



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO.47 OF 2014

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLE 47 (1) OF THE CONSTITUTION OF KENYA 2010**

BETWEEN

JAMES MAKORI AKUMA PETITIONER

VERSUS

TOMBE TEA FACTORY COMPANY LIMITED 1ST RESPONDENT

KENYA TEA DEVELOPMENT AGENCY

MANAGEMENT SERVICES LIMITED 2ND RESPONDENT

RULING

1. By a petition dated 30th December 2014 the petitioner JAMES MAKORI AKUMA pursuant to **Articles 2, 3(1), 10, 20, 22(1) (3), 47 (1), 165 (3) (b)** of the **Constitution of Kenya 2010** stated that on 10th November 2014 he submitted all documents required to the factory unit manager which document included a certificate of good conduct issued on 29th November 2013 expiring on 29th November 2014.
2. The petitioner further stated that on 25th November 2014 in exercise of due diligence he applied for renewal of the certificate of good conduct for a further period of 12 months from 29th November 2014 which certificate was issued on 3rd December 2014.
3. On 10th December 2014 the 1st respondent addressed to the petitioner a letter by the Chairman of the verification committee informing the petitioner that his application was not successful on account that the same did not submit a valid certificate of good conduct. In exercise of the right to appeal the petitioner on 10th December 2014 lodged an appeal which was on 15th December 2014 dismissed thereby denying the petitioner the right to participate in election scheduled then for 6th January 2015.
4. It was the petitioner's case that the said decision denied him the right or opportunity to participate in the elections of the directors of the 1st respondent and therefore violated the petitioner's right to an administrative action that is expeditious, lawful, reasonable and procedurally fair as stipulated in **Article 47 (1)** of the **Constitution of Kenya 2010**.
5. The petitioner therefore prayed for the following orders:-
 - a. *A declaration that the respondents violated the petitioner's right to an administrative action that is expeditious, lawful, reasonable and procedurally fair.*

- b. A declaration that the 1st respondent's purported elections slated for 6th January 2015 or any other date before or thereafter in exclusive of the petitioner is null and void.
 - c. An order directed at the respondents themselves, their agents, officers or employees compelling inclusion of the petitioner into the list of candidates vying for or shortlisted to participate in the election of the 1st respondent's directors scheduled for 6th January 2015.
1. The petition was supported by an annexed affidavit sworn by the petitioner in which he deponed that he is a bonafide Shareholder/Grower of the 1st respondent being **Grower Number 757 Zone one Irianyi Tea Centre** and that on 21st November 2014 he submitted his application together with all the documents stipulated in the notification/invitation dated 19th November 2014 including a certificate of good conduct valid upto 29th November 2014 which was subsequently renewed upon his application dated 25th November 2014.

NOTICE OF MOTION

2. Together with the said petition the petitioner filed under certificate of urgency a Notice of Motion in which he sought the following orders:-
 - a. *Temporary injunction restraining the respondents from conducting the election pending the hearing and determination of the application.*
 - b. *Temporary injunction pending the hearing and determination of the petition herein.*
 - c. *Mandatory order of injunction directed to the respondents compelling inclusion of the petitioner into the list of candidates vying or shortlisted to participate in the election of the 1st respondent.*
1. On 31st December 2014 the matter appeared before Justice Okongo in the presence of M/s Mose for the petitioner and Mr. Millimo for the respondent who certified the application urgent and granted temporary injunction pending inter partes hearing.

