



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CIVIL CASE NO. E001 OF 2021**

1. ORINA NYANGAU.....1<sup>ST</sup> PLAINTIFF/APPLICANT
2. PHILEMON OGERO.....2<sup>ND</sup> PLAINTIFF/APPLICANT
3. REBECCA NYAMOITA.....3<sup>RD</sup> PLAINTIFF/APPLICANT
4. KERUBO KOINANGE.....4<sup>TH</sup> PLAINTIFF/APPLICANT
5. JACKSON O. NYANGERI.....5<sup>TH</sup> PLAINTIFF/APPLICANT

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1. NYANSIONGO TEA FACTORY CO. LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT
2. COUNTY COMMISSIONER NYAMIRA.....2<sup>ND</sup> DEFENDANT/RESPONDENT
3. COUNTY EXECUTIVE COMMITTEE MEMBER FOR  
AGRICULTURE NYAMIRA COUNTY.....3<sup>RD</sup> DEFENDANT/RESPONDENT
4. COUNTY DIRECTOR OF AGRICULTURE NYAMIRA COUNTY...4<sup>TH</sup> DEFENDANT/RESPONDENT
5. NICHOLAS OCHENGE OMWENGA.....5<sup>TH</sup> DEFENDANT/RESPONDENT

**RULING**

In the suit filed herein on 18<sup>th</sup> May 2021 the plaintiffs/applicants pray for judgement against the defendants/respondents jointly and severally for: -

- “1. A declaration that the 1<sup>st</sup> to 4<sup>th</sup> defendants breached the mandatory criteria set out under the tea factory company election regulation 2021 to conduct free and fair elections.**
- 2. The election of the 5<sup>th</sup> defendant Nicholas Ochenge Omwenga as director of Nyansiongo Tea Factory Company Limited held on 30/4/202 (sic) be nullified.**
- 3. That the 1<sup>st</sup> to 4<sup>th</sup> defendants be directed to conduct fresh election within a specified period in respect to director representing Kitutu Electoral Zone within Nyansiongo Tea Factory Limited in compliance of the law.**
- 4. Costs of this suit be borne by the defendants.**
- 5. Any other alternative relief that this honourable court may deem fit to grant.”**

Simultaneously with the plaint the plaintiffs/applicants filed a Notice of Motion seeking orders that: -

“(a) That the instant application be certified as urgent and be heard ex-parte in the first instance.

(b) Pending the hearing inter-parties of this application there be issued an order of injunction barring the returning officer in charge of Nyansiongo Tea Company Limited from presenting to the minister for Agriculture for appointment and gazettelement as director Nyansiongo Tea Company Limited.

(c) Pending the hearing and final determination of this application there be issued an order of injunction barring the minister for agriculture from appointing and gazetting the 5<sup>th</sup> defendant as duly elected director of Nyansiongo Tea Factory Company Limited.

(d) Pending the hearing and final determination of this suit there be issued an order of injunction restraining the 5<sup>th</sup> defendant from discharging duties and/or taking of oath as director of Nyansiongo Tea Company Limited.

(e) That the costs of this application be provided for.”

The application is premised on the grounds set out on its face and in the supporting affidavit of Orina Nyangau (the 1<sup>st</sup> plaintiff/applicant) sworn on 13<sup>th</sup> May 2021. Those grounds are: -

“1. That the purported election of the 5<sup>th</sup> defendant as a director Nyansiongo Tea Company Limited is irregular.

2. That the 5<sup>th</sup> defendant was elected through fraudulent into office as the electoral malpractices were rampant.

3. That the election committee colluded with the 5<sup>th</sup> defendant and the returning officer to rig the elections and have the 5<sup>th</sup> respondent elected against the law.

4. It is on public interest that the orders sought herein be granted.”

All but the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents entered appearance to the suit and filed their responses to the application. On 24<sup>th</sup> May 2021 this court, with the consent of Counsel for the parties, gave directions that the application dated 13<sup>th</sup> May 2021 would be heard through written submissions and by 27<sup>th</sup> May 2021 those of the 5<sup>th</sup> respondent had been received. However, despite this court directing that submissions were to be filed within three days of the giving of directions due to the urgency of the application, Counsel for the plaintiff/applicants and the 3<sup>rd</sup> and 4<sup>th</sup> defendants/respondents did not file theirs until 9<sup>th</sup> June 2021.

