



**REPUBLIC OF KENYA**

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

**ELECTION PETITION NO. 1 OF 2015**

**WILLIAM NJIRAINI NGURU .....PETITIONER**

**-VERSUS-**

**MUNUNGA TEA FACTORY.....1<sup>ST</sup> RESPONDENT**

**RETURNING OFFICER MUNUNGA**

**TEA FACTORY .....2<sup>ND</sup> RESPONDENT**

**KENYA TEA DEVELOPMENT AGENCY LTD.....3<sup>RD</sup> RESPONDENT**

**PATRICK KARIMI MUTHII.....4<sup>TH</sup> RESPONDENT**

**RULING**

**WILLIAM NJIRAINI NGURU**, the petitioner/applicant herein has moved this court vide a Notice of Motion dated 21<sup>st</sup> January 2015 for the following reliefs:

- 1. That this court do issue an order restraining the confirmation of Patrick Karimi Muthii the 4<sup>th</sup> respondent herein, as the Director Mununga Tea Factory Ltd of MUKURU SOUTH ELECTORAL AREA passing debating, or adopting agenda NO. 5(b) in the annual General Meeting which was scheduled for 26<sup>th</sup> January,2015 for Mununga Factory Company Limited pending hearing and determination of this petition herein.***
- 2. That this court do order the 2<sup>nd</sup> respondent to produce the voting register and all proxy forms, and all records or documents used in the voting process in the elections of 6<sup>th</sup> January, 2015.***
- 3. That this court do order a recount of the votes cast personally and by proxy at all the four polling stations and that counting be done in the presence of the applicant herein.***
- 4. That costs be provided for.***

The petitioner/applicant has listed ten grounds in the face of the application which are supported by his affidavit sworn on 21<sup>st</sup> January 2015. He contends that the elections conducted on 6<sup>th</sup> January 2015 to get a director of Mununga Tea Factory Limited were not done in a fair and just way and that the elections were riddled with irregularities and anomalies. These can be summarized as follows.

- a. That the elections of 6<sup>th</sup> January 2015 were not free and fair as the 4<sup>th</sup> respondent obtained proxy forms and power of attorney signatures before other contestants including the applicant therefore giving him unfair advantage over the others.***
- b. That there was conflict of interests involving the 4<sup>th</sup> respondent whose wife alleged to be an***

*employee of 1<sup>st</sup> respondent, participated in the election exercise and that she took part in counting of votes at Gathambi polling station.*

- c. That some of the petitioners voters were denied right to vote and gave the example of a one David Karimi Kanegeni as one who could not vote due to mix ups and malpractices in the use of proxy forms .*
- d. That some dead voters allegedly took part in the election exercise and gave the following names Stephen Nderitu Mugo, Laban Munene, Edward Mundia, Muriithi Kabugu , Muthii Kamwenje and Michael M. Waru as deceased persons who allegedly voted posthumously.*
- e. That there were malpractices witnessed in the use or misuse of power of attorney forms some of which led to double counting of votes and fraud.*
- f. That the elections conducted given the environment under which they were conducted were not free and fair and it only just if scrutiny is done recounting of votes as per the valid register is done.*

Miss Thungu counsel for the applicant reiterated the above grounds and added that a production of voters register could provide an insight as to who actually voted and whether the number of votes casted indicated the number of shares held by the voters as it was not a one man one vote exercise. She also submitted that the reliefs being sought in this application being injunctive in nature were necessary and just as damages would not be adequate if the petitioner eventually succeeds in his petition . The reasons given by M/S Thungu, is that the applicant is a previous director and held the position for service rather than for monetary considerations. She further pointed out the balance of convenience tilts in favour of granting the reliefs sought and that granting the petitioner a chance to serve a director in the meantime will not prejudice the respondents in any way.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents through Mr Ngigi had strongly opposed this application. The 1<sup>st</sup> to 3<sup>rd</sup> respondents relied on affidavit of KENNETH MAVALE sworn on 10<sup>th</sup> February 2015. According to the deponent of that affidavit, the elections which is the subject of the petition herein were conducted in a transparent and fair manner with the results being declared in the presence of the candidates and their agents. According to him, there were no reports of irregularities or any anomaly at any of the centres where the elections were conducted. The 1<sup>st</sup> to 3<sup>rd</sup> respondents faulted the applicant for falsehoods exhibited in his affidavit in support of his application .They have pointed out for instance that contrary to what the applicant claims, there were proxy forms available for collection by all candidates on 19<sup>th</sup> November, 2014. They have annexed a notification that was sent out and marked it “KMI”.

