



REPUBLIC OF KENYA



**Kinyua & 8 others v Independent Electoral and Boundaries Commission Secretariate  
& 6 others; Kamau & 23 others (Interested Parties) (Constitutional Petition  
E009 of 2024) [2024] KEHC 14371 (KLR) (5 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14371 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CONSTITUTIONAL PETITION E009 OF 2024  
RM MWONGO, J  
NOVEMBER 5, 2024**

**BETWEEN**

**FREDRICK M KINYUA ..... 1<sup>ST</sup> PETITIONER  
ALBERT KAMAU MURAGE ..... 2<sup>ND</sup> PETITIONER  
JOHN NYAGA MILANO ..... 3<sup>RD</sup> PETITIONER  
PAUL MILANO ..... 4<sup>TH</sup> PETITIONER  
JANE NYAGUTHII KINYUA ..... 5<sup>TH</sup> PETITIONER  
DAUGLUS KIBUCHI KINYUA ..... 6<sup>TH</sup> PETITIONER  
AMOS MIANO MURAGE ..... 7<sup>TH</sup> PETITIONER  
CHARITY WAMUI KIBUCHI ..... 8<sup>TH</sup> PETITIONER  
ANDREW RUKENYA ..... 9<sup>TH</sup> PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION  
SECRETARIATE ..... 1<sup>ST</sup> RESPONDENT  
KIMUNYE TEA FACTORY CO LTD ..... 2<sup>ND</sup> RESPONDENT  
MUNUNGA TEA FACTORY CO LTD ..... 3<sup>RD</sup> RESPONDENT  
NDIMA TEA FACTORY CO LTD ..... 4<sup>TH</sup> RESPONDENT  
THUMAITA TEA FACTORY CO LTD ..... 5<sup>TH</sup> RESPONDENT  
KENYA TEA DEVELOPMENT AGENCY ..... 6<sup>TH</sup> RESPONDENT  
TEA BOARD OF KENYA ..... 7<sup>TH</sup> RESPONDENT**



AND

ANTONY MWAI KAMAU & 23 OTHERS & 23 OTHERS & 23 OTHERS ..... INTERESTED PARTY

JUDGMENT

**Background**

1. The 1<sup>st</sup> - 10<sup>th</sup> Petitioners are tea farmers duly registered shareholders of their respective tea factories, namely, Thumaita, Ndima, Kimunye and Mununga Tea Factories. By their petition dated 15<sup>th</sup> July, 2024, they seek, inter alia declarations that the notices for, changes to and carrying out elections for the director of the said tea factories are unlawful and lack propriety, or were conducted ultra vires *the constitution*.
2. The 4<sup>th</sup> - 10<sup>th</sup> Petitioners subsequently pulled out of the petition on ground that they had not given instructions, leaving Petitioners 1- 3 to pursue an Amended Petition dated 29<sup>th</sup> July 2024.
3. The 1<sup>st</sup> Respondent is a constitutional organ established under Article 88 of *the constitution*, which is mandated to conduct election, referenda, and to conduct the exercise of boundaries delimitation and delineation.
4. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents are public limited liability companies incorporated under the *Companies Act*, whose object is that of processing tea, and the petitioners are shareholders in the said companies.
5. The 5<sup>th</sup> Respondent is a statutory body registered under the *Companies Act*, whose object is that of regulating the affairs of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents herein.
6. The 1<sup>st</sup> to 24<sup>th</sup> Interested Parties are purported Directors from Thumaita, Kimunye, Ndima and Mununga Tea Factories, awaiting confirmation on the 16<sup>th</sup> June, 2024.
7. When the Petition was first filed under urgency, Omido J granted interim conservatory orders in terms of prayer 2 were granted until 24<sup>th</sup> July 2024. The said orders were reviewed and made effective upto 23<sup>rd</sup> July 2024 following additional applications by parties.
8. Ruling on Directions was issued by this court on 23<sup>rd</sup> July 2024 extending the interim orders up to 26<sup>th</sup> July 2024, and directions on close pleadings and submissions in respect of interlocutory applications were issued. Highlights thereon were taken on 26<sup>th</sup> July 2024.
9. At the close of highlighting of submissions on interlocutories, the court peremptorily discharged the interim orders indicating that reasons for such action shall be contained in the judgment on the substantive petition. Directions were also given for conclusion of exchange of pleadings and submissions on the substantive amended petition.
10. I now give the reasons leading to the Court discharging the interim conservatory orders.  
Reasons for the Court's Decision to Discharge the Interim Conservancy Orders
11. At the hearing on 26<sup>th</sup> July 2024, after hearing and considering the parties' positions, I stated and determined as follows:

