



**Tonui & 2 others v Kapkoros Tea Factory & another (Constitutional  
Petition E003 of 2025) [2025] KEHC 4816 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4816 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CONSTITUTIONAL PETITION E003 OF 2025  
JK NG'ARNG'AR, J  
APRIL 24, 2025**

**BETWEEN**

**ERICK TONUUI ..... 1<sup>ST</sup> PETITIONER  
KIPRONO LANGAT ..... 2<sup>ND</sup> PETITIONER  
ANTHONY KIPYEGON NGETICH ..... 3<sup>RD</sup> PETITIONER**

**AND**

**KAPKOROS TEA FACTORY ..... 1<sup>ST</sup> RESPONDENT  
KENYA TEA DEVELOPMENT AGENCY (MANAGEMENT SERVICES  
LIMITED) ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Petitioners/Applicants have moved the court by the Notice of Motion dated 20<sup>TH</sup> March, 2025. the application is premised on the provisions of sections 1,2,3,10, 159(2) and 259 of *the constitution* of Kenya 2010, Section 1 and 3A of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya), Order 40, Rules 1 and 2 and order 51 rule 1 *Civil Procedure Rules* and Article 19,25(C), 27,29 and 50 *the Constitution*. they seek the following orders:
  - a. spent
  - b. That this honorable court be pleased to restrain the Respondents jointly and severally from continuing with the process of separation of the Applicants' factories account (Kapkoros, Tirgaga, Olenguruone and Motigo), buying centers and farmers green leaf supply numbers or undertaking any process that may lead to the above separation pending the hearing and determination of this application.



- c. That this honorable court be pleased to restrain the Respondents jointly and severally from continuing with the process of separation of the Applicants' factories account (Kapkoros, Tirgaga, Olenguruone and Motigo), buying centers and farmers green leaf supply numbers or undertaking any process that may lead to the above separation pending the hearing and determination of the petition herein.
2. The application is supported by an affidavit of Erick Tonui sworn on 20<sup>TH</sup> March, 2025. The same was sworn on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners /Applicants following a signed authority to depone dated 20<sup>th</sup> March, 2025.
  3. The respondent filed a notice of preliminary objection to be determined in limine dated 26<sup>th</sup> March, 2025. They raise issue that the facts pleaded in the petition and the accompanying application together with the facts and substance in dispute concerns the merits of resolution passed on 9<sup>th</sup> January, 2025 and 3<sup>rd</sup> January, 2025 by the 1<sup>st</sup> Respondent's board of Directors. Both resolutions are on record.
  4. They further contend that it is trite law that the conduct of business of any company are subject to its Memorandum and Articles of Association and the Companies Act, 2025.
  5. The issue for determination is whether the preliminary objection has merit.
  6. The case of Mukisa Biscuits Manufacturing Ltd v West End Distributors (1969) EA 696 is renowned on the issue of what constitutes a preliminary objection. The court observed thus:-  
 .....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.
  7. Sir Charles Newbold P. stated:-  
 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 the 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.
  8. Similarly the Supreme Court in the case of Hassan Ali Jobo & another v Suleiman Said Shabal & 2 others SCK Petition No 10 of 2013 [2014] eKLR held that: -  
 “A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”
  9. Further in the case of Hassan Nyanje Charo v Khatib Mwashetani & 3 others, [2014] eKLR the court held that:-  
 “Thus a preliminary objection may only be raised on a ‘pure question of law.’ To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”



10. Plainly, a preliminary objection must be founded upon a settled and brisk point of law, to the intent that its application to undisputed facts, leads to but one conclusion that the facts are incompatible with the point of law.
11. This court lays reference to section 238, 239, 240 and 241 of the *companies Act* 2015 which gives power to the minority shareholders to file a derivative suit where they feel aggrieved by act of omission involving negligence, default, breach of duty or trust by a director of the company. The power so given by law should and must be exhausted in compliance with the law.
12. Particularly, this court is guided by the provisions of section 239 of the *Companies Act* on Application for permission to continue derivative claim. The act provides thus:
  - (1) In order to continue a derivative claim brought under this Part by a member, the member has to apply to the Court for permission to continue it.
  - (2) If satisfied that the application and the evidence adduced by the applicant in support of it do not disclose a case for giving permission, the Court—
    - (a) shall dismiss the application; and
    - (b) may make any consequential order it considers appropriate.
  - (3) If the application is not dismissed under subsection (2), the Court—
    - (a) may give directions as to the evidence to be provided by the company; and
    - (b) may adjourn the proceedings to enable the evidence to be obtained.
  - (4) On hearing the application, the Court may—
    - (a) give permission to continue the claim on such terms as it considers appropriate;
    - (b) refuse permission and dismiss the claim; or
    - (c) adjourn the proceedings on the application and give such directions as it considers appropriate.
13. Further this court finds that Section 279 of the *Companies Act* give directions on the Power of members to convene general meeting at the expense of the company provides as follows:
  - “(1) If, after having been required to convene a general meeting under section 277, the directors fail to do as required by section 278, the members who requested the meeting, or any of them representing more than one half of the total voting rights of all them, may convene a general meeting.
  - (2) If the requests received by the company included the text of a resolution intended to be moved at the meeting, the members concerned shall include in the notice convening the meeting the text of the intended resolution.
  - (3) The members concerned shall ensure that the meeting is convened for a date not more than three months after the date on which the directors were requested to convene a meeting.
  - (4) The members concerned shall convene the meeting, as nearly as practicable, in the manner in which meetings are required to be convened by directors of the company.



- (5) The business that may be dealt with at the meeting includes a resolution of which notice is given in accordance with this section.
- (6) The company shall reimburse the members concerned for all reasonable expenses incurred by them because the directors failed to convene a meeting as required by section 278.
- (7) The company shall deduct from the remuneration payable to the directors who were in default the amount of expenses reimbursed to members under subsection (6)."

14. This court notes that the above provisions give guidance on the modes and mechanisms of dispute resolution before lodging the current petition in court. All exhaustible mechanisms provided in law have not been exhausted. The company has a right through its directors to make resolutions on behalf of shareholders to far as it is their best interest.
15. The obtaining position in law is that the exhaustion doctrine or avoidance doctrine require that a party exhausts the statutory procedures before proceeding to such a petition.
16. It has been held severally that a party is required to exhaust any alternative dispute resolution mechanism before filing a matter in Court as a matter of law. To this end the Court of Appeal in the case of *Geoffrey Mutbinja & another v Samuel Muguna Henry & 1756 others* [2015] CA 304 (KLR) the court of Appeal observed as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.” See also Peter Muiruri Kabiru & 2 Others –Vs- Paul Wandati Kabue HCCC NO. 319 of 2009 (Milimani).

17. I am persuaded that the petitioners failed to abide by the provisions I have quoted above and that the matter was prematurely brought before this court.
18. For the reasons I have set out, I find that the preliminary Objection dated 26<sup>th</sup> March, 2025 has merit and it is hereby allowed. The petition is accordingly struck out with costs for being improperly before the court.

**DATED AND DELIVERED AT BOMET THIS 24<sup>TH</sup> APRIL, 2025**

**J. K. NG'ARNG'AR**

**JUDGE**

Court of Assistant: Siele

Mugumiya for the Petitioners/Applicants.

C. Koech for the Respondents.

COURT



Certified copies of the ruling to be issued to the parties. Leave to appeal is granted.

**J. K. NG'ARNG'AR**

**JUDGE**