Mr. Anyona, Learned Counsel for the plaintiff/applicants submitted that the plaintiffs/applicants are all voters from Kitutu Electoral zone who participated in the elections for directors in which the 5<sup>th</sup> defendant/respondent was declared the winner. Counsel submitted that the elections in all the six electoral zones were marred with irregularities in that agents of some candidates and in some cases voters were chased away; that the wrong register was used and generally that the elections were not free and fair and therefore the 5<sup>th</sup> defendant/respondent was not validly elected. Counsel submitted that if the instant application is not granted and the 5<sup>th</sup> respondent is allowed to assume office the plaintiff/applicants shall suffer great loss and damage as their candidate was shortchanged. Counsel submitted that the election in favour of the 5<sup>th</sup> respondent went against the wishes of many farmers and it is imperative that an injunction should issue to restrain the 5<sup>th</sup> defendant/respondent from being gazetted as the director. Counsel contended that the substantial losses likely to be suffered by the applicants are the salaries due to be received by the 5<sup>th</sup> respondent as the same is taxed from the earnings of the farmers in the electoral zone. Counsel contended that the 5<sup>th</sup> respondent would most likely not be in a position to refund the said salaries if they are paid and the suit herein succeeds. Counsel also asserted that the balance of convenience tilts in favour of allowing the application and further stated that the application is highly merited and it should be allowed.

Counsel for the 3<sup>rd</sup> & 4<sup>th</sup> defendants/respondents merely filed a list and bundle of legislation and cases upon which they rely but did not file any submissions. They were represented by Mrs. E. Asati Advocate whose brief was later taken up by Mr. Nyagarama as Mrs. Asati had been appointed a Judge of the Environment and Land Court and could no longer appear.

Mr. Nyasimi, Learned Counsel for the 5<sup>th</sup> respondent on his part submitted that the applicants did not meet the conditions for grant of a temporary injunction. Counsel submitted that the applicants have not demonstrated that firstly they have a prima facie case with reasonable prospect of success or secondly that they are likely to suffer irreparable damage that cannot be compensated by an award of damages or thirdly that the balance of convenience tilts in their favour. To support this submission Counsel relied on the celebrated case of **Giella v Cassman Brown & Co. Limited [1973] EA 358**. Counsel contended that none of the applicants were candidates in the impugned election. He pointed out that none of those who were candidates raised any complaint regarding the elections. Counsel contended that the applicants hail from one tea buying center yet over twenty centres took part in the election and none but them have impugned the election. Counsel accused the applicants of being mere pawns being used for ulterior motives to abuse the court process. Counsel submitted that it was telling that the applicants have not disclosed the number of votes obtained by each of the candidates in the election and stated that this information would have gone a long way in determining the genuineness of their complaint. Counsel also submitted that the applicants have not indicated the nature of loss or damage they are likely to suffer and have not therefore demonstrated irreparable loss. On the balance of convenience, Counsel stated that the same tilts in favour of allowing the operations of the tea company to operate. Counsel also pointed out that the **Tea (Tea Factory Limited Company Elections) Regulations, 2021** provide a mechanism for the resolution of election disputes at **Regulation 18** which he submitted the applicants should have exhausted before coming to this court. To support his submission Counsel cited the cases of **Speaker of National Assembly v Njenga Karume [2008] KLR 425** and **Petition E011 of 2020 – Francis Nzioki Kavuu v Kenya Copyright Board & 2 others [2021] eKLR** and urged this court not to entertain this application and to support his submission that the suit herein “is a nonstarter with no chance of success.” Counsel urged this court to dismiss the application with costs.

I have carefully considered the application, the grounds thereof, the supporting affidavit, the replying affidavit of the 5<sup>th</sup> defendant/respondent, the rival submissions of Learned Counsel for the parties, the cases cited and the law. I agree with Counsel for the 5<sup>th</sup> respondent that this court ought not to entertain the application and indeed the suit herein. It is now settled that where the Constitution or an Act of Parliament has provided a mechanism for resolution of a dispute, parties must first exhaust that mechanism before coming to court. This principle was enunciated in the case of **Speaker of National Assembly v Njenga Karume [2008] KLR 425** where the court held: -

**“.....In our view there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions.**

In the case of **Francis Nzioki Kavuu v Kenya Copyright Board & 2 others [2021] eKLR** the court stated: -

**“The constitution vide Article 159(2)(c) recognizes the use of alternative dispute resolution mechanism. Again, the Fair Administrative Actions Act recognizes the need for an aggrieved party to exhaust alternative dispute resolution mechanisms before approaching the High Court. Section 9(2) and (3) of the Fair Administrative Actions Act No. 4 of 2015 provides as follows:**