“Having heard the parties the leaning I have taken is as follows:



1. I am minded and do hereby discharge the ex parte interim conservatory orders forthwith.
2. The effect is that the Application for conservatory orders is dismissed and the application for discharge thereof is allowed to the extent herein
3. ...
4. ....
5. Reasons for this decision shall be reserved and contained in the decision on the Petition.
6. ....
7. ....” (Emphasis added)

12. The interim conservatory order which had been issued by the Court was in the following terms:

“That pending the hearing and determination of this application, this Honourable Court be pleased to grant a conservatory order staying the respective special general meetings that have been called by the Kimunye, Ndima, Thumaita and Mununga Tea Factories Co. Ltd vide their notices for special general meetings dated 1<sup>st</sup> July 2024, and more specifically the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents either by themselves, their agents, assignees, nominees, and/or servants be so restrained”

13. The reasons for my discharging the said orders were alluded to in my observations in my earlier Ruling on Directions dated 23<sup>rd</sup> July 2024, where I had stated as follows in paragraph 13:

- “ 13. Without delving into the merits of the Applications or Substantive Petition, the Court observes as follows:
- a) From the Mediation Agreement it is clear that there have been disputes of “public importance” (Clause 7 Mediation Agreement) in the Tea Sector since at least 2020 resulting in Constitutional Petition Nos E254/2020 and E016/2021.
  - b) Appeal proceedings in the Court of Appeal followed thereafter in the following suits, NAI Nos E618/2023, NAI E007/2024, NAI E008/2024, NAI 015/2024 and NAI E612 of 2024.
  - c) All these proceedings in the Court of Appeal were compromised and withdrawn following the Mediation Agreement of 2<sup>nd</sup> April 2024 that is signed by the counsel for and involving seventeen parties.
  - d) Undoubtedly, the Mediation proceedings were invoked pursuant to Article 159 (2)(c) of *the Constitution* by which the Court is obligated to promote mediation in exercise of its judicial authority.
  - e) There are conservatory orders that were extended for six (6) months by the High Court in Constitutional Petition No.



E003 of 2021(Clauses 2 & 3) & Mediation Agreement) details of which are not in the knowledge of this Court. The said extension commenced on 2<sup>nd</sup> April 2024 and are therefore extant at present.”

14. My reasons for peremptorily discharging the interim conservatory orders are as follows:
- a. The actions of the respondents in conducting the impugned elections were wholly grounded in and premised upon the decision and orders of a three Judge High Court bench in Nairobi Constitutional Petition No E003 of 2021;
  - b. That the said orders of the Nairobi High Court Bench were still live and there was no evidence that they had been challenged, reviewed or appealed against;
  - c. That the said elections orders were delivered by the said Bench following a substantive Mediation Agreement dated 2<sup>nd</sup> April 2024, involving essentially the entire Tea industry and following numerous suits in the High Court that had been consolidated and appeals in the Court of Appeal that had been compromised in the said Mediation Agreement;
  - d. That the Mediation Agreement, and in particular, paragraphs 4, 6, 7, 8, 10, 11 thereof, gave specific directions for the holding of the aforestated elections of the Tea Factories;
  - e. That the interim conservatory orders appeared to directly controvert, or at the very least challenge, the said Orders of the Bench in the Nairobi case.
15. Having given the reasons for discharging of the interim conservatory orders, I now revert to the substantive petition.

### **The Amended Petition**

16. The Amended petition dated 29<sup>th</sup> July, 2024 seeks the following orders:
1. A declaration that by abruptly changing the election date from the 28<sup>th</sup> June, 2024 to 29<sup>th</sup> June, 2024 and further failing to issue sufficient notice to the petitioners herein, the Respondents violated Article 47 as read together with Section 4 and 5 of the Fair Administrative Actions Act.
  2. A declaration that by carrying out the impugned elections, the Respondents violated Article 88(4) and Article 88(5) of *the Constitution* as read together with Section 3 and 4 of the *Independent Electoral and Boundaries Commission Act*.
  3. A declaration that the 1<sup>st</sup> Respondent acted ultra vires to *the constitution*, by carrying out a function of supervising an election that is not contemplated under Article 88(4) and Article 88(5) of *the Constitution* as read together with Section 3 and 4 of the *Independent Electoral and Boundaries Commission Act*.
  4. A declaration that the 1<sup>st</sup> Respondent mandate and functions are strictly limited to the functions contemplated under Article 88(4) and Article 88(5) of *the Constitution* as read together with Section 3 and 4 of the *Independent Electoral and Boundaries Commission Act*, and whether the 1<sup>st</sup> Respondent can lawfully undertake to carry out a private citizen election.
  5. A declaration that prior to conducting of the said election, the 1<sup>st</sup> Respondent was in compliance with Section 11A of *Independent Electoral and Boundaries Commission Act*, in



respect to the formulation of a policy guiding the 1<sup>st</sup> Respondent's engagements with a private citizen in matters relating to elections.

