



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A. K. NDUNG'U J

CIVIL CASE NO 12 OF 2019

DAVID NYAKENGO NYAKWAMA.....1ST APPLICANT/PLAINTIFF

SAMWEL OGATA ATWORI2ND APPLICANT/ PLAINTIFF

VERSUS

KENYA TEA DEVELOPMENT AGENCY LTD1ST RESPONDENT/ DEFENDANT

NYAMACHE TEA FACTORY COMPANY LTD2ND RESPONDENT/ DEFENDANT

ROBERT ARAKA AROR3RD RESPONDENT/ DEFENDANT

RULING

INTRODUCTION

1. The Notice of Motion dated 18th November 2019 is brought under **Order 40 Rules 1&2** of the **Civil Procedure Rules, Sections 1, 1A, 3, 3A & 63(e)** of the **Civil Procedure Act** and other enabling provisions. The application is based on the grounds listed at the foot thereof and the affidavit of David Nyakengo Nyakwama sworn on 18th October 2019. The application seeks the following orders;

a. spent;

b. That pending *inter partes* hearing of this application, there is and is hereby issued an order of temporary injunction barring the 1st and 2nd respondents/defendants from admitting the 3rd defendant to the board of directors of Nyamache Tea Factory Limited as factory Director and/or nominee director representing Masige electoral area;

c. That pending the hearing of this suit, this honorable court be pleased to issue an order of interim injunction restraining the 1st and 2nd defendant from allowing 3rd defendant to transact any business as director for Nyamache Tea Factory Company Limited representing Masige electoral area and /or as nominee director of the 2nd defendant;

d. Costs of this application be provided for;

e. Such further and/or other orders be made as the court may deem fit and expedient.

2. The applicants describe themselves as founder shareholders of the 2nd defendant within Masige Electoral Area. Among the rights a shareholder of the 2nd defendant enjoys is the right to participate in elections to determine who should be elected as a director of the 2nd respondent.

3. Pursuant to a management agreement entered into between 1st respondent and the 2nd respondent, the 1st respondent issued a notice for elections to be held on 5th November, 2019, for director of the 2nd respondent representing Masige Electoral Area. The 3rd respondent put in his application to contest in the elections but his application was rejected by the verification committee. The applicants claim that the reason for the 3rd respondent's disqualification was due to his failure to deliver at least 2,000 kilograms of green leaf during the preceding year in accordance Article 88 (4) of the 2nd respondent's Articles of Association.

