



Njeru v Kamau & 4 others; Branch & another (Interested Parties) (Civil Appeal E059 of 2024) [2024] KEHC 12430 (KLR) (16 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E059 OF 2024
LM NJUGUNA, J
OCTOBER 16, 2024**

BETWEEN

EPHANTUS MUGENDI NJERU APPLICANT

AND

MOSES NJAGI KAMAU RESPONDENT

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
INTENDED RESPONDENT**

TEA BOARD OF KENYA 2ND INTENDED RESPONDENT

KENYA TEA DEVELOPMENT AGENCY 3RD INTENDED RESPONDENT

**KATHAGARIRI TEA FACTORY COMPANY LIMITED 4TH INTENDED
RESPONDENT**

AND

KATHAGARIRI BRANCH INTERESTED PARTY

MBUVORI BRANCH INTERESTED PARTY

RULING

1. The applicants filed a Notice of Motion dated 15th July 2024 premised on the grounds set out on its face and in the supporting affidavit thereof. The applicant seeks the following orders:

1. Spent;
2. That leave be granted to the firm of Charles Gomba & Company Advocates to come on record for the appellant/applicant in place of Nzekele Magdalene & Associates Advocates;



3. That pending interparties hearing of this application, a temporary injunction do issue restraining the 2nd and 3rd intended respondents, their servants, agents and/or assigns from swearing in and/or confirming the 1st respondent as the nominee director of Mbuvari Electoral area, Kathagariri Tea Factory Company Limited;
 4. That a temporary injunction do issue restraining the 2nd and 3rd intended respondents, their servants, agents and/or assigns from swearing in and/or confirming the 1st respondent as the nominee director of Mbuvari Electoral area, Kathagariri Tea Factory Company Limited pending hearing and determination of the appeal;
 5. That leave be granted to the applicant to enjoin the 2nd, 3rd, 4th and 5th intended respondents in the suit;
 6. That leave be granted to the applicant to enjoin the 1st and 2nd interested parties in the suit;
 7. That upon leave to enjoin parties being granted, the applicant to amend his pleadings accordingly to reflect the necessary amendments;
 8. That the applicant be granted leave to adduce additional evidence in this appeal; and
 9. The costs of this application be provided for.
2. It was the applicant's case that the 2nd intended respondent was contracted to conduct elections for 54 small holder tea companies on 28th June 2024. That on the said date, the 2nd intended respondent abruptly postponed the elections to 29th June 2024, which was a Saturday, thus disenfranchising voters and aspirants who ascribe to the Seventh Day Adventists (SDA) faith. He stated that this move is a violation of these voter's and aspirant's constitutional rights and it curtailed their fundamental freedoms under Articles 27 and 32 of the Constitution. That moreover, the elections were marred with irregularities and due to time constraints, the applicant couldn't present them before the dispute committee. Through his supporting affidavit, the applicant produced copies of the notices by the 2nd intended respondent postponing the elections and he also produced his church membership card to prove that he ascribes to the Seventh Day Adventists faith.
 3. The 1st respondent filed a replying affidavit in which he termed the application as a waste of court's time given the fact that the timeline for resolving election disputes has since passed. That the 2nd intended respondent indeed postponed the elections due to logistical challenges in availing election materials and the new date was communicated in good time. He urged that it is not necessary to enjoin the intended parties in the suit as it will only protract the matter yet he was properly elected by the voters.
 4. That the dispute resolution committee's mandate has already been discharged and that the court's time should not be wasted on the applicant's dispute, in which no evidence will be adduced at this stage. Through a further affidavit, he produced a copy of the oath of office he took on 16th July 2024, installing him into office as the elected Director of the board of the 5th intended Respondent together with his letter of acceptance. He deposed that he has previously served as a member of the board of the 5th intended respondent and he produced a copy of his certificate of service.
 5. John Kinyua Mwii filed a replying affidavit on behalf of the 2nd, 4th and 5th intended respondents. He stated that he was the returning officer at Mbuvari Electoral Area and that the 2nd, 4th and 5th intended respondents were never parties or witnesses before the dispute resolution committee, thus they are not befitting to be enjoined as parties to this suit. That their addition as parties to the suit does not add any legal value since any grounds adduced herein were never adduced before the dispute resolution committee. He stated that the parties will be forced to incur expenses unnecessarily for an appeal which



was already put to rest. That considering that the 1st respondent has already been installed into office, prayer (3) has been overtaken by events.