6. A declaration that the doctrine in the case of Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission 4 others [2017] eKLR is applicable in this case.
  7. A declaration that the companies Act does not contemplate a scenario where the 2<sup>nd</sup> to 5<sup>th</sup> Respondents' elections would be undertaken by the 1<sup>st</sup> Respondent.
  8. A declaration that prior to conducting of the said election, the 1<sup>st</sup> Respondent failed to comply with Section 11A of Independent Electoral and Boundaries Commission Act, especially in respect to the formulation of a policy guiding the 1 Respondent's engagements with a private citizen in matters relating to elections.
  9. A Declaration the 1<sup>st</sup> Respondent's services for supervising and/or carrying the 2<sup>nd</sup> to the 5<sup>th</sup> Respondents elections were procured in total disregard and violation of the provisions of Article 227 of the Constitution.
  10. Orders of certiorari to remove to this Honourable Court and quash the elections that were conducted of the 29<sup>th</sup> June, 2024.
17. The petitioners deposed to a 40-paragraph amended supporting affidavit with the following major averments:
1. That the petitioners are tea farmers who are duly registered shareholders of their respective tea factories herein; to wit Thumaita, Ndima, Kimunye and Mununga Tea Factories.
  2. That the 1<sup>st</sup> Respondent is a constitutional organ established under Article 88 of the constitution, which is mandated to conduct election, referenda, and to conduct the exercise of boundaries delimitation and delineation.
  3. That the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents are public limited liability companies incorporated under the Companies Act, whose object is that of processing tea, and the petitioners are shareholders in the said companies.
  4. That the 6<sup>th</sup> Respondent is a statutory body registered under the Companies Act, whose object is that of regulating the affairs of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents herein.
  5. That the 1<sup>st</sup> to 14<sup>th</sup> Interested Parties are the purported Directors from Thumaita, Kimunye, Ndima, Mununga Tea Factories, who were allegedly elected as directors on the 29<sup>th</sup> July, 2024 and who are awaiting confirmation on the 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> July 2024 respectively.
  6. That vide a letter dated 24<sup>th</sup> May, 2024, "all shareholders/growers of smallholder tea factory companies" were notified that the elections for candidates for Directorship of all Tea Factory Companies Ltd would be carried out on Friday 28<sup>th</sup> June 2024 between 7.00 am to 3.00pm.
  7. That the 7<sup>th</sup> Respondent did produce and circulate an Election Manual guideline, which was also available at the 6<sup>th</sup> Respondents.
  8. That the election manual guideline provided that all those who appeared in the voter register of the tea factory, had the right to vote and participate in the election which was to be done through a democratic system of one grower one vote.



9. That the 7<sup>th</sup> Respondent was to nominate an independent electoral management body to be referred to as "the electoral body" which was to conduct the elections of the Board of Directors of the tea factory.
10. That the 6<sup>th</sup> Respondent's electoral body was mandated via the elections manual guideline; Part IV Rule 9(2); to issue at least twenty-one (21) days' notice before the election date.
11. That on the morning of the election date, 28<sup>th</sup> June 2024, the 6<sup>th</sup> Respondent sent out KTDA-Ms, message to various registered voters, including the petitioners herein, informing them of delays encountered in the election process and did state that the same would be sought out and the elections would proceed as scheduled.
12. That the said KTDA-Ms was not part of the proposed independent body so as to warrant postponing the scheduled election.
13. That the purported delays continued up until close of business, and the elections as scheduled vide the TBA Election guidelines did not occur on the 28<sup>th</sup> June, 2024 and great confusion was orchestrated amongst the registered voters as and at when the long-awaited elections were to be conducted.
14. That the Election for directors was conducted on the 29<sup>th</sup> June 2024, without prior and sufficient notice to the registered voters, and as a result of which many of the registered voters were denied the opportunity to vote a director of their choice.
15. That the postponement of the election was intended to occasion a voter's suppression, to the prejudicing the petitioners herein.
16. That the 1<sup>st</sup> to 24<sup>th</sup> Interested parties are at the verge of being sworn into office notwithstanding the fact that they were elected vide a fraudulent process.
17. That the said impugned elections were conducted by the 1<sup>st</sup> Respondent, the Independent Election and Boundaries Commission herein after referred to as "IEBC" contrary to the Provisions of the TBA election manual which provided that the independent electoral management body, "the electoral body" was in-charge of conducting the elections.
18. That the 1<sup>st</sup> Respondent is not constitutionally constituted so as to enable it carryout its constitutional mandate of overseeing and election, as there are no commissioners in office, as mandated under Article 88 as read together with Section 5 of the Independent Election and Boundaries Commission Act.
19. That following the said impugned elections, the 2<sup>nd</sup> Respondent has issued a notice of special general meeting dated 1<sup>st</sup> July, 2024 calling for a special general meeting scheduled for the 17<sup>th</sup> July, 2024 for purposes of the 7<sup>th</sup> to 12<sup>th</sup> interested parties as duly elected directors of the 2<sup>nd</sup> Respondent.
20. That following the said impugned elections, the 4<sup>th</sup> Respondent has issued a notice of special general meeting dated 1<sup>st</sup> July, 2024 calling for a special general meeting scheduled for the 17<sup>th</sup> July, 2024 for purposes of the 13<sup>th</sup> to 18<sup>th</sup> interested parties as duly elected directors of the 4<sup>th</sup> Respondent.
21. That following the said impugned elections, the 3<sup>rd</sup> Respondent has issued a notice of special general meeting dated 1<sup>st</sup> July, 2024 calling for a special general meeting scheduled for the 18<sup>th</sup>



