



**Machogu & 5 others v Independent Electoral & Boundaries Commission & 44 others;
Seventh-Day Adventist Church, East Kenya Union Conference, Nyamira Conference
(Interested Party) (Petition E005 of 2024) [2024] KEHC 9461 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9461 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
PETITION E005 OF 2024
WA OKWANY, J
JULY 19, 2024**

BETWEEN

**MOFFAT TEYA MACHOGU MANG'ARE 1ST PETITIONER
EVANS MAOGA KIRIAMA 2ND PETITIONER
ELIJAH NYABUTI MAMBOLEO 3RD PETITIONER
JOSHUA NYAMBACHA 4TH PETITIONER
JOSEPH NYAMWARO MOMANYI 5TH PETITIONER
SAMSON KIBEGWA NYAOSI 6TH PETITIONER**

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
RESPONDENT
TEA BOARD OF KENYA 2ND RESPONDENT
KENYA TEA DEVELOPMENT (MS) AGENCY LIMITED 3RD RESPONDENT
GIANCHORE TEA FACTORY COMPANY LIMITED 4TH RESPONDENT
NYANKOBA TEA FACTORY COMPANY LIMITED 5TH RESPONDENT
KEBIRIGO TEA FACTORY COMPANY LIMITED 6TH RESPONDENT
NYANSIONGO TEA FACTORY COMPANY LIMITED 7TH RESPONDENT
TOMBE TEA FACTORY COMPANY LIMITED 8TH RESPONDENT
SANGANYI TEA FACTORY COMPANY LIMITED 9TH RESPONDENT
OTUTO DANIEL MAKORI 10TH RESPONDENT**



MONICA MORAA	11 TH RESPONDENT
MOMANYI DANIEL RASUGU	12 TH RESPONDENT
OMWENGA NICHOLAS	13 TH RESPONDENT
KERINA RICHARD NYAKUNDI	14 TH RESPONDENT
OGATA ELIJAH ONSONGO-	15 TH RESPONDENT
NYAMONGO JOSEPH ACHOKI	16 TH RESPONDENT
NYANDIEKA THOMA ONCHABA	17 TH RESPONDENT
MAKORI YUVINALIS MATUNDA	18 TH RESPONDENT
DICKSON RANGI DEMO	19 TH RESPONDENT
NYAKUNDI DANCAN NYANGAU	20 TH RESPONDENT
NYAKUNDI DAVID OMBAGI	21 ST RESPONDENT
MANGENYA THADDEW MOSE	22 ND RESPONDENT
OBARE NELSON MOKAYA	23 RD RESPONDENT
ABUGA JACOB ORORI	24 TH RESPONDENT
NYAKUNDI SIMON NYANGAU	25 TH RESPONDENT
MOSIGISI TABELUS JOEL	26 TH RESPONDENT
GESORA RICHARD MONGARE	27 TH RESPONDENT
ONYANCHA NELSON ONDUKO	28 TH RESPONDENT
BURU PETER OKONGO	29 TH RESPONDENT
OMAYO DAVID	30 TH RESPONDENT
NYAMBATI CHARLES ONYAMBU	31 ST RESPONDENT
MOSIGISI ZEBEDEE BUNDI	32 ND RESPONDENT
JAMES M AKUMA	33 RD RESPONDENT
TOM MBOGA	34 TH RESPONDENT
ROBERT NYANYUKI	35 TH RESPONDENT
OGATO T MOMANYI	36 TH RESPONDENT
NAHASHON M OOGA	37 TH RESPONDENT
JAMES K NYAGISERE	38 TH RESPONDENT
DAVID R NYAMONGO	39 TH RESPONDENT
ONDIEKI EVANS ONGAGA	40 TH RESPONDENT
ARANI ANDREW ONTERI	41 ST RESPONDENT
OCHARO NYANCHAMA EVANS	42 ND RESPONDENT