4. The 3rd respondent appealed the decision rejecting his candidature to the Dispute Resolution Committee, an organ of the 1st respondent, and his appeal was allowed. He was cleared to contest and went on to win the elections.
5. The decision of the Dispute Resolution Committee is challenged by the applicants who claim that the appeals committee gave no reasons for allowing the appeal. They depose that the decision to clear the 3rd respondent to contest was driven by selfish interests since the 3rd respondent had served as a clerk with the 1st respondent. It is said that the 3rd respondent supplies his green leaf to a rival company known as Mara Tea Company Limited and his election as a director will prejudice the interests of the farmers.
6. According to the applicants, the tea sector in Kenya has been mismanaged, to a large extent, by the 1st respondent which manages most tea factories in Kenya on behalf of farmers. The decision to disregard clear provisions of the Articles and Memorandum of Association of the 2nd respondent being a clear case in point of the alleged mismanagement. The court is asked to intervene by granting the temporary injunction.
7. The 3rd respondent in his replying affidavits sworn on 10th February 2019 and 6th August 2020 avers that he too is a holder of founder shares of the 2nd respondent. He is aware that yearly, 1/3 of the directors offer themselves for election subject to their eligibility. He states that when the verification committee failed to prequalify him for nomination as a director for Basi Masige Electoral Area he preferred an appeal against the decision and the appeals committee allowed his appeal.
8. The 3rd respondent insists that he met all the conditions necessary to be a candidate and that he was duly nominated and garnered the majority votes in the elections which were uncontested. He also asserts that the decision of the Dispute Resolution Committee was not biased or driven by selfish interests and the assertions of mismanagement by the 2nd respondent have not been proved. Further, that the applicants did not lodge a complaint or appeal as per the election manual and have not exhausted the internal mechanisms laid down by the 1st and 2nd respondents' memorandum and articles of association and the election manual. That the applicants have also not demonstrated what rights have been violated and they are being used by external forces to delay his swearing in.
9. The 1st and 2nd respondents did not file responses to the application.
10. Directions were taken to canvass the application by way of written submissions which I have duly considered.
11. Learned counsel for the 3rd respondent contested the jurisdiction of this court to determine the application in his written submissions. He argued that the election manual provided for a mechanism to be followed after elections and in this case no complaints, disputes, petitions or appeals arose out of the voting process. He submits that the internal mechanisms laid down by the 2nd respondent company must be exhausted before the matter is raised before a court of law.
12. The court is referred to the cases of **Paolo Murii v Gian Battisha Murii & Another [2000]eKLR**, **Zaburi Musa Hamisi & 3 others vs Ishmael Hillon & 4 Others [2015]eKLR**, **Shiawase Limited and another v Pianesi Gino [2012]eKLR** and **Dadani v Manji & 3 Others HCCC No. 913 of 2002**, where the courts upheld the principle that unless there is *ultra vires* or fraudulent acts not amendable to rectification, the courts will be reluctant to interfere with the internal management of a company.
13. It is argued that since the applicants have failed to demonstrate any illegality occasioned by the respondents in the conduct of the elections, this court lacks the mandate to deal with the application or grant the orders sought.
14. Counsel also cited the case of **Job Felis Ndarera & Another v Nyamache Tea Factory Company Limited & 2 Others [2016]eKLR** where the court declined jurisdiction on the grounds that the rules contained in the election manual were binding on the applicants in so far as the elections dispute resolution forum is concerned as they are derived from the company law, the company's articles of association and the management agreement.
15. He adds that the legality of the election rules of the 2nd respondent was determined in the affirmative in the **Moraa Juma v Ogembo Tea Factory Company Limited & 2 Others [2017]eKLR** case. The respondents maintain that the elections held in October 2019 were carried out in strict compliance with Article 86 of the Memorandum and Articles of Association and the applicants have not exhausted the internal dispute resolution processes before approaching the court.
16. I have considered counsel's submissions on the jurisdiction of this court. Indeed, without jurisdiction a court has no power to adjudicate over a matter that is placed before it and must immediately down its tools. The jurisdiction of a court is derived from the Constitution, legislation or both. I agree with counsel's position that ordinarily, courts will not interfere with the internal management of companies unless it is shown that the act complained about is *ultra vires* or is of a fraudulent character or not rectifiable by ordinary resolution.
17. The applicants case is that that the appeals committee which overturned the decision disqualifying the 3rd respondent from running for the elections did not consider the fact that the 3rd respondent failed to meet the requirement under Article 88(4) of the 2nd respondent's Articles of Association that a candidate had to remit 2,000 kgs of tea leaves to the 2nd respondent in the year preceding the elections. They have attached to their affidavit, data of delivery of green leaves by the 3rd respondent which shows that he only supplied 1,311 kgs of tea leaves.
18. The applicants also contend that the appeals committee which is an organ of the 1st respondent improperly cleared the 3rd respondent to contest the elections. They claim that the elections were craftily manipulated to favour the 3rd respondent who had served as clerk for the 1st respondent. He is also accused of being a registered supplier for a rival tea factory and his supply of tea to the 2nd respondent is said to be sporadic. The applicants are certain that these facts show that his heart is not with the 2nd respondent and the orders sought should be granted

to protect the farmers' interests.

19. The 3rd respondent refutes the allegations made against him by the applicants. He deposes that he supplies tea to the 2nd respondent and had met the threshold for nomination as a director. The decision of the appeals committee is produced in support of this. He also contends that the applicants have not shown that the elections were irregular or proved their claim that the 2nd respondent has mismanaged the tea sector.