On the issue of proxy forms, the 1<sup>st</sup> to 3<sup>rd</sup> respondents have submitted that proxy forms are always given or supplied to growers who would not in a position to physically go and vote at a polling centre and it was not possible to supply the same to candidates in the elections.

Mr Ngigi for the 1<sup>st</sup> to 3<sup>rd</sup> respondents faulted the application before me for being an afterthought and demonstration of a sore loser. He contended that the applicant has not provided specifics of his complaint but just out on fishing expedition looking for evidence to turn the tables against the victor, the 4<sup>th</sup> respondent herein. He took issue with the applicant for saying he learnt of election malpractices from his “agents” but did not specify which agent and on which date did he learn of the same since the agents signed tallying forms from all the tallying centres as exhibited in annexures marked “KM3”.

Mr Ngigi further opposed the application saying that the prayers sought in the application are irregular as they are hamped together instead of being alternative prayers.

On the issue of conflict of interest and the allegations of the involvement of 4<sup>th</sup> respondent’s wife on the election, the 1<sup>st</sup> to 3<sup>rd</sup> respondent have denied the same saying that no formal complaint was received prior or during the election about any impropriety by the wife of the 4<sup>th</sup> respondent whom they admitted was an employee but added that she is a grower herself and has a right to participate in the elections like other growers. They have however disputed the fact that she participated in the tallying of votes saying the same is false.

On the allegation of dead voters, the 1<sup>st</sup> to 3<sup>rd</sup> respondents denied the submissions made by the applicant saying that no proof has been given to show that the dead participated in the voting exercise either posthumously or otherwise by proxy.

The 1<sup>st</sup> to 3<sup>rd</sup> respondent in opposition to the reliefs being sought in the application have contended that the petitioner has failed to show that he has a prima facie case or that he would suffer irreparable harm if injunction is not issued. In support of this contention, Mr Ngigi quoted two authorities in the case of **EAST AFRICAN DEVELOPMENT BANK –VS-HYUNDAI MOTORS K.LTD (2006) e KLR** and the case of **NICHOLAS MAHIHU –VS- NDIMA TEA FACTORY LTD & ANOTHER (2009) e KLR**.

The 1<sup>st</sup> to 3<sup>rd</sup> respondents have also faulted the applicant for seeking equitable remedies with unclean hands as demonstrated by the affidavit of one Albert Munene Kinyua and opines that the contents of paragraph 22 of the said affidavit are contradictory and misleading and that if there was any fraud in the use of proxy forms then the same were perpetuated by donors affiliated to the applicants.

Finally the 1<sup>st</sup> to 3<sup>rd</sup> respondents submitted through their counsel that the position of a director is salaried and the remuneration can be ascertained therefore damages suffered can easily be computed and compensated given if the elections are reversed by this court.

The 4<sup>th</sup> respondent through Mr Abubakar advocate, also opposed the application associating himself with the sentiments expressed by the 1<sup>st</sup> to 3<sup>rd</sup> respondents. The 4<sup>th</sup> respondent, through his affidavit sworn on 10<sup>th</sup> February, 2015 deponed inter alia that the elections that saw him being declared the victor, was done in a transparent manner. He has faulted the applicant for peddling lies and making baseless allegations which to him are quite unfounded.

Mr Abubakar contended that the application is a non starter as the petition filed is incompetent and bad in law. He pointed out that as framed the petition is presented as though it is an election petition under the Elections Act of 2011 when it is obviously not and that the petition is unsupported by a verifying affidavit or any evidence supporting it. According to Mr Abubakar the application is introducing extraneous matters to the petition as the petition makes no claim of proxy forms. The 4<sup>th</sup> respondent has faulted the application for seeking to amend the petition irregularly which is incompetent. He has quoted the case of **OSORE OGUTU –VS- MICHAEL ONYURA ARINGO & 2 OTHERS** (unreported) and **CHARLES OIGARA MOGERE –VS- CHRISTOPHER MOGERE OBURE & 2 OTHERS (2013) e KLR** to buttress this argument and further that a recount of votes ordinarily cannot be ordered without the actual petition seeking the same remedy.

The 4<sup>th</sup> respondent has also pointed out that the applicant did not raise any complaint or channel it to the right channel as provided by the election regulations as annexed by the applicant as “WNN2” in his affidavit in support of his application now before court.