ARISI VINCENT ATEI 43RD RESPONDENT
NYATIGO CHRISTOPHER NYABWARI 44TH RESPONDENT
NYAMOKO DANIEL ONDIEKI 45TH RESPONDENT

AND

SEVENTH-DAY ADVENTIST CHURCH, EAST KENYA UNION
CONFERENCE, NYAMIRA CONFERENCE INTERESTED PARTY

RULING

1. The Petitioners herein filed the petition dated 9th July 2024 seeking the following orders: -
 - a. An order that the smallholder tea factories' directors' elections for directors of NYANSIONGO TEA FACTORY COMPANY LIMITED, GIANCHORE COMPANY LIMITED, NYANKOBA TEA FACTORY COMPANY LIMITED, KEBIRIGO TEA FACTORY COMPANY LIMITED, TOMBE TEA FACTORY COMPANY LIMITED and SANGANYI TEA FACTORY COMPANY LIMITED is null and void.
 - b. A declaration that the election of Directors of NYANSIONGO TEA FACTORY COMPANY LIMITED, GIANCHORE COMPANY LIMITED, NYANKOBA TEA FACTORY COMPANY LIMITED, KEBIRIGO TEA FACTORY COMPANY LIMITED, TOMBE TEA FACTORY COMPANY LIMITED and SANGANYI TEA FACTORY COMPANY LIMITED be conducted afresh.
2. Concurrently with the petition, the Petitioners filed an application dated 9th July 2024 under certificate of urgency, seeking orders as follows: -
 1. Spent
 2. That pending the hearing and determination of this application, the honourable court be pleased to issue an interim order injunction restraining the 1st and 2nd respondents, their agents, assigns and/or representatives from swearing and/or confirming the nominee directors of Gianchore Tea Fctory, Nyankoba Tea Factory, Kebirigo Tea Factory, Nyansiongo Tea Factory, Tombe Tea Factory And Sanganyi Tea Factory whatsoever.
 3. That upon prayer (2) hereinabove being granted, the honourable court be pleased to issue a temporary order of injunction restraining the 1st and 2nd respondents, their agents, assigns and/or representatives from swearing and/or confirming the nominee directors of Gianchore Tea Fctory, Nyankoba Tea Factory, Kebirigo Tea Factory, Nyansiongo Tea Factory, Tombe Tea Factory And Sanganyi Tea Factory pending the hearing and determination of this petition.
 4. Costs of this application be provided for.
3. The application is supported by the 1st Petitioner's Affidavit and is premised on the following grounds: -
 1. That the 1st and 2nd respondents rescheduled elections from 28th June, 2024 in terms of the timetable for smallholder's tea factories election for directors to 29th June, 2024 which was on a Saturday thus locking out over 50% of the voters and candidates from participating in the exercise considering that this is the area for the seventh day Adventist faithfuls.



2. That even if any notices were issued, the same must have been done on 28th June, 2024 when the voters must have been so tiered and left to their respective homes without that information.
 3. That the notices issued were by way of test messages to the candidates who received them after the voters had left due to tiredness and who dint have be mandate to go and announce to the voters across the electoral areas hence making it literally difficult for the voters to have known about the abrupt change of the election date.
 4. That the 1st, 2nd and 3rd respondents didn't even deem it necessary to make the announcement of the change of the election date through the National Radio and Television stations and local radio stations across the electoral areas.
 5. That the 1st, 2nd and 3rd respondents needed to have put announcements on conspicuous places across the tea buying centers for the voters to be able to have the information which they also failed to do.
 6. That failure to convey information to the voters as required even by use of announcing using mobile vehicles across electoral areas amounted to an act of rigging the elections.
 7. That failure to do the needful in terms of announcements of the change of the date across the electoral areas was unfortunate and prejudicial to the candidates and the voters.
 8. That the petitioners are apprehensive that nominee directors in all the electoral areas of the aforesaid factories will be sworn and confirmed before this matter is heard and determined.
 9. That unless the 1st and 2nd respondents are restrained from swearing in the nominee directors pending the hearing and determination of this matters, the petitioners and the interested party herein will suffer substantial loss and damage.
 10. That it is therefore important and on the wider interests of justice that there be an order for temporary injunction restraining the 1st and 2nd respondents from swearing in the nominee directors pending the hearing and determination of this matter.
 11. That there appears special, peculiar, unique and plausible circumstances to warrant the application herein being allowed Ex-Debito Justitiae.
4. When the matter first came up before me for mention, under certificate of urgency, on 11th July 2024, the court granted orders of interim injunction to restrain the 1st & 2nd Respondents from swearing in or confirming the nominee directors of the various tea factories pending the hearing and determination of the application inter partes. The court then directed the Petitioners to serve the pleadings on the Respondents.
 5. When the matter came up for mention on 16th July 2024, Counsel for the Respondents informed the court that the Respondents had filed an application dated 13th July 2024 seeking, inter alia, orders to set aside/lift the ex-parte orders of 11th July 2024.
 6. The court then directed the parties to exchange pleadings and submissions in respect to the two pending applications. The matter was thereafter listed for further directions on 18th July 2024.
 7. During mention of 18th July 2024, Counsel for the Respondents once again urged this court to lift the ex-parte orders of injunction which prayer was vehemently opposed by the Petitioners and Interested Parties.



