



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 5B OF 2020**

**JAMES ANTONY MAINGI MURIITHI.....PETITIONER**

**V E R S U S**

**1. KANGAITA TEA FACTORY CO. LTD.....1<sup>ST</sup> RESPONDENT**

**2. KENYA TEA DEVELOPMENT AGENCY MANAGEMENT SERVICE LTD....2<sup>ND</sup> RESPONDENT**

**3. PETER WACHIRA.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. This petition was filed on the 18/6/2020 by one James Antony Maingi Muriithi against the three Respondents under **Articles 22(1), 35(1), 47(1) and 165(3)(B) of the 2010 Constitution of Kenya and Section 4 of the Fair Administrative Action Act, 2015** in respect of disputed elections of Tea Factory Company Directors, nominees and buying Centre Committee Members of Kangaita Factory Company Limited, the 1<sup>st</sup> Respondent.

2. The Petitioner is a member of the 1<sup>st</sup> Respondent, and was a contestant for the position of Director in the Company. He lost during the nomination process. By the Petition, he claims that the process of nomination and the election of Directors of the Keriko North Electrical Zone of Kangaita Tea Factory Company Limited (1<sup>st</sup> Respondent) was a sham, not free and fair and were skewed and craftily manipulated to favour the 3<sup>rd</sup> Respondent who emerged as the winner; and proceeds to term the nomination/election as a violation of his Constitutional and fundamental rights and freedoms as enshrined under **Article 35(1), 47(1) of the Constitution**.

3. The Petitioner thus seeks declarations on violations of the stated Constitutional rights, and orders to compel the 1<sup>st</sup> Respondent to hold a free and fair election. Together with the Petition, a Notice of Motion application was filed under **Rules 19 and 23(1) of the Constitution**.

**4. The Application dated 11/6/2020**

The applicant/Petitioner seeks Orders that:

**1) .....Spent**

**2) An interim injunction do issue, restraining the 3<sup>rd</sup> Respondent purportedly nominated as Director elect from Kariko North Electro Zone on 05/11/2019, from carrying out any functions as full Director of the 1<sup>st</sup> Respondent, pending the hearing and determination of this application.**

**3) An injunction do issue, restraining the 3<sup>rd</sup> Respondent PETER WACHIRA, purportedly nominated as Director elect from Kariko North Zone on 05/11/2019, from carrying out any functions as a full Director of the 1<sup>st</sup> Respondent herein, pending the hearing and determination of this Petition.**

**4) An Order of this Honourable Court do issue, compelling the 1<sup>st</sup> Respondent to supply the Petitioner with its Shareholders Register, to be tabled for investigation and scrutiny, as well as authenticate the Special Powers of Attorney used by the 3<sup>rd</sup> Respondent, pending the hearing and determination of the Petition.**

5) **An Order of this Honourable Court do issue, compelling the 1<sup>st</sup> Respondent to supply the Petitioner with its marked Shareholders Register that was used at the nomination and voting stage of Director on 05/11/2019, pending the hearing and determination of the Petition.**

6) **An Order of this Honourable Court do issue, compelling the 1<sup>st</sup> Respondent to allow the Petitioner access to the 1<sup>st</sup> Respondent's marked ballot papers, counter foils and Power of Attorneys case during the nomination/voting stage of Directors for Kariko North Zone on 05/11/2019, for verification and scrutiny, pending the hearing and determination of the petition.**

7) **Costs of this application to be provided for.**

5. It is based on numerous grounds stated at the face of the application, the Supporting affidavit and annexures thereto. The Respondents oppose the application by grounds of opposition filed on the 3/11/2020 and a Replying Affidavit filed on even date. Submissions by the rival parties have also been filed.

6. **Grounds of opposition to application.**

i) **That the matters in issue at the petition and application were settled in petition No. 442 of 2019 – Peter Mwangi Mbote & 2 Others –v-v KTDA Holdings Ltd & KTDA Management Services Ltd.**

ii) **That the application has been overtaken by events, and applicant is guilty of delay and lacks merits.**

iii) **The court is now functus official.**

iv) **That the application is an abuse of court process, is frivolous and abuse of court's precious time.**

v) **That the application dated 11/6/2020 lacks merits and should be dismissed.**

**An examination of Nairobi Constitutional Petition No. 442 of 2019 – Judgment (2020) eKLR.**

7. The Petitioners are tea growers in Muranga County and shareholders of Makomboki Tea Factory Ltd, Njunu Tea Factory Ltd and Kiru Tea Factory Ltd respectively.