July, 2024 for purposes of the 19<sup>th</sup> to 24<sup>th</sup> interested parties as duly elected directors of the 5<sup>th</sup> Respondent.

22. That following the said impugned elections, the 5<sup>th</sup> Respondent has issued a notice of special general meeting dated 1<sup>st</sup> July, 2024 calling for a special general meeting scheduled for the 16<sup>th</sup> July, 2024 for purposes of the 19<sup>th</sup> to 24<sup>th</sup> interested parties as duly elected directors of the 5<sup>th</sup> Respondent.
18. The 2<sup>nd</sup> - 6<sup>th</sup> Respondents deposed to a lengthy Replying affidavit with the following major averments:
  1. That there is absolutely no material to show which Petitioner has shareholding in which factory and as such, the Petitioners lacks locus standi to challenge the elections of directors carried out under the Companies Act.
  2. That through the intervention of the 7<sup>th</sup> Respondent herein, a mediation settlement was reached between the warring parties. The outcome of the mediation was that the Smallholder Tea Factory Companies hold elections and all the suits challenging the various reforms in the Tea Sector be marked as settled.
  3. That the mediation agreement dated 2<sup>nd</sup> April, 2024 was adopted as court decree on 11<sup>th</sup> April, 2024. The decree and the mediation agreement required elections of the Smallholder Tea Factory Directors elections to be held by end of June, 2024.
  4. That the Petitioners have brought this Petition as Tea Growers claiming that the IEBC acted ultra vires in presiding over an election when it lacked the powers to so, when it had no commissioners and that the postponement of the subject election from the date scheduled to another date violated their fundamental rights.
  5. That the Petitioners thus seek to have the entire elections conducted on 29<sup>th</sup> June, 2024 quashed.
  6. That there is no Constitutional issue in a dispute over election of directors of a Limited Liability Company and I would urge this court to apply the doctrine of Constitutional avoidance and assert that the Petitioners should endeavour to exhaust other remedies first before approaching the court for constitutional remedies.
  7. That in particular, the Petitioners have failed to bring to the attention of this court that the recent elections as well as the requirement of holding the SGMs within a particular timeframe was pursuant to a Court Order issued by the 3 Judge bench in Nairobi Consolidated Constitutional Petition No. 254 of 2020 KTDA & others vs Cabinet Secretary, Ministry of Agriculture & Others.
  8. That the Decree in the said Constitutional Petition No.254 of 2020 also required that the elections of Directors of Kenya Tea Development Agency (Holdings) Ltd of which the Respondents are all shareholders be conducted within one month of the election of Tea Factory Directors elections.
  9. That failing to hold the SGMs within the required timeframe would not only have been an act of contempt against the Nairobi Court orders but would also have led to the 2<sup>nd</sup> -5<sup>th</sup> Respondent's failing to participate in the election of Directors of Kenya Tea Development Agency (Holdings) Ltd which were scheduled on 26<sup>th</sup> July 2024.



