



**Njeru v Kamau & 4 others; Seventh Day Adventist Church
Kathagariri Branch & another (Interested Parties) (Civil Appeal
E059 of 2024) [2025] KEHC 4865 (KLR) (23 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4865 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E059 OF 2024
RM MWONGO, J
APRIL 23, 2025**

BETWEEN

EPHANTUS MUGENDI NJERU APPELLANT

AND

MOSES NJAGI KAMAU 1ST RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 2ND
RESPONDENT**

TEA BOARD OF KENYA 3RD RESPONDENT

KENYA TEA DEVELOPMENT AGENCY 4TH RESPONDENT

KATHAGARIRI TEA FACTORY COMPANY LIMITED 5TH RESPONDENT

AND

**SEVENTH DAY ADVENTIST CHURCH KATHAGARIRI
BRANCH INTERESTED PARTY**

**SEVENTH DAY ADVENTIST CHURCH MBUVORI BRANCH INTERESTED
PARTY**

RULING

Background and the Application

1. The appellant contested for the position of Director, Mbuvari Electoral Area in the Tea Elections at Kathangariri Tea Factory Company Ltd. The elections were held, following an extension of time, on 29th June, 2024.



2. Dissatisfied with the declared results, he lodged a complaint before the Dispute Resolution Committee (DRC) established under the Factory's Election Manual. The DRC dismissed the complaint, leading to the present application.
3. The 1st respondent/applicant filed this Notice of Motion dated 12th November 2024, seeking for an order that:
 1. The honourable court be pleased to strike out the Memorandum of Appeal dated 15th July 2024 and all the amendments thereto and or the appeal herein in its entirety for the honourable court lacks the requisite jurisdiction to entertain the matter.
4. The application is premised on the grounds set out on its face and in the supporting affidavit sworn by the 2nd respondent. In it, he stated that the appeal arises from the decision of the 4th and 5th respondents' Dispute Resolution Committee which is not a subordinate court. He referred to the internal election manual which is not legislation, and which simply states that any party dissatisfied with the decision of the committee may refer the matter to court; not through a civil appeal as preferred by the appellant. Therefore, there is no order being appealed against since the appeal does not arise from the decision of a subordinate court. He stated in that regard, that, this court is not equipped with the relevant jurisdiction to determine the appeal.
5. The application was opposed through grounds of opposition by which the appellant/respondent stated that the applicant is seeking a back-door review of this court's ruling delivered on 16th October 2024. That the issue of jurisdiction was determined through that ruling and if the applicant was not satisfied, he should have appealed against it at the Court of Appeal.

Submissions.

6. The interested parties filed their written submissions in which they argued that it is their members who were denied a chance to participate in the elections, thus, this argument forms the basis of the appeal itself. They relied on section 44 of the *Tea Act* and Article 165(3) of *the Constitution* which gives the High Court jurisdiction to determine the matter. Further reliance was placed on the case of Riley Services Limited v Judiciary [2015] KEHC 6976 (KLR) and Attorney General v Bala [2023] KECA 117 (KLR).
7. The 3rd respondent filed written submissions in support of the application. It stated that Rule 10(8) of the Manual for Election of Directors of Smallholder Factories does not permit referral of disputes to court in the form of appeals but rather as civil suits. He relied on the case of Joel Nyabuto Omwenga & 2 others v IEBC & another [2013] KEMC 68 (KLR) where the Magistrate's court stated that the court cannot confer jurisdiction upon itself.
8. The applicant submitted that the provisions of the Election Manual do not mean that the word 'refer' the matter to court should be interpreted to mean an appeal. He relied on the cases of Joel Nyabuto Omwenga & 2 others v IEBC & another [2013] KEMC 68 (KLR), Attorney General v Bala [2023] KECA 117 (KLR) and Isaac Mbugua Ngirachu v Stephen Gichobi Kaara [2021] KEHC 8022 (KLR). He urged that the issues raised in the memorandum of appeal should not be canvassed together with the constitutional issues arising herein, if any. That the court lacks jurisdiction to entertain the appeal since it is not based on an order of a subordinate court.