8. The Respondents submitted that there was an urgency in lifting the impugned interim orders as they have the effect of interfering with the elections in the entire tea sector yet the directorship position cannot be left in limbo. The Respondents faulted the Petitioners for failing to disclose that the timelines for the elections in the tea sector had been set by a 3 Judge Bench in Constitutional Petition No. E254/2020 consolidated with Petition No. E016 of 2021 (hereinafter “the three Judge Bench Case”) following serious acrimony that had been experienced in the tea sector.
9. It was submitted that the postponement of the elections did not prejudice any party as they mutually agreed to it since it was occasioned by circumstances that were beyond their control.
10. It was the Respondent’s case that should the Petitioners’ succeed in the main petition, then the outcome of the current elections will be nullified and a fresh election conducted just like in the parliamentary/general elections. The Respondents emphasized that the lifting of the interim orders will not prejudice the Petitioners in any way while, on the flipside, the entire tea sector will remain at a standstill due to the lacuna created in the directorship of the affected tea factories.
11. The 2nd Respondent joined issue with the rest of the Respondents and reiterated that the parties agreed to conduct the factory elections at the end of June 2024. The 2nd Respondent faulted the Petitioners for failing to disclose the timelines set, by the 3 Judge Bench, for the conducting of the factory elections.
12. It was submitted that the petition was prematurely filed before this court as the Petitioners were required to file their dispute, in the first instance, before the Election Dispute Resolution Committee (EDRC), before coming to court in line with paragraph 8 of the Election Manual governing the said elections.
13. The Petitioners submitted that proper notice was not sent to the parties when the elections were slated for 28th June 2024 were postponed to 29th June 2024 thereby leading to the exclusion of majority of voters from participating in the said elections.
14. The Petitioners also took issue with the holding of the elections on a Saturday, which they argued, disenfranchised majority of the Seventh-Day Adventist voters who worship on Saturdays.
15. It was submitted that the Directors of the factories are not employees and that the delay in swearing them in will not affect the operations of the affected factories.
16. The Petitioners also observed that the Counsel on record for the Respondents were not properly on record as they had not filed their respective authorities to act for the listed companies.
17. The Interested Parties supported the Petitioners’ submissions and argued that the Respondents did not demonstrate that the factories will grind to a halt if the interim orders are not lifted.
18. It was submitted that the alternative dispute resolution mechanism provided in the Election manual could not override the jurisdiction of the constitutional court in handling the disputes over violation of constitutional rights of the voters.
19. It was submitted that the Petitioners were not the contestants in the said elections and are not therefore bound by the provisions of the Elections manual and neither were they parties in the three Judge Bench case.
20. The Interested Parties urged this court to sustain the interim orders pending the hearing and determination of the petition.
21. I have carefully considered the pleadings filed herein and the parties’ rival submissions. I find that the main issue for determination is whether the interim orders of injunction issued on 11th July



2024 should be lifted. A determination of this issue will require this court to consider the principles governing the granting of orders of injunction with a view to establishing if, in this case, the Petitioners have made out a case for the granting of orders of injunction.