6. That the appeal herein intends to introduce evidence, which procedure will unduly complicate and prolong the proceedings. He deposed that Regulation 8 of the 2nd intended respondent's election manual provides that election disputes should be brought to the dispute resolution committee within 24 hours, which has already lapsed, making the appeal untenable. That the 2nd intended respondent was never informed of the dispute thus the proceedings herein are baseless. He referred to regulation 13 of the Election Manual which provides that any election dispute should be reported to the presiding officer or escalated to the returning officer who will investigate and take appropriate action.
7. He denied having received any complaint regarding the elections as claimed by the applicant. He stated that delivery of election material delayed, thus prompting postponement of the elections, a move that was communicated in good time. That the 5th intended respondent's company secretary had communicated to the 2nd intended respondent that the elections are to be held by end of June 2024 and the only way to achieve this after the election materials delayed was by postponing them to the following day. That he has only learned of the alleged disenfranchisement claim by the SDA faithful through this appeal as the applicant never raised the issue with him before. That the election was free and fair, with all the election forms being properly signed by the election officials thus the election was credible. He urged the court to dismiss the application.
8. Willy Mutai deposed a replying affidavit on behalf of the 3rd intended respondent. He stated that the high court through other Nairobi High Court Petition E254 of 2020 (as Consolidated with Petition No. E243 of 2020 and E083 of 2021) and Nairobi High Court Petition E016 of 2021 *Kenya Tea Growers Association & 55 others v. A.G. & 24 others*, ended in resolutions, inter alia, that the elections for smallholder tea factories should be held by the end of June 2024. That due to this finding, the 2nd intended respondent had no choice but to hold the election the following day, otherwise, they risked falling outside the prescribed timeline.
9. He referred to the Election Manual and stated that the dispute was not brought to the attention of the dispute resolution tribunal within the stipulated timeline. That the election delayed due to logistical challenges and the change of date was communicated to the electorate in good time. He annexed a copy of the decision by the dispute resolution committee at Embu Zone 6 and stated that the case made therein had nothing to do with the 3rd intended respondent, thus rendering it irrelevant to the proceedings herein. That this appeal will reopen a matter that was already determined and the court should disallow the application.
10. Being churches registered under the *Societies Act*, the intended interested parties deposed through their church elders that the act does not prescribe the procedure for their participation in these proceedings. That they were prepared to participate in the elections when the 2nd respondent changed the election date to the following day, which happened to be their day of worship, thus disenfranchising them. That the election disputes resolution tribunal only addresses complaints from contestants and not voters, hence they could not lodge their complaint about their disenfranchisement.
11. They deposed that they would like a chance to participate in the proceedings herein because it is their opportunity to raise their grievance since their freedoms under Articles 27 and 32 of the *Constitution* were infringed. That they are eligible voters too and nothing stopped the 2nd respondent from rescheduling the elections to a day that is not a recognized day of worship. They stated that they raise points of law which should be addressed by the court. They supported the applicant's case.
12. The application was canvassed by way of written submissions.