**“The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”**

**Section 9(3) of the Act provides that the High Court or subordinate court shall, if it is satisfied that the remedies referred to in subsection (2) have not been exhausted, direct that the applicant shall first exhaust such remedy before instituting proceedings.”**

This was also the holding in the case of **East Africa Pentecostal Churches Registered Trustees & 1754 others v Samwel Muguna Henry & 4 others [2015] eKLR** where the court stated: -

**“71. There must have been and there must be a procedure that the petitioner’s church follows in conducting fair and free election and the failure to do so lead to various suits. In view of the petitioner’s constitution, it is most appropriate that the established mechanism be followed in resolving the dispute arising out of the election. The established petitioner’s constitution should be given room to work as contemplated.**

**72. It is trite law where a statute establishes a dispute resolution procedure, then the procedure must be strictly followed in resolving the dispute.**

**73 .....**

**74. In the instant petition the plaintiff’s cases concern the church election process, which the plaintiffs’ challenge on various grounds, the principle that where an institution or a statute has established a dispute resolution procedure then that process must be strictly followed or applied is of universal application. The mere fact that the constitution is cited or invoked is not sufficient to qualify the matter to be a Constitutional matter and confirm (sic) a license to High Court to inquire, investigate, arbitrate surcharge or in any manner deal with the issues which can be dealt with through the dispute resolution procedure provided by constitution or a statute.”**

The court went ahead and held that: -

**“75. That though the court has jurisdiction to deal with plaintiff’s complaints it is premature as they did not strictly follow the church constitution providing for dispute resolution mechanism. The plaintiffs having failed to pursue their grievance as provided in the church constitution they should be allowed to proceed with their dispute resolution mechanism as members of church before pursuing claim before a court of law. I find the plaintiff’s acted in violation of the laid down procedure in dispute resolution procedure by the constitution of the petitioner’s church and as such I am satisfied all civil suits filed concerning the petitioner church affairs to be improperly before courts.”**

The instant case is no different in that the **Tea Act, 2020** has provided an election dispute resolution mechanism at **Regulation 18** of the **TEA (TEA FACTORY LIMITED COMPANY ELECTIONS) REGULATIONS, 2021** as follows:-

**“18. (1) A dispute arising from the election held in a specific electoral area shall be made in writing to the Election Committee within forty-eight (48) hours.**

**(2) The aggrieved party shall file the grounds of the election dispute together with copies of relevant documents with the Election Committee.**

**(3) The aggrieved party shall serve the other party within twenty four (24) hours of filing the dispute.**

**(4) The Election Committee shall give notice to the parties of the date and place of hearing of the dispute.**

**(5) The Election Committee shall consider and determine the dispute and communicate the final decision to the affected parties within seven (7) days.**

**(6) The filing of a dispute pursuant to rule (15) shall not operate as a stay of the election unless the Election Committee so orders.”**

**Article 159 (2) (c)** of the **Constitution** enjoins this court to promote alternative dispute resolution mechanisms. It would be an affront of the said constitutional provision and the aforestated decisions for this court to entertain a party who refuses to resort to the dispute resolution mechanism provided in the **Tea Act**. I note that in paragraph 7 of the supporting affidavit the 1<sup>st</sup> plaintiff/applicant deposes that they made their grievances known to the Elections Committee within the prescribed period but the same had not been heard hence the reason they filed this suit. This deposition appears to contradict the averment in his witness statement that he lodged a complaint with **“the presiding officer who did not however attend to him.”** Note that his witness statement does not make any mention of a complaint made to the Elections Committee which means the deposition in the affidavit was but an afterthought. In any event even were we to believe that a complaint was properly made to the Elections Committee this only goes to confirm that the appellants did not exhaust the dispute resolution mechanism provided in the **Tea Act 2020** before filing this suit and this court ought not therefore to entertain their application or even the suit. In the premises the application is dismissed with costs and the entire suit is also struck out with costs to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants/respondents. As the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents did not appear or take part in these proceedings they shall not be entitled to costs either of the application or the suit. It is so ordered.

**RULING SIGNED, DATED AND DELIVERED (ELECTRONICALLY VIA MICROSOFT TEAMS) AT NYAMIRA THIS 8TH DAY OF JULY 2021.**

**E. N. MAINA**

**JUDGE**