10. That the prayers sought in the Petition are tantamount to asking this court to sit on appeal and set aside lawful court orders of a Court of Equal and Competent Jurisdiction presided over by 3 judges.
11. That while IEBC may not have capacity to carry out national, county, constituency and ward elections for the Republic of Kenya due to lack of Commissioners, there is nothing that prevents it from carrying out elections of non-governmental bodies when requested to do so.
19. The parties filed written submissions which they orally highlighted as directed by the Court

### **Petitioner's Submissions**

20. There are no written submissions on record. Mr Ndegwa for the petitioners made oral submissions.
21. Counsel submitted that the petitioners are not aggrieved by the decree from Nairobi Court, but the manner of its execution. Their concern was that that Court's decree anticipated that the decree would be executed lawfully and by a body known in law.
22. Further, that Article 88 of *the Constitution* creates the Electoral Commission and not the Secretariat of the Commission, with the functions under Article 88(4) of conducting elections. He argues that the IEBC cannot undertake the election functions proposed in the present case, since IEBC as currently constituted has no Commissioners. In addition, that the "doctrine of severance" by which it was urged that the Secretariat could conduct the election on behalf of the IEBC.
23. He argues that the respondents are public limited liability companies established under the *Companies Act*, and there is no provision under that Act under which the IEBC could conduct the elections of such companies. Thus, that the actions of the IEBC in respect of the conduct of those elections was unlawful, notwithstanding that the Replying Affidavit of the 1<sup>st</sup> Respondent indicates that there was a Memorandum of Understanding to conduct the said elections, and that such activity was a CSR activity on their part.
24. According to the petitioners, the allegations that the IEBC had allegedly conducted elections of the Kenya Magistrates and Judges (KMJA) Association, are neither here nor there. The legal capacity of the IEBC could be challenged. They rely on the case of Michael Sistu Macharia (supra).
25. With regard to the issue of whether the respondents have locus standi to present the present case, he submits that Article 3 of *the Constitution* requires every Kenyan to defend *the Constitution*. Further that Article 258 of *the Constitution* expands the common law doctrine on locus standi in that any person can now approach the court.
26. Ultimately, the petitioners submit that the decree of the Nairobi Court was anticipated to be effected lawfully through lawful organs, and that that this court is the correct forum to redress the asserted violations of *the constitution*.

### **1<sup>st</sup> – 6<sup>th</sup> Respondents Submissions**

27. The 1<sup>st</sup> to 6<sup>th</sup> Interested parties' submissions are were made in four prongs

### **Locus Standi**

28. The 1<sup>st</sup> – 6<sup>th</sup> Interested Parties submit that the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners have not demonstrated in writing that they gave authority to the 1<sup>st</sup> Petitioner to swear affidavits on their behalf.



29. The 2<sup>nd</sup> – 4<sup>th</sup> Respondents are limited liability companies governed by Articles and Memoranda of Associations. Only their members (shareholders) have a right to Petition over election irregularities.
30. There is nothing to show that any of the Petitioners is a member of the 4<sup>th</sup> Respondents. The Petitioners only threw to the court a bunch of documents alleging it to be a voter register. Their names are not highlighted on the alleged register and the said register is for Mununga Tea Factory Company Ltd only. There is no single document for any of the other 3 factories connecting the said factories with the Petitioners. The Petitioners have availed no Tea Growers Slip or certificate linking them to the named companies. They are thus strangers with no locus.

### **Conflict with an existing court Decree**

31. There is a court Decree by a 3 Judge bench of the High Court in Nairobi that directed fresh elections to be held by 30 June 2024 for the Tea Factories and 30 days after for the KTDA Holdings Ltd.
32. The elections were conducted within the timeframe directed by the Nairobi Court, were overseen by the 7<sup>th</sup> Respondent as directed by the Nairobi Court and were conducted by the 1<sup>st</sup> Respondent as directed by the Nairobi Court. Had the Respondents tried to do it in any other way, they would have run afoul of the Nairobi Court Decree.
33. Reliance was placed on the case of *In re Estate of Mugo Kang'auro (Deceased)*[2020]eKLR, where Njuguna J declined to issue orders which would have conflicted with existing orders.

### **Mandate and capacity of IEBC**

34. The Petitioners seems to suggest that under Article 88(4) of *the Constitution* as read with Sections 3 & 4 of the IEBC Act, the IEBC has not been granted powers to conduct any other elections save for the presidential, parliamentary, gubernatorial, County Assembly and referendum elections.
35. The aforesaid argument is a complete misapprehension of the law. First, the relevant article of *the Constitution* reads -Article 88(4) "The Commission is responsible for conducting or supervising referenda and elections to any elective body OR office established by this Constitution..."
36. The Petitioners are reeling under the misconception that the IEBC is moribund and cannot undertake any tasks for want of Commissioners. Reliance is placed on the decision in *Michael Sistu Mwaura Kamau v EACC*. It is also suggested that the IEBC is not clothed with powers to conduct election of a limited liability company.
37. As observed in the *Michael Sistu Kamau (supra)* case heavily relied on by the Petitioners, a Commission in light of the provisions of Article 253 continues to exist even when there is not a single commissioner in office. The Court of Appeal in that case had this to say:-