13. The applicant submitted that prayer (2) should be granted as prayed since none of the other parties has opposed it, and for this, he relied on Order 9 Rule 9 of the *Civil Procedure Rules*. He relied on the case of *EG v Attorney General; David Kuria Mbote & 10 others (Interested Parties)* (2021) eKLR and stated that the court has the power to enjoin a party in a suit if it so deems fit. That he has demonstrated that all the intended interested parties have a stake in the proceedings and outcome thereof while the intended respondents have failed to distance themselves from the proceedings.
14. Further reliance was placed on the case of *Kenya Agricultural and Livestock Research Organization v Okoko & another* (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) where the court relied on the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR and he argued that there is no specific governing procedure on allowing additional evidence but the High Court may allow the same based on the parameters stated therein. He urged that once the court has granted the orders prayed for, it should allow him to amend his pleadings accordingly and he relied on the case of *Gladys Nduku Ntbuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR.
15. In their submissions, the 2nd, 4th and 5th intended respondents did not object to granting of prayer (2) as it is supported under Order 9 Rule 9 of the *Civil Procedure Rules*. Regarding their joinder as parties, they relied on the cases of *Samwel Kazungu Kambi v. Nelly Ilongo the Returning Officer, Kilifi County & 2 others* [2017] eKLR and *Mwamlole Tchappu Mbwana v Independent Electoral & Boundaries Commission, Kwale County Returning Officer Amina Hussein Soud, Constituency Returning Officer Kinango (Charo Kalume Charo), Lunga Lungu, (Saba Mwadzungu Isaiab), Msambweni (Yusuf Abubakar Mohamed Matuga (Kassim Mwagomba Kaema), Presiding Officer & Deputy Presiding Officer Baraka Park, Matuga & Salim Mvurya Mgala* [2017] KEHC 2313 (KLR) and argued that the 1st respondent having been elected and already taken office, his election should only be challenged through an election petition and not this appeal.
16. That according to Regulation 8(1) of the Election Manual for directors, the timeline for appealing against an election finding has already lapsed thus the matter does not sit well before the court. They rehashed their statements made in the replying affidavit and added that the SDA issue was never raised in the petition, neither was it adjudicated upon. That an appeal is limited to the issues raised and adjudicated upon, otherwise, the appeal is unprocedural and incompetent. They urged that joinder should not vex the parties or convolute the proceedings as the court stated in the case of *EG v Attorney General; David Kuria Mbote & 10 others (Interested Parties)* (2021) eKLR. That if they are enjoined as parties, they will be greatly inconvenienced since the applicant seeks to introduce new matters, thus tasking them to submit more before the court.
17. They also relied on the case of *Kenya Agricultural and Livestock Research Organization v Okoko & another* (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) where the court relied on the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR and argued that the appeal does not meet the threshold for introduction of new evidence at this point in time. Further reliance was placed on the cases of *Gladys Nduku Ntbuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR and *Trust Bank Limited v Shah & 8 others* (Civil Suit 73 of 2001) [2024] KEHC 2676 (KLR) and they submitted that the applicant should not be allowed to amend pleadings because the matter was already litigated at the trial court without them thus the application is made in bad faith.
18. On his part, the 1st respondent submitted, placing reliance on the cases of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) where the Supreme Court referred to the case of *Julius Meme*