20. The 1st applicant annexed, to his affidavit, a copy of the election manual issued by the 1st respondent. The document contained the procedure for nomination of directors, guidelines on how the election would be conducted, the counting of votes and importantly, a procedure for resolution of disputes on the prequalification exercise and the voting process.

21. When 3rd respondent successfully appealed the decision to bar him from running in the elections to the Dispute Resolution Committee, the applicants did not contest the findings of the appeal's committee. They did not bring up their reservations with the decision of the appeal's committee when it made its decision. The 3rd respondent went on to vie for the position and emerged the winner. There is no evidence that the applicants contested the 3rd respondent's election in accordance with the procedure set out in the election manual.

22. That said, I find that at the heart of the matter is the question of the suitability of the 3rd respondent to be a director for the 2nd respondent. In the main suit, the applicants seek declaratory orders that the 3rd respondent is not qualified to be a director of the 2nd respondent. They claim that the 3rd respondent is not in good standing and that he has been supplying tea leaves to a rival company to the detriment of 2nd respondent.

23. From the foregoing, I have filtered the issues for determination to be two fold;

1. Whether the court has the requisite jurisdiction to entertain the matter.

2. Whether if (1) above is in the affirmative whether the applicants have achieved the legal threshold for the grant of an injunction as sought.

24. Naturally, the court must address the issue of jurisdiction first since without jurisdiction this court would be bereft of the necessary authority to adjudicate on the application before it, and indeed, the whole suit. The importance of jurisdiction was pronounced eloquently in the case of **The Owners of Motor Vessel Lillian "S" vs Caltex Oil Kenya Limited 1989 KLR 1653** where the Court of Appeal held as follows:

"Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction"

25. At the heart of the dispute herein is the propriety of the election of the 3rd respondent as a director of the 2nd respondent.

Suffice it to note from the outset that the said elections are governed by an elaborate procedure contained in an election manual which provides for procedure of nomination of directors, guidelines on how the election would be conducted, the counting of votes and **a procedure for resolution of disputes on the prequalification exercise (emphasis mine).**

26. The applicants' have rights, as readily acknowledged, to participate in elections to determine who should be 'director'. The 3rd respondent has the right to vie as a director. Both sides are bound by the rules governing such elections as alluded to above.

27. And which leads me to the nature of the dispute before me. The applicants' grouse is that the 3rd respondent was not qualified for election as a director. It is urged that the 3rd respondent faced a Verification Committee which found him unfit to vie was a director. He appealed the decision before a Dispute Resolution Committee which cleared him to contest.

28. This process is embodied in **"The Election of Tea Factory Company Directors Nominees and Buying Centre Committee Members – Procedures – 2019."**

29. The 3rd respondent was thus subjected to a nomination process that is in accordance with the rules. A decision was rendered by a verification committee. That decision was appealed against and the 3rd respondent found fit to contest.

30. In exercising its powers, the Disputes Resolution Appeals Committee sat as a quasi judicial body. The decision was an administrative action falling within the meaning provided at **Section 2(i) and (ii) of the Fair Administrative Act.**

31. The applicants' challenge is directed to the decision of the Dispute Resolution Appeals Committee. They state that no reasons were given by the Dispute Resolution Appeals Committee and that the decision was driven by selfish interests. (read bias)

32. The rules provide in **rule 15** that;

"Rule 15: The decision of the committee shall be final save for a decision of a court of jurisdiction (High Court) reversing the

same.”

33. It is thus crystal clear that a well established internal mechanism exists governing the process of the impugned elections. The court cannot be called upon to supplant that mechanism nor can it substitute it with its own prescribed mechanism.

34. The mechanism is comprehensive and addresses pre-election processes as well as post election processes. While the applicants challenge the suitability of the candidature of the 3rd respondent, it is worth noting that the elections took place and the 3rd respondent was elected. Any complaint, dispute, petition or appeals arising out of the voting process ought to, in accordance with the rule, be raised with the returning officer within 48 hours.

35. It is obvious, then, that the applicants have sidestepped this process and approached the court. The question that readily springs to mind is whether this court is divested of jurisdiction