"It is also important to reiterate that pursuant to the provisions of Article 253 of *the Constitution*, the EACC is a body corporate with perpetual succession and capable of being sued and suing in its own name. To our mind that means that the EACC is an autonomous legal person, it has separate legal personality and continues to exist independently of any of its members. What is heavily contested in this appeal is whether the EACC can effectively carry out its legal mandate in the absence of its commissioners."
38. By analogy, the IEBC still exists as an entity and continues to undertake tasks that the Secretariat can undertake under the provisions of Section 11A of the IEBC Act. The argument that the IEBC no longer exists to the extent that the Petitioners sued the Secretariat cannot therefore hold.



39. In addition, it is apt to borrow the words of Okwany, J in the case of *Isaiah Biwott Kangwony v Independent Electoral & Boundaries Commission & another* [2018] eKLR when she held:

“My finding is that the occurrence of a vacancy in the commission does not invalidate the composition of the commission and it is for this reason that the lawmakers enacted clear provisions regarding the prompt replacement of commissioners upon the resignation of any one of them.”

### **Procurement issue is misplaced**

40. The Petitioners Amended their Petition and included an issue of procurement. They argue that the IEBC did follow procurement laws in being engaged by the KTDA factories. That line of argument is misconceived and should be dismissed at the first instance. This is because the laws on procurement only relate to when a public body is procuring goods and services rather than when its services are being procured.

### **Issues for Determination**

41. The key issues for determination revolve around the following questions:
- a. Whether the the petitioners have locus standi to institute this case
  - b. Whether the carrying out or issuance of notices in respect of KTDA Director elections by IEBC was unconstitutional or unlawful
  - c. Whether IEBC services were procured in violation of the provisions of Article 227 of *the Constitution*

### **Analysis and Determination**

42. The Petitioners’ case is on the recently held elections of directors by the 2<sup>nd</sup>- 5<sup>th</sup> Respondents. They claim that the 1<sup>st</sup> Respondent (IEBC) lacked the mandate under both *the constitution* as well as the Independent Electoral & Boundaries Commission (IEBC) Act to conduct an election. The 1<sup>st</sup> Respondent lacked Commissioners as at the time the elections were being held hence had no capacity to conduct them.
43. Further, they claim that the postponement of the elections by a day from 28<sup>th</sup> June, 2024 to 29<sup>th</sup> June, 2024 was unlawful. They seek for orders of certiorari to remove to this Honourable Court and quash the elections that were conducted of the 29<sup>th</sup> June, 2024.

### **Locus Standi**

44. The respondents submit that there is nothing to show that any of the Petitioners is a member of the four Respondents. The Petitioners only threw to the court a bunch of documents alleging it to be a voter register.
45. The petitioners submit that they brought the matter to court in the public interest. They rely on Article 258 of *the Constitution* which provides that:

- “ 1. Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.



2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –
  - a. a person acting on behalf of another person who cannot act in their own name;
  - b. a person acting as a member of, or in the interest of, a group or class of persons;
  - c. a person acting in the public interest; or
  - d. an association acting in the interest of one or more of its members.”

46. In the present case, it was argued by the respondents that Articles 22 and 258 clarify the scope of the persons who can challenge decisions based on constitutional violation to be:
  - a. A person acting in their own interest
  - b. A person acting on behalf of another person who cannot act in their own name
  - c. A person acting as a member of, or in the interest of, a group or class of persons;
  - d. A person acting in the public interest, or
  - e. An association acting in the interest of one or more of its members
47. According to the respondents, the petitioners having chosen to approach the court through the category of persons acting in their own interest, had to demonstrate their own grievance.
48. I am of the view that Articles 22 and 258 read together are broad-based provisions that, generally, entitle any and all persons who consider that *the constitution* is threatened with breach, to sue.
49. However, beyond the stricture of locus standi, it was asserted by the petitioners that they are tea farmers who were notified of the elections as shareholders or growers, with the right to vote; that on the morning of the election they received messages as registered voters concerning delays in the election, and that when the election was finally conducted, they were denied the opportunity to vote for the director of their choice.
50. In such capacity, they premise their entitlement to be engaged in the elections that were to be free and fair conducted by an electoral management body duly nominated. The petitioners stated in the Amended Petition that the 6<sup>th</sup> Respondent did produce and circulate an Election Manual Guideline which was available at the 6<sup>th</sup> Respondent’s website, and that the electoral body shall apply the election manual.
51. In light of this assertion, it may be noted that as participants in the elections, they acquiesced in the elections, and cannot be heard to say that the IEBC was ill suited for the task. They cannot blow hot and cold in the same breath. To state that the IEBC was ill suited for the task would be to query the Nairobi Court Order which ought to have been done before the Court that issued the Order.