RESPONSE

2. In reply to the said application the respondents through Mr. John Kennedy Omanga filed a replying affidavit in which he deponed that the respondents are Limited Liability Companies incorporated under the **Companies Act, Cap 486** and are therefore governed by the said statute and their Memorandum and Articles of Association.
3. It was deponed that the respondents entered into a management agreement dated 15th April 2009 in which the 2nd respondent was appointed the managing agent of the 1st respondent. It was deponed that the said management agent under Clause D as read with Clause 2.2.9 the 2nd respondent was mandated to provide *inter alia* professional services that would ensure that the 1st respondent complied with its own Memorandum and Articles of Association together with the provisions of the Companies Act.
4. It was further deponed that pursuant to the Articles of Association of the 1st respondent and the provisions of the Companies Act, persons in the names of Directors are elected by shareholders to manage the affairs of the 1st respondent which elections are provided for under **Articles 87 - 90** of the 1st respondent's Memorandum and Articles of Association which elections are held from time to time as provided for aforesaid.
5. It was deponed that to ensure that the electoral process is conducted in a civilized and orderly manner, the 2nd respondent developed Election Rules and Regulations to oversee the process and also to resolve any dispute arising therefrom.
6. It was deponed that the petitioner offered himself as a candidate among others for the post of a Director, Zone 1 Electoral Area and submitted document in support thereof which included the petitioner's handwritten application letter, national identity card, KCSE certificate, Tax compliance certificate, Bonus Founder Share certificate, Police clearance certificate dated 29th November 2013, police clearance certificate receipt dated 25th November 2013, Rules compliance

- and Acceptance undertaking.
7. Upon deliberations the verification committee arrived at a conclusion that the petitioner herein among other candidates were unsuccessful for the prequalification to vie for the post of a director on the ground that he did not submit a valid certificate of good conduct and further that the petitioner lodged an appeal against the said decision of which the constituted dispute resolution committee of 15th December 2014 found that the appeal had no merit.
 8. It was further deponed that the validity of the documents submitted by the candidate is evaluated as on the date of verification and not any other date such as the submission date or otherwise. It was therefore submitted that the candidates who were successful in the nomination exercise had been cleared for election which was scheduled for 6th January 2015 and therefore their shareholders of the 1st respondent who are over twenty four thousand have legitimate expectations to engage in the election process of electing their preferred directors for representation.
 9. It was deponed that the order sought by the petitioner herein if issued shall throw into disarray the respondents election process and to irreparably disrupt the process.
 10. The application was on 31st December 2014 certified urgent and an interim order of conservatory granted pending the inter partes hearing before this court.

SUBMISSIONS

11. When this matter appeared before me for inter parte hearing Mr. Mose appeared for the petitioner while Mr. Millimo appeared for the respondent and opposed the petition.
12. It was submitted by Mr. Mose that what the petitioner is seeking is to be included amongst the prequalified candidates on the ground that at the time when the same lodged his letter of application he had included a valid certificate of good conduct which was to expire on 29th November 2014 midnight and that at the date of application he had satisfied all the requirements.
13. It was submitted further that the petitioner on 25th November 2014 applied for an extension of the certificate of good conduct the receipt thereof he presented to the factory unit manager and a new certificate issued on 3rd December 2014 and therefore at the time of verification which was done on 9th December 2014 the petitioner had in force a valid certificate of good conduct.
14. It was therefore submitted that by virtue of **Article 47** of the **Constitution of Kenya 2010** the right to Fair Administrative Action the actions of the respondents were unlawful and unfair and therefore in contravention of **Articles 19** and **20** of the **Constitution** which binds all legal entities and therefore the court was urged to exercise the powers granted under **Article 23** of the **Constitution**. It was submitted that **Article 20** of the **Constitution binds** everybody including legal entities.
15. Mr. Millimo for the respondents submitted that under the 1st respondent's Director Elections Rules one of the requirements is being of good standing in society at **Article 88 (1)** and that the date of submissions by interested persons was on 9th December 2014 at noon as per notice dated 10th November 2014 and that the validity of the documents should have been at the time of verification.
16. It was submitted that the respondent had provided for an appeal process which the petitioner followed and which failed since he had not submitted the required documents as at the date of appeal. It was therefore submitted that the petitioner was not qualified to participate in the election since he did not have certificate of good conduct.
17. It was further submitted that the petitioner seeks a mandatory injunction which can not be granted since the matter is not a plaint where mandatory injunction can be granted at interlocutory stage. It was further submitted that the respondents are private entities subject to Companies Act and that there has not been any allegation of breach of the said Act. It was therefore submitted that the court has no jurisdiction to amend or rewrite rules of the company.
18. It was submitted that the court can not micro manage the private companies and that the petitioner has not submitted that any rules of the company had been violated. In support thereof reliance was placed on my decision in **Kelvin Kariuki Kinyune -vs- Dedan Kimathi University of Technology**. It was further submitted that the rights alleged to have been violated are private rights and that the petitioner has not demonstrated any constitutional rights which have been violated.