Issue for Determination

9. The core issue for determination is whether the order sought may be granted.



Analysis and Determination

10. The appellant filed a memorandum of appeal dated 15th July 2024. Through it, he sought for the following orders:
 1. The appeal be allowed; and
 2. The Decision of the Dispute Resolution Committee at Embu (Zone 6) - Petition No. 1 of 2024 - Ephantus Mugendi Njiru -vs- Moses Njagi Kamau delivered on 8th July, 2024, be set aside and substituted with a Judgment in favour of the Appellant as follows:-
 - a.) A declaration that Moses Njagi Kamau was not validly elected as the Director, Mbuvari Electoral Area, Kathangariri Tea Factory Company Limited.
 - b.) The Independent Electoral and Boundaries Commission do conduct fresh elections for the Position of Director, Mbuvari Electoral Area, Kathangariri Tea Factory Company Limited in strict compliance with the Law.
 - c.) The Respondents do bear the costs of this Appeal.
11. The grounds of appeal were stated as follows:
 1. The Dispute Resolution Committee erred in law and in fact by disregarding evidence of electoral malpractices furnished by the Appellant and in essence finding that the Appellant had not discharged both his Legal and Evidential burden of proof required of him.
 2. The Dispute Resolution Committee was not properly constituted as per the mandatory requirements of Regulation 6(1) of the Manual for Election of Directors of Small Holder Tea Factories.
 3. The Dispute Resolution Committee erred in law and in fact by failing to appreciate that the cancellation and postponement of the Elections at short notice prejudiced the Appellant, other aspirants and the voters.
 4. The Dispute Resolutions Committee failed to appreciate that the Elections having been postponed from Friday 28th June, 2024, to Saturday 29th June, 2024, without consulting the Stakeholders including the Aspirants and the Voters the said elections held on Saturday 29th June, 2024, which is a Sabbath day, were in contravention of various Constitutional Rights of various stakeholders who practice the Seventh Day Adventist (SDA) Faith. The said action contravened and not only curtailed the voters Rights to Freedom of Religion as enshrined in Article 32 of [the Constitution](#) but also Equality and Discrimination in Article 27 of [the Constitution](#).
 5. The Dispute Resolutions Committee erred by failing to appreciate that the decision to hold elections on a Sabbath Day and the restrictive timelines imposed by the Regulations in the Elections Manual effectively prevented the voters practicing the SDA Faith to challenge the elections results thereby infringing on their Constitutional Rights to Fair Administrative Actions, Access to Justice and a Fair Hearing as enshrined in Articles 47, 48 and 50 of [the Constitution](#) of Kenya.



12. In the course of determining an application accompanying the memorandum of appeal, this court conceded that there are constitutional issues arising through the Memorandum of Appeal. Through ruling dated 16th October 2024, this court stated as follows:

“29. While the arguments are sensible, in as much as the issue of the applicant’s sabbath was not raised earlier but it appears for the first time in the memorandum of appeal, it is my view that the same is a valid constitutional issue that the court, bearing jurisdiction to determine, cannot turn away from..... An issue of violation of constitutional rights and fundamental freedoms may be addressed by the court whether or not it is brought through a formal petition. Rule 10(3) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules provides thus:

“(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.”

To this end, it is my view that the constitutional issues raised are validly before the court thus, the input of the intended interested parties will help the court to determine the issues.”