The Respondents are KTDA Holdings, Kenya Tea Development Agency (Management Services) and Kiru Tea Factory Ltd.

8. The Petitioner's case is that the respondents have violated their rights and other small scale tea growers as guaranteed under Article 47 of the Constitution. It is their case that the violations have prompted them to approach this court **in their own interest and in the interest of all shareholders in the 54 tea factory companies managed by the respondents, in respect of election of Directors of the 1<sup>st</sup> Respondent (KTDA Holdings Ltd) and managed by the Respondents.**

9. It is their case that the election of the Directors of the tea factories managed by KTDA Holdings is inimical of Article 47 CoK and ought to be declared null and void, and further that the Company secretary and the Management in carrying out the elections are conflicted, biased and incapable of rendering credible results. It is a further material fact that the KTDA (Management services) has entered into management agreements with each of the 54 Tea factory companies which it manages – grouped into 12 zones wherein one Director is elected nomination and election of the Directors, who have since taken over the Management of the tea factories in their respective areas.

10. The Zone in issue in the instant petition is Kariko North Zone. The elections were conducted on the 5<sup>th</sup> November 2019. It is among the 54 tea zones. On the 7/11/2019 the High Court suspended confirmation of successful nominees in the Country following the election exercise conducted at both factory and zonal levels. This included the Kariko Zonal elections. By its Judgment dated 20/2/2020, the petition No. 442/2019 was dismissed.

11. The effect of the dismissal of the petition meant and means that all the 113 Nominated Directors in the entire country were ordered to proceed to assume to represent each of the 12 zones in KTDA Holdings. Kariko North Zone is among the 12 Zones.

The election rules are prepared by the company secretary and christened Election of Tea Factory Companies Directors Nominees and Buying Centre Committee Members – procedures – November 2019, which they state are illegal as having been made unilaterally by the Company Secretary without authority, who is also an employee of the 2<sup>nd</sup> Respondent.

12. In the Petition, the petitioners sought orders and declarations that the Zonal election held in October 2019 were illegal, null and void, order quashing the election and an order compelling the Respondents to conduct fresh elections at both levels in accordance with the Companies Act and respective Articles of Association.

13. Upon hearing the petition, the court (Weldon Korir J) dismissed the petition, thus upholding the elections of the Directors, in their respective factories/companies, which they did post the judgment.

14. I have taken the liberty to peruse and understand the purport and import of the Judgment in Petition No. 442/2019 so as to appreciate its relevance to the matters raised in the present petition, in view of the grounds of opposition raised by the Respondents and more particularly

that this petition is Res judicata and has therefore been overtaken by events pursuant to the said Judgment.

15. I took the liberty to interrogate the issue whether the Petition and the Application is Res-Judicata in the first instance, because the result thereof will determine whether it will be necessary to take any further steps, and proceed to determine the issues raised in the Notice of Motion dated 11/6/2020.

16. The doctrine of Res-Judicata is provided under **Section 7 of the Civil Procedure Act**.

It Provides;

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by the court”**

17. The Court of Appeal in the Independent Electoral and Boundaries Commission –v- Maina Kiai & 5 Others, Nairobi CA Civil Appeal No. 105/2017 (2017) eKLR, held that;

**“Thus, for the bar of Res-judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied as they are rendered not in disjunctive but conjunctive terms;**

**a) The suit was directly and substantially in issue I the former suit.**

**b) That former suit was between the same parties or parties under whom they or any of them claim.**

**c) The issue was heard and finally determined in the former suit.**

**d) Those parties were litigating under the same title.**

**e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”**

18. The Applicant submits, that issues raised in this petition were not directly or substantially in issue in petition No. 442/2019 nor where the prayers sought as they were totally different. He however concedes that in the former petition the petitioner was challenging the election of Tea Factory Company Directors nominees and buying centre Committee members – procedure – November 2019 as null and void in the election held in October 2019.

19. It is submitted that in the petition herein, the challenge is in respect of Keriko North Electoral Zone held on 5/11/2019 and not zonal elections held in October 2019, and what was on trial was the process and procedures applied by the respondents during the Zonal elections.

20. At Paragraph 3, 4 and 5 of the applicant’s affidavit in support of the application – found at Paragraphs 11, 12, 13 and 14 of the Petition, the challenge is on the process and procedures of conducting the Zonal election.