- v Republic & another* (2004) eKLR. He argued that the applicant has failed to demonstrate the value that the intended parties will add to the appeal, which he is using to initiate a fresh suit. That the issue of the applicant’s right to worship was not raised before the committee and that it should not be raised now.
19. That the applicant should be bound by its pleadings as was stated in the cases of *Independent Electoral and Boundaries Commission & another v Mule & 3 others* (Civil Appeal 219 of 2013) [2014] KECA 890 (KLR) and *Methodist Church in Kenya v Fugicha & 3 others* (Petition 16 of 2016) [2019] KESC 59 (KLR). He also relied on the case of *Jirongo v Soy Developers Ltd & 9 others* (Petition 38 of 2019) [2021] KESC 32 (KLR) where the court discussed factors for consideration when a party wants to adduce fresh evidence at the appeal stage.
 20. The 3rd intended respondent submitted that parties may be enjoined in a suit when their joinder will help the court to determine a substantive issue before it, as provided under Order 1 Rule 10 of the *Civil Procedure Rules*. It rehashed the averments made in its replying affidavit and stated that it is suspect that its joinder is triggered by the appellant and not the 3rd intended respondent itself. It relied on the cases of *Kering v Torome & 5 others; Registrar of Political Parties (Proposed Interested Party)* (Election Appeal E002 of 2023) [2023] KEHC 18318 (KLR) and *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR. It argued that the subject of appeal should be limited to the issues raised and determined by the dispute resolution tribunal and not new evidence arising at the appeal stage.
 21. The key issues for determination are as follows:
 1. Whether leave should be granted for the firm of Charles Gomba & Company Advocates to come on record for the applicant;
 2. Whether the intended respondents and intended interested parties should be enjoined in this suit;
 3. Whether a temporary injunction should be issued restraining the 2nd and 3rd intended respondents, their servants, agents and/or assigns from swearing in and/or confirming the 1st respondent as the nominee director of Mbuvari Electoral area, Kathagariri Tea Factory Company Limited, pending hearing and determination of the appeal; and
 4. Whether the applicant should be granted leave to adduce additional evidence in this appeal.
 22. On the first issue, the parties herein have not opposed the prayer for leave to allow the applicant’s counsel to come on record. Therefore, there is no point in belaboring that point. That prayer is granted.
 23. The second issue is of joinder of the intended parties and it is provided for under Order 1 Rule 2(b) of the *Civil Procedure Rules* thus:
 - “(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”



24. In the case of *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2015] eKLR where the court stated:

“...Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”

25. This position was reiterated in the case of *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* [2017] eKLR in which the High Court held that the test of joinder is whether an intended interested party has an identifiable stake or a legal interest or duty in the proceedings. According to the landmark case of *Francis Karioko Muruatetu & Another v Republic & 5 others* Petition 15 as consolidated with 16 of 2013 [2016] eKLR the court discussed the guiding principles of enjoining interested parties:

“One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- (i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- (ii) The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- (iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

26. In this appeal, the applicant has challenged the decision of the Dispute Resolution Committee at Embu (Zone 6) being Petition No. 1 of 2024 reached on 08th July 2024. The applicant had sought orders inter alia, that the election be nullified and the certificate issued to the 1st respondent be revoked. The petition was disallowed through the said decision which prompted the applicant herein to file a memorandum of appeal dated 15th July 2024. It is through this appeal that the applicant first raised the issue of the election being conducted on a sabbath day, a day when he enjoys his freedom of worship alongside other constitutional issues.

27. The intended respondents are stakeholders in the election that resulted in election of the 1st respondent. The 2nd intended respondent conducted the election which was challenged through the petition at the dispute resolution tribunal. The issues in the appeal cannot be disposed of without its input since the dispute resolution tribunal based its decision on the Election rules formulated by the 2nd respondent. The dispute resolution tribunal based its findings on Manual for Election of Directors of Smallholder Tea Factories, 2024, that is authored by the 3rd respondent. The 1st respondent was elected as director of the 5th intended respondent through Mbuvi electoral area. The 4th intended respondent manages the affairs of the 5th respondent and other smallholder tea factories.



28. The intended interested parties have expressed that they do not have a problem with being enjoined in the suit. Through the pleadings, the intended respondents have contended that the applicant's issue with the elections being held on his day of worship, has been raised for the first time through this appeal. The intended interested parties are eager to add their voices to the applicant's arguments to that end. From a perusal of the dispute resolution committee's decision that is the subject of the appeal herein, the issue of postponement of the election to the applicant's sabbath day was not raised or canvassed.
29. At this stage, the issues raised in the memorandum of appeal should be limited to the findings of the dispute resolution committee on election (ir)regularity. The intended respondents have rightly submitted that introduction of evidence at the appeal stage is not to be allowed by the court without due caution. 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. In any event, the applicant in prayer (8) of the application has sought the leave of Court to adduce additional evidence, in the appeal pending herein. 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.