13. The question of jurisdiction is before the court. In order to determine it, it is prudent to go over the arguments made. The election herein is for the Directors of Small holder tea factories and it is indisputably governed by the Manual for Election of Directors of Small Holder Tea Factories, 2024 (hereinafter referred to as ‘the Manual’). Disputes arising from these elections are heard by the Dispute Resolution Committee established under part III of the Manual (hereinafter referred to as ‘the Committee’)

14. The applicant herein has stated that the appeal is based on a pronouncement by the Committee which also dismissed his petition. In that petition for determination by the Committee, the appellant sought for orders that the election of the applicant herein as Director of Mbuvari Electoral zone be nullified, the certificate be revoked, the voter register be scrutinized and a repeat election be ordered.

15. As it were, the appellant was dissatisfied with the finding of the Committee on these issues, hence the appeal herein. According to Rule 8(10) of the Manual:

“any person who is not satisfied with the decision of the Election Dispute Resolution Committee may refer the matter to court.”

16. The provision does not specify to which court the matter should be referred. When it is recommended that a matter be referred to court, the relevant laws and rules of procedure apply, in this case, the *Civil Procedure Act* and Rules. Section 11 of the Civil Procedure Rules provides for the place of suit as follows:

“Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same county competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts:



Provided that—

- (i) if a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court; and
- (ii) nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate court in the same county.”

17. This court sitting as an appellate court would be tasked essentially with re-evaluating the evidence adduced at trial as was stated in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123. Appeals may also lie in the High Court from tribunal findings. In this case, the Manual provides that anyone dissatisfied by the committee’s decision should refer the matter to court. The Manual did not specify that the matter be referred to the High Court, even though it bears unlimited original jurisdiction bestowed upon it under Article 165(3)(a) of *the Constitution*. In my view, this means that the appellant herein ought to have applied the *Civil Procedure Act* and instituted a civil suit in the court of the lowest grade competent to try it.
18. As long as this appeal subsists, there remains unresolved constitutional issues and civil procedure issues. These 2 categories of suits can seldom be determined within the same suit. If this had been a constitutional petition with the civil issue arising within it, this court, could possibly have applied the doctrine of constitutional avoidance and recommended that the dispute be placed before a civil court for determination. As it were, the election dispute is before the wrong court since, as already stated, it should have been referred to the Magistrates’ court and not the High Court. That being said, the constitutional issues remain and were considered as valid ones.
19. Constitutional issues still remain validly raised before this court which bears jurisdiction to hear them as bestowed to it under Article 165(3)(b) of *the Constitution*. Rule 10(3) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules indeed permit aggrieved parties to approach the court informally on issues of violation of rights and fundamental freedoms under *the Constitution*.
20. However, this does not mean that the appellant’s counsel should disregard the rules of procedure, regardless of the form taken in his petition. In *Mwiciigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* [2016] KESC 2 (KLR) the Supreme court stated thus:

“This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case that it benefits not the attribute of mere technicality. The conventional wisdom, indeed is that procedure is the hand maiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the court would not hesitate to declare the attendant pleadings incompetent.”

Conclusion

21. While the constitutional issues arising may be heard by this court, it is clear that the remaining electoral issues are not properly before the High Court sitting as an appellate court. It would be unconscionable to allow the appeal to stand as it is because the court cannot exercise its constitutional jurisdiction



only and leave the civil matter undetermined for want of jurisdiction, yet the constitutional issue arose through the civil matter. It is necessary and in the interest of justice that the constitutional matter be heard in its proper and right forum, being presented as a constitutional petition.

22. In light of the foregoing, the application has merit.
23. Accordingly, the appeal is hereby struck out and the following orders are issued:
 1. The orders sought through the Memorandum of Appeal be sought through a civil suit instituted in the relevant Magistrates' Court;
 2. The appellant to file a proper Constitutional Petition detailing violation of his rights in this court, within 30 days of this ruling.
24. Costs to follow the event.
25. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 23RD DAY OF APRIL, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

1. Abubakar for 1st, 2nd, 4th and 5th Respondents
2. Gomba for Appellants
3. Kabalika holding brief for Orege for 3rd Respondent
4. Gomba holding brief for Ochieng for Interested Party.
5. Francis Munyao - Court Assistant

