Petitioner/Applicant
- Mr. Ndege for the Respondents
- Omwoyo court clerk