The 4<sup>th</sup> respondent has further shielded his wife from blame saying that she was proceeding on normal leave contrary to averments from the applicant. The 4<sup>th</sup> respondent has alleged that DAVID KARIMI KANEGENI informed him that he was not going to be present during the voting exercise and was given proxy forms which he executed willingly and upon execution of proxy forms he could not be allowed to vote again during the voting exercise .

On the issue of dead voters, the 4<sup>th</sup> respondent submitted that one of the dead persons named is actually his deceased father MUTAHI KAMWENJI and there is no evidence to show that he voted. The 4<sup>th</sup> respondent further contend that the tallying of voters was done openly and the same showed that he had won by a huge margin of 7000 votes. Therefore there was no doubt as to who won the elections and that is why he was issued with a certificate to certify that he was a director elect.

The 4<sup>th</sup> respondents contended that the affidavit of ALBERT MUNENE is perjurious and should not

be relied as all agents signed tallying forms in election centres showing that the election exercise was conducted smoothly and without

On the issue of the balance of convenience the 4<sup>th</sup> respondents has contended that the same tilts in his favour and that Mununga Tea Factory deserves to be led by a popularly elected director and according to him, he is that director.

I have considered all the affidavits filed in this petition in support of the application. I have considered the submissions made by M/S Thungu counsel for the petitioner/applicant herein. I have also considered the rival submissions made by all the respondents herein and the submissions made by Mr Ngigi counsel for 1<sup>st</sup> to 3<sup>rd</sup> respondent and Mr Abubakar counsel for the 4<sup>th</sup> respondent.

Although the Notice of Motion before does not state the provisions of the law under which the same is brought, the petition as presented invokes the provisions of **Elections Act, 2011** and the **Judicature Act cap 8 Laws of Kenya**. The notice of motion of course is hinged on the petition itself and the question that seemed to have bothered the petitioner herein is whether or not the Elections Act does apply to elections outside the general elections in this country. To put the matter to rest, the **Elections Act 2011** is defined as an Act of parliament to provide for the conduct to the office of the President, the National Assembly, the Senate, County Governor and County Assembly to provide for the conduct of referenda, to provide for election dispute resolution and for connected purposes. The Act or Statute is therefore specific to elections to the office of the President, the National Assembly, the Senate, County Governor and County Assembly members only. With due respect to the counsel for the applicant election of directors in a company like other elections in other bodies is not applicable here. Companies and other registered bodies and Societies have their own regulations and rules that govern elections of various offices and positions I will come back to issue and the relevant laws governing elections which is the subject of this petition later in this ruling.

Let me turn my attention to the reliefs sought in the application before me. The reliefs being sought in my view are injunctive both prohibitory and mandatory in nature. And being injunctive, the normal principles of injunctions does apply and there is no better case law on injunction than the famous case of **GIELLA –VS-CASSMAN BROWN & CO. LTD (1973) EA page 358**. The conditions for the grant of interlocutory injunction are now well settled. First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt, it will decide an application on a balance of convenience. The above is the threshold that an applicant coming to a court of law must of essence satisfy before qualifying to be granted the remedies of injunction.

Now let me examine the case or the petition filed in this case and see if the same as it stands has demonstrated a prima facie case with a probability of success. The respondents in unison submitted that the applicant's petition does not establish a case infact, the 4<sup>th</sup> respondent raised the issue of competence of the petition from the onset pointing out that it was defective and incompetent. Mr Abubakar submitted that the petitioner cannot invoke the **Election Act 2011** and I agree as I have indicated above. But perhaps more importantly the petition is unsupported. There is no affidavit supporting it and for good measure, M/S Thungu admitted that Elections Act was erroneously invoked and that the issue of verifying affidavit can be cured through an amendment and filing of affidavits. The petitioner however never said anything on the statements but assuming that the petition was a normal suit or that the petitioner actually wanted to file a suit on the basis of grievances pointed out, then what would automatically follow is the legal requirement to comply with **Order 3 Rule 2** and **Order 4 Rule 2 (2)** of the **Civil Procedure Rules** which is a compulsory requirement. In the absence of this, I am afraid the issue at hand now is not even whether the petition as it stands or presented stands the risk of being struck out in accordance with **Order 4 Rule 1(b)** of the above rules cited, but perhaps what even bedevils the petition application before me the more is the inapplicability of the Elections Act, 2011 as stated above. The impugned elections herein related to elections of a director of a company- the 3<sup>rd</sup> respondent herein. The management of companies whether private or public is governed by the **Companies Act ( Cap 486 Laws of Kenya)**. Election of directors and other