19. It was the respondents' case that the Rules that govern the grant of injunctions had not been met by the petitioner. It was further submitted that once power had been granted to the Management Agent, then it was the said agent to manage the election. In support thereof the case of **Affordable Homes Africa Ltd -vs- Ian Henderson & 2 others – Milimani Commercial Courts HCCC No.524 of 2004** was submitted.
20. It was further submitted that so long as the rules established to ensure the elections are valid they can not be declared unconstitutional and there is therefore no sufficient cause for the court to interfere with their exercise. In support of the submission the following cases were submitted – **Kisii High Court Petition No.181 of 2010 – Kerosi Ondieki -vs- Minister of State for Defence & another** and **Lucy Wanjiru Njunge & 2 others -vs- Job Mwangi Macharia & 9 others – Nakuru High Court Civil Suit No.158 of 2005.**
21. It was finally submitted that the Unit Manager was right in rejecting the petitioner's application and in support thereof **High Court at Kericho Civil Suit No.102 of 2009 – Robert K. Bett & another -vs- Unit Manager Mogogosiek Tea Factory Ltd. & 2 others** was used. The respondent further stated that the petitioner had not met the requirement for the grant of mandatory injunction at the interlocutory stage and that there is the element of public interest of the shareholders having an election director in place against the rights of the petitioner. In support thereof the following cases which I have had the advantage of reading were submitted:-
1. **High Court at Garissa Petition No.2 of 2013 – Abdi Salat Agalab -vs- Governor Garissa County & another**
 2. **Green Valley Enterprises Limited -vs- Naisiandi Mpeshe & others – Nairobi ELC NO.601 of 2013**
 3. **East African Cables Limited -vs- The Republic Procurement Complaints Review and Appeals Board & another – Court of Appeal at Nairobi Civil Appeal No.109 of 2007.**
 4. **Samuel G. Kabiru -vs- Kenya Tea Development Agency Limited & another – High Court at Nairobi Civil Case No.1 of 2014.**

UNCONTESTED ISSUES

1. From the pleadings and submission herein the following issues are uncontested:-
 - a. *The elections of directors of the 1st respondent had been called by the 2nd respondent and schedule of events thereof given to all the parties and that those elections were to be governed by rules issued by the said 2nd respondent as circular No.40/2014 dated 19th November 2014.*
 - b. *The regulations provided for a dispute resolutions system which provided that if the issue in dispute is in respect of lack of submission of required documents and for the purposes of the case original certificate of good conduct – the petitioner/disputant/appellant must attach proof of having applied for the same before the closing (of submission of) of 9th December 2014 and attach a valid certificate.*
 - c. *The 2nd respondent constituted Dispute Resolution Committee made up of the following:-*
 1. *Chege Karoba – Chairman*
 2. *Peter Mbadi – D. Chairman*
 3. *Paul Maina*
 4. *Caroline Mukiira*
 5. *Ronald Moguche*
 6. *Juliet Gachihi*
 7. *Caroline Gituma – Secretary*
 - a. *The petitioner at the time of lodging his application tendered in a certificate of good conduct dated 29th November 2013 together with official receipt dated 25th November 2014 in respect of a clearance certificate produced by the respondent as JKU5(g).*
 - b. *The petitioner was disqualified on the basis that he did not submit a valid certificate of good conduct by a letter dated 10th December 2014.*

- c. On 11th December 2014 the petitioner lodged an appeal and on 15th December 2014 the chairman of the Dispute Resolution Committee notified the petitioner that his complaint was found without merit.
- d. Being aggrieved by the said decision the petitioner filed this petition.