### **Mandate and capacity of IEBC to conduct the elections**

52. The starting point is that it is not in dispute that there is a court Decree by a 3 Judge bench of the High Court in Nairobi Consolidated Constitutional Petition No. 254 of 2020 KTDA & others v Cabinet Secretary, Ministry of Agriculture & Others. It is not in dispute that that Court directed that fresh



- elections to be held by 30 June 2024 for the Tea Factories and 30 days after for the KTDA Holdings Ltd.
53. It is also not in dispute that the Nairobi Court ordered that the 6<sup>th</sup> Respondent was to nominate an independent electoral management body to conduct the said elections.
54. The petitioners challenge the manner in which the decree of the court was executed by IEBC. They say the body acted ultra vires as it did not have powers to conduct elections of public limited liability companies. The same elections were to be conducted as contemplated in the Coffee Act.
55. The petitioners state that the 6<sup>th</sup> Respondent was to nominate an independent electoral management body to be referred to as “the electoral body” which was to conduct the elections of the Board of Directors of the tea factory, and that such body must be known to the law.
56. The Petitioners take the narrow argument that under Article 88(4) of *the Constitution* as read with Sections 3 & 4 of the IEBC Act, the IEBC has not been granted powers to conduct any other elections save for the Presidential, Parliamentary, Gubernatorial, County Assembly and referendum elections.
57. The respondents submit that the aforesaid argument is a complete misapprehension of the law. They contend that the relevant article of *the Constitution*, Article 88(4) reads -
- “The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution...”
58. They submit that the IEBC has at its disposal election tools, gadgets, kits, ballot boxes, booths, stamps, experts and staff. These. They urge, are purchased and used during statutory national election periods, as by law required. However, they state that the IEBC is not usually busy in between national election periods.
59. As I understood the respondents, it is in between those periods when the IEBC is not engaged in statutory elections, that they, in the public interest and as a gesture of Corporate Social Responsibility (CSR) can avail their tools, gadgets, kits ballot booths, stamps and expertise to be used to help those in need outside of the national electoral periods governed by statute.
60. The respondents also submit that it is also for the CSR reason that the IEBC has upon request been conducting elections for such entities including the LSK, the Kenya Magistrates and Judges Association (KM)A since 2013, school councils and University student unions.
61. The petitioners submit that the subject elections were not a CSR but elections that resulted from a court decree. They had to be conducted by a constitutional body. They rely on the case of: Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 4 others [2017] eKLR
- “This appeal succeeds on the technical ground that the EACC was not properly constituted at the time it completed the investigations and forwarded its report and recommendations to the DPP. From the foregoing anti-corruption constitutional edicts, the parties are at liberty to proceed as they deem necessary on the basis of a properly constituted EACC and within the dictates of *the Constitution* and the law.”
62. The respondents submit that the IEBC still exists as an entity and continues to undertake tasks that the Secretariat can undertake under the provisions of Section 11A of the IEBC Act. The argument that the IEBC no longer exists to the extent that the Petitioners sued the Secretariat cannot therefore hold.



63. They observed that in the Michael Sistu Kamau (supra) case heavily relied on by the Petitioners, a Commission in light of the provisions of Article 253 continues to exist even when there is not a single commissioner in office. The Court of Appeal in that case had this to say:

“It is also important to reiterate that pursuant to the provisions of Article 253 of *the Constitution*, the EACC is a body corporate with perpetual succession and capable of being sued and suing in its own name. To our mind that means that the EACC is an autonomous legal person, it has separate legal personality and continues to exist independently of any of its members. What is heavily contested in this appeal is whether the EACC can effectively carry out its legal mandate in the absence of its commissioners.”

64. The IEBC is a commission established under Article 253 of *the Constitution*. It a body corporate with perpetual succession and a seal. In *Isaiah Biwott Kangwony v Independent Electoral & Boundaries Commission & another* [2018] eKLR it was held that:

“My finding is that the occurrence of a vacancy in the commission does not invalidate the composition of the commission and it is for this reason that the lawmakers enacted clear provisions regarding the prompt replacement of commissioners upon the resignation of any one of them.”