21. At Paragraph 6 of Judgment in Petition 442/2019, the Petitioners posited that small – scale tea farmers who number over 560,000/- own shares in 54 tea factory companies which in turn own shares in KTDA Holdings and which entered into management agreements with each of the 54 tea factories which it manages, and which have been grouped into 12 zones in the KTDA Board.

22. The Petitioner has not tendered any evidence that the Kangaita Factory Company Ltd (1<sup>st</sup> Respondent) and the Keriko North Electoral Zone are not included in the 54 tea factories, nor that it is not among the 12 zones represented in KTDA’s Board.

23. The questions raised for determination in the former petition are the same questions raised in this instant petition and application. Further, the remedies sought are similar, carrying same purport, import and consequences, notwithstanding the period of the elections, October and November 2019. I must state that the petitioner’s submission quoted at Paragraph 59 of the Judgment in petition 442/19 was his opinion, not the court’s finding. The court’s finding is at the tail end, of its judgment.

24. The Petitioners in 442/19 were challenging the Zonal elections and the election rules used to conduct those elections.

In the instant petition, the petitioner challenges the election of Director of his tea factory, Kariko North Electoral Zone, for what he states to be blatant disregard of provisions of the Articles of Association of the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent’s Management Agreement and election of Tea Factory Company Directors, nominees and Buying Centre Committee Members procedures.

25. The above are the issues the court in Petition No. 442/19 dealt with extensively under Paragraphs 129 to 142, with the finding that the petition was indeed unmerited.

To that end, I find and hold that the questions in this instant petition were directly ad substantially in issue in the former suit, and were dealt with to the final conclusion, exhibited in the Judgment delivered on the 20/2/2020.

26. I further find that the parties in both suits and in particular the former suit was between the same parties save for the petitioners, who were challenging election of the Directors of their respective tea factory Directors, and therefore were litigating under the same title.

There is no dispute that the former suit was not heard and finally determined by a court competent to try the suit.

27. This is so clear as the present petition had to be stayed pending hearing and determination of the former. The only reason that the parties and the court found it fit to stay hearing of this suit pending of the former, was because the issues raised in this petition were similar and the courts finding in the former would bind the others, including this petition.

28. **Order 37 (1) of the Civil Procedure Rules** provides for staying of several suits against the same defendants while **Rule 2** provides for staying of suits upon application by defendants, upon the court being satisfied that the issues to be tried in each suit are precisely similar to the issues to be determined in such other suits – Curio Welfare Association –v- Reuben Kyalo Kithinga & Another (2008) eKLR.

29. In the former suit, (PET 422/19) the court on the 7/11/2019, suspended the confirmation of successful nominees in the country following elections conducted at both factory and Zonal levels.

This order no doubt affected the Zonal election of the 3<sup>rd</sup> Respondent in the instant petition. That goes to show that this petition and the former are similar and the orders and final judgment dated the 20/2/2020 applies to the instant petition.

30. Further, by the judgment, the 113 nominated Directors in the Country including the 3<sup>rd</sup> Respondent were ordered to proceed to assume office in their respective factories and Companies which the 3<sup>rd</sup> Respondent did, prompting the Petitioner hereof to bring the application under consideration, dated 11/6/2020.

In **E.T.V Attorney General & Another (2012) eKLR**, the court held that;

**“The Courts must always be vigilant to guard litigants evading the doctrine of Res judicata by introducing new cause of action so as to seek the same remedy before the court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction.”**

31. In the case Hoystead and Others –v- Taxation Commissioner (1925) ALL ER Re 56, Page 6 Cited in Rose Njeru Munoru & 13 Others, -v- Hannah Mwhaki Muturi & 4 Others (2016) eKLR.

**“The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation stated with a view of obtaining another Judgment upon a different assumption of fact ----- parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, of new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents of the weight of certain circumstances. If it was permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted.”**

32. For the foregoing the application dated 11/6/2020.

33. Having made a finding that the issues in this petition were determined in the former petition No. 422/2019, and the instant petition is res-judicata, the petition is dismissed.

34. There shall be no orders as to costs on both the application dated 11/6/2020, and this Petition.

**Dated, Delivered and Signed at Kerugoya this 4<sup>th</sup> day of February 2021.**

**J.N. MULWA**

**JUDGE**