management issues are internal issues that are usually regulated by rules and regulations embedded in the articles of association and memorandum of association. Mr Abubakar is correct to point out that the applicant disregarded internal mechanisms of first dealing with complaints that may have arisen during the election exercise. The applicant has himself annexed the regulations that were properly given out by the 3<sup>rd</sup> respondent and exhibited them as “WNN 2”. I have gone through the regulations and tellingly at page 11 of the said regulations, internal mechanisms or avenue is provided for anyone with any complaint on the election process. There is a body (Dispute Resolution Committee) constituted to address such complaints and it would appear that avenues are provided to those who may be dissatisfied with the decision of the dispute resolution committee which is a court of law. No evidence was presented before me that the applicant did exhaust the internal mechanism before coming to this court. The applicant did not also allude any difficulty or reservations he had or could have had on the avenue provided for by the 3<sup>rd</sup> respondent in dealing with his complaint. Courts of law are normally reluctant to enter into the arena of disputes that arises from internal management of companies especially where the internal mechanism are proved to deal with such disputes. In the case of **MILKA ADHIAMBO OTIENO & ANOTHER –VS- ATTORNEY GENERAL & 2 OTHERS (2012) e KLR**, the respondents raised a jurisdictional point that the court lacked jurisdiction to entertain allegations of election malpractices that were alleged to have occurred during election of directors to the board of directors. Their argument was based on **Regulation 13 (2) of Sugar (Elections) Regulations 2002** which provided that all disputes arising out of an election under sugar( elections) Regulations shall be lodged with a tribunal set up under the regulations. The court held as follows:

***“ We therefore find and hold that the issue squarely lies within the jurisdiction of the Sugar Tribunal . It therefore follows that the petitioners ought to have preferred any complainants of election malpractices to the said Tribunal in the first instance”.***

The above ratio decidendi is apparent in the case of **PAOLO MURRI –VS- GIAN BATTISTA MURRI & ANOTHER (2000) e KLR** where the court held the view that the appointment of directors in a company is regulated by the companies Articles of Association and further observed as follows:

***“ The petition makes no allegation that the Articles of Association have been breached or any appointment made unlawfully. Upon a careful consideration of the petition it is plain and obvious that basically this is a dispute about internal management of the company and a court does not interfere with internal management of the company acting within its powers: See Rule in FOSS-VS- HARBOTTLE (1843) 2 HAKE 261 to see exceptional circumstances where court’s intervention is allowed e.g ultra vires, fraud e.t.c which have not been pleaded” (sic)***

In view of the above authorities though it is true that the applicant’s petition raises arguable issues but without the necessary amendments and compliance with the rules as pointed out above it may not see the light of day.

It is also important to note that it is a well established rule of evidence that whoever asserts a fact is under obligation to prove in order to succeed. The applicant has made a number of serious allegations including the issue of dead voters coming back to vote in the impugned election exercise but without proof at this stage of the proceedings I am unable to make any finding. The applicant though still has a chance to table facts proving that the elections were indeed marred by election malpractices.

It is also important to make a finding on whether damages could be adequate compensation to the applicant if he is to be successful in his petition. Well granted, it is my view that the position of a director contrary to the applicants view, is salaried with remuneration or benefits that can be ascertained with some degree of accuracy. I do find as a matter of fact that damages suffered can easily be computed and compensation given if he is successful in his petition. In accordance with the 2<sup>nd</sup> principle in Giella’s case it is therefore obvious that the application does not meet the threshold. I am not persuaded that the applicant’s views the position as that service to the community. Surely there are many non elective positions in any given community or society which can provide avenues for the

applicant to offer charitable services to his people.

I therefore find no material placed before me that persuades me that damages cannot be computed and cannot adequately compensate the applicant for the loss of his seat. In view of failure by the application to meet the 1<sup>st</sup> and 2<sup>nd</sup> threshold in Giella's case I do not consider it necessary to make any finding on the 3<sup>rd</sup> limb of balance of convenience since a court will only consider the balance of convenience where there is a doubt as to whether the first two principles have been met.

The prayers sought under prayer 4 and 5 of the application are premature at this stage in the absence of sound legal basis. The upshot of the above is that the application dated 21<sup>st</sup> January, 2015 lacks in merit. It must fail. I have no alternative but to dismiss it with costs. It is so ordered.

**R.K. LIMO**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 16<sup>TH</sup> DAY OF MARCH 2015** in the presence of

M/S Thungu Counsel for the applicant

Ms Kiragu for 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and holding brief for Mr Abubakar counsel for 4<sup>th</sup> respondent

Willy Court clerk