22. Before I delve into determining the subject of the interim orders, of injunction, I am minded to consider the issue raised by the Petitioners over the failure, by Counsel for the Respondents, to demonstrate that they were duly authorized to act for the Respondents' companies by resolutions passed by the said companies' directors.
23. The issue of company resolution to authorize the filing of pleadings or to act for such companies has been the subject of several court decisions. Courts have taken the position that such resolutions by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit and further, that the absence of a resolution is not fatal to the suit. This is the position that was taken in *Republic v Registrar General and 13 Others Misc. Application No. 67 of 2005* [2005] eKLR where Kimaru J. (as he then was) stated:-

“...such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore, not fatal to the suit.”

24. In *Arthi Highway Developers Limited vs. West End Butchery Limited & 6 others* [2015] eKLR, the court of appeal held thus:-

“44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; *Bugerere Coffee Growers Ltd v Sebaduka & Anor*(1970) 1 EA 147. The court in that case held:-

“When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.”

45. To their credit, the appellant's Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the *Bugerere* case has since been overruled by the Uganda Supreme court. The authority is *Tatu Naiga & Emporium vs. Virjee Brothers Ltd Civil Appeal No 8 of 2000*.

The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the *Bugerere* case was no longer good law as it had been



overturned in the case of United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998. The latter case restated the law as follows:-

The decision has since been applied in Kenyan courts, for example, in Fubeco China Fushun vs. Naiposha Company Limited & 11 others [2014] eKLR.”

25. Similarly, in Spire Bank Limited vs. Land Registrar & 2 others [2019] eKLR the Court of Appeal also stated as follows:-

“...It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company’s seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.”

26. Guided by the findings above cited cases, I find that the Respondents’ Counsel’s failure to file resolutions authorizing them to act for the Respondent, was not fatal to their response.

27. Turning to the lifting of the interim orders, it is to be noted that the impugned orders were issued ex-parte, which means that the Respondents were not given a hearing before the said orders were issued.

28. It is also trite that the granting or setting aside of an order of injunction is at the discretion of the court. Needless to say, such discretion must be exercised judiciously and not capriciously. This was the holding in St. Patrick’s Hill School Ltd vs. Bank of Africa Kenya Ltd [2018] eKLR where it was held: -

“Similarly, this court has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if the injunction does not serve the ends of justice it was intended to serve when it was issued. Questions such as whether it is unjust to maintain the injunction in force or it is otherwise unjust and inequitable to let the order remain will be asked when considering an application to discharge an injunction.”

29. As I have already noted in this ruling, the interim orders were granted ex-parte, in the first instance, before hearing the arguments from all the parties.

30. After a careful consideration of the respective parties’ depositions and submissions I note that while the Respondents state that the operations of the factories will be left in limbo and the scheduled elections in the entire tea sector put in jeopardy if the interim orders of injunction are not lifted, the Petitioners did not state what injury or loss they stand to suffer if the interim orders are lifted.

31. This court notes that the Petitioners’ main grievance is with the manner in which the elections were conducted. They contended that elections postponed at the eleventh hour to a date that fell on a Saturday thus locking out a majority of voters who were unable to turn out for the voting due as the election date fell on their day of worship.



32. My finding is that the Petitioners did not demonstrate that their petition will be rendered nugatory if the interim orders are lifted. Indeed, as correctly pointed out by the Respondents, in the event that the Petitioners succeed in the petition, this court can still nullify the elections and order that fresh elections be conducted.
33. I am therefore not persuaded that the Petitioners will suffer irreparable prejudice if the interim orders are lifted.
34. For the reasons that I have stated in this ruling, I find that the Respondents have made out a case for the lifting of the ex-parte interim orders and I therefore allow the application dated 13th July 2024 with orders that the costs of the application shall abide the outcome of the main petition.
35. The orders issued in this matter will apply to the related case being Nyamira HCCC No. E004 of 2024. I direct that this ruling be place in the related file for record purposes. Parties are further directed to expedite the hearing of the main petition in the interest of justice in light of the critical importance of stability and smooth running of the tea sector.
36. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 19TH DAY OF JULY 2024.

W. A. OKWANY

JUDGE