ISSUES FOR DETERMINATION

1. The court has identified the following issues for determination.
 1. *Did the petitioner meet the conditions set by the respondent in respect of election of a director of the 1st respondent.*
 2. *Has the petitioner's constitutional right to fair administrative process been violated.*
 3. *Has the petitioner met the conditions for grant of mandatory injunction.*
 4. *What order should this court make.*
1. For the avoidance of doubt I have said before would restate the same position, that not all disputes arising between parties and entities should be elevated into constitutional litigation. The dispute herein is that between a member and shareholder of the 1st respondent and the respondents in respect of the elections as a director of the 1st respondent and the same should be properly adjudicated by this court exercising its civil jurisdiction.
2. The above notwithstanding in view of the provision of **Article 159** of the **Constitution of Kenya 2010**, the era of Legal Technicalities is long buried and it is the duty of the court to do substantive justice to the parties before the court and therefore take the considered view that this court has jurisdiction to determine the issues as presented herein above.
3. The rules of the 1st respondent as regards the qualification to the office of director requires among others at **Article 88 (1)** that he must be a person of good standing in society. As evidence of that the respondent requires one to produce a certificate of good conduct issued by the CID. To my mind therefore a certificate of good conduct is rebuttable evidence of a person of good standing in society.
4. Whereas the petitioner did not provide a valid certificate of good conduct as at 9th December 2014 the date of verification as at 15th December 2014 the date of appeal the petitioner had met the requirement as evidenced by the respondent's replying affidavit paragraph 12.
5. In therefore dismissing the petitioner's appeal the respondent's Dispute Resolution Committee violated their own Rules as stated in Circular No.42/2014 and therefore find as a fact that the petitioner's rights to fair administrative procedure were violated. Further having acted against their own rules the decision of the Disputed Resolution Committee dated 15th December 2014 is hereby quashed and set aside.
6. In **Green Valley Enterprises Ltd (supra)** P. Nyamweya J at page 4 thereof had this to say:-

“The principles for the grant of mandatory injunction were set out by the Court of Appeal in Kenya Breweries Ltd and another -vs- Washington Okeyo (2002) 1 E.A.109 wherein it was held that there must be special circumstances shown over and above the establishment of a prima facie case for a mandatory injunction to issue and even then only in clear cases where the court thinks that the matter ought to be decided at once. As to what constitute a prima facie case, the Court of Appeal in Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 others (2003) eKLR stated as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttable from the latter.”

7. In this case the special circumstances are that as at 3rd December 2014, the petitioner had in force a valid certificate of good conduct, there is no evidence tendered that between 29th November

- 2014 and 9th December 2014 the petitioner had ceased being a man of good standing in society. There is evidence that at the time of the appeal the same had in force a valid certificate of good conduct and therefore his disqualification was unreasonable without any lawful justification.
8. For the avoidance of doubt it is the members of the 1st respondent who would decide whether the petitioner becomes its director or not and for proper management of the affairs of the 1st respondent might be it is now time for the 2nd respondent to change the rules which are in operation to remove the control of the election process from the factory unit manager and appoint an independent body not influence by the factory politics.
 9. Based upon the material placed before the court, I am satisfied that the petitioner has made up a case for grant of prayer No.(c) which I hereby grant an order directed at the respondent to include the petitioner into the list of candidates vying or shortlist to participate in the election of the 1st respondent's directors at a date to be fixed by the respondents in compliance with the Memorandum and Articles of Association of the 1st respondent and in the words of Hon. Kenneth Matiba **“Let the people decide.”**
 10. Each party shall meet its own cost and it is so ordered.

Signed and dated 23rd day of January, 2015

J. WAKIAGA

JUDGE

Delivered on 23rd day of January 2015

In the presence of:-

N/A for Petitioner

N/A for Respondents