65. In the Isiah Biwott case, the claim was that a statutory by-election was unlawfully held because the IEBC lacked the full quorum of Commissioners since four IEBC Commissioners had resigned and had not been formally replaced.

66. It is to be noted that in Isiah Kibiwott what was challenged was a constitutionally and statutorily required election, in respect of which strict statutory electoral guidelines are mandated and in paly

67. In the present case, what is challenged is merely the asserted goodwill conduct of a non-statutory election; an election ordered by a court through an electoral management body. According to the Nairobi Constitutional Court Order in Pet E254 of 2020, the authority to engage such a body was contained in Order 9 to the effect that:

“9 The Tea Board of Kenya shall oversee the elections of Smallholder Tea Factory Companies and KTDA Holdings Ltd and that the Tea Board of Kenya shall nominate an independent electoral management body to conduct the elections. The cost of the elections shall be borne by the respective tea factory companies and KTDA Holdings Ltd” (Emphasis added)

68. There was nothing in the Court Order to suggest that the IEBC could not conduct such an election if its commissioners were not quorate. On its part, IEBC asserted that it had a policy of engaging in Corporate Social Responsibility through which it conducts “External Elections”. It exhibited through Ruth Khatievi Kulundu, the Deputy Commission Secretary, a document for the “Conduct of External / Statutory Election” which indicates its scope as follows:

“This guide provides for a mechanism through which the Commission conducts/supervises external elections”

69. In addition, the document contained requirements for a Memorandum of Understanding when engaging in external elections, and as far as the Corporate Social Responsibility element of the IEBC was concerned it is noted in the said exhibited document that “The Commission’s overriding Corporate Social Responsibility (CSR) theme is ‘Connecting with the Vote’.



70. As I understood it, the argument of the petitioners is that the IEBC has no business engaging in elections unless it has a fully quorate Commission; and in any event, IEBC is not mandated to conduct any election other than Presidential, Parliamentary, Gubernatorial, Senate and County elections. At its core, this is a clear textualist interpretation of *the Constitution* and leaves no room for originalist or purposive interpretations.
71. In the present case, I am persuaded that IEBC is capable of conducting CSR based external election programmes for third parties during its non-peak electoral periods, and that a vacancy in the office of Commissioners need not invalidate the conduct of such CSR programmes.
72. In any event, as I have earlier stated, it is my considered view that if the petitioners were serious about challenging the entitlement of IEBC to conduct the KTDA elections herein, the proper approach should have been to make the challenge through an application within the Consolidated Suits in Nairobi Constitutional Petition No E254 of 2020 in which the orders were issued.

### **Procurement of the services of IEBC**

73. The petitioners seek for a declaration that the 1<sup>st</sup> Respondent's services for supervising and/or carrying the 2<sup>nd</sup> - 5<sup>th</sup> Respondents were procured in total disregard and violation of the provisions of Article 227(1) of *the Constitution*. That Article states that:
- “(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.”
74. The language of Article 227 is clear. It relates to scenarios whereby a public entity seeks to contract for goods and services, or simply put, to procure. That is to say, that when a public entity is seeking for goods or services for which it will spend public funds, it must do so in a fair, equitable, transparent, competitive and cost-effective. Nothing is contained in Article 227 concerning the situation when a public entity is rendering its services to third parties.
75. Article 227(2) of *the Constitution* clarifies the scenario in sub-Article 1, by requiring Parliament to enact a statute which prescribes a framework and policies for procurement and asset disposal.
76. In line with this, the respondents correctly submit that the laws on procurement only relate to when a public body is procuring goods and services rather than when its services are being procured.
77. In this case the IEBC was offering electoral services to the respondents as part of its Corporate Social Responsibility.
78. I hold that the legal regimen for public procurement and disposal under Art 227 was not at play when the IEBC was rendering its services to KTDA or other third parties.

### **Disposition**

79. In essence, I find and hold that the respondent's actions were guided and underpinned by the Order of the Constitutional Bench in Consolidated Petition No 254 of 2020, and as such were not unlawful.
80. In light of all the foregoing, I am not persuaded that the Petitioners have made out a case warranting any of the declarations and orders sought in the Petition.
81. Accordingly, the petition is hereby dismissed in its entirety.
82. In light of the nature of these proceedings as public proceedings, no order is made as to costs.



83. Orders accordingly.

**DATED AT KERUGOYA THIS 5<sup>TH</sup> NOVEMBER 2024**

**R. MWONGO**

**JUDGE**

Delivered in the presence of:

Ndegwa for the Petitioners

Achola holding brief for Thuita (With Muite) for the 1<sup>st</sup> -6<sup>th</sup> Respondents

Achola holding brief for the Interested Parties

Murage Court Assistant