30. The third issue for determination is whether the court should issue a temporary injunction restraining the 2nd and 3rd intended respondents, their servants, agents and/or assigns from swearing in and/or confirming the 1st respondent as the nominee director of Mbuvari Electoral area, Kathagariri Tea Factory Company Limited. The 1st respondent filed a supplementary affidavit stating that he has already taken his oath of office and he produced the oath and his acceptance letter. It was his submission that since he was validly elected into office, the applicant should challenge his election through an election petition and not through this appeal. He urged that this prayer has already been overtaken by events.
31. In considering the prayer for injunction, the court is guided by the case of *Joel Kipkurui arap Koech v Alice Wambui Magandu & 3 others* [2018] eKLR in which the court stated:

“In the case of *Suleiman – v- Amboseli Resort Ltd (2004)* {{abbr{title Kenya Law Reports} KLR}} 589, *Ojwang J.* (as he then was) stated thus: “Counsel for the Defendant urged that the shape of the Law governing the grant of injunctive relief was settled long ago, in *Giella – v- Cassman Brown*, in 1973 and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before.Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in *Giella –v- Cassman Brown*, the court has to consider the following questions before granting injunctive relief:

- i) Is there a prima facie case.....
- ii) Does the applicant stand to suffer irreparable harm....



iii) On which side does the balance of convenience lie.....

Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory injunctive relief should always opt the lower rather than the higher risk of injustice... if granting the applicant's prayers will support the motion towards full hearing, then should grant those prayers..."

32. As I have stated earlier, the issues raised herein are not only arising from the dispute resolution committee but they are also constitutional issues that the court should entertain. In my view, the appeal raises a prima facie case. On the second element of irreparable harm, the applicant has deposed that the election was held on his sabbath day, thus he suffered the injustice of infringement of his rights under articles 27 and 32 of the Constitution. Article 23(3) of the Constitution provides for recourse available to a person whose rights and fundamental freedoms have been infringed. When the court determines the constitutional issues raised there are several options for repairing the harm caused, if any. That is to say, there is no irreparable harm in the circumstances herein to warrant granting of an injunction. This prayer cannot succeed.
33. The final issue is whether the applicant should be allowed to adduce new evidence at the appeal stage. I have already stated that the constitutional issues raised through the appeal deserve to be addressed by the court. If doing so demands that new evidence be adduced at the appeal stage, the court is sufficiently guided by the Supreme Court. In the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad, Ahmed Muhumed Abdi, Gichohi Gatuma Patrick & Independent Electoral Boundaries Commission* [2018] KESC 62 (KLR), the supreme court held:

“Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

- (a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
- (b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
- (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
- (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
- (e) the evidence must be credible in the sense that it is capable of belief;
- (f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;



- (g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
- (h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;
- (i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.
- (j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
- (k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.”

34. It is my view that the applicant’s case regarding violation of constitutional rights can be canvassed through additional evidence adduced in this appeal, having satisfied that parameters set by the Supreme Court on the subject.

35. In the end, I find that the application herein partially succeeds and I do order as follows:

1. Leave is hereby granted to the firm of Charles Gomba & Company Advocates to come on record for the appellant/applicant in place of Nzekele Magdalene & Associates Advocates;
2. The 2nd, 3rd, 4th and 5th intended respondents are hereby enjoined in the appeal as the 2nd, 3rd, 4th and 5th respondents;
3. The 1st and 2nd intended interested parties are hereby enjoined in the suit as 1st and 2nd interested parties;
4. Leave is hereby granted to the applicant to amend his pleadings accordingly to include the 2nd, 3rd, 4th and 5th respondents and 1st and 2nd interested parties as enjoined in the suit;
5. Leave is hereby granted to the applicant to adduce additional evidence in this appeal, limited to Constitutional issues raised. The additional evidence shall be by way of affidavit; and
6. Each party to bear its own costs.

36. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF OCTOBER, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant/Applicant

..... for the 1st Respondent

..... for the 2nd Intended Respondent



..... for the 3rd Intended Respondent
..... for the 4th Intended Respondent
..... for the 5th Intended Respondent
..... for the 1st Intended Interested Party
..... for the 2nd Intended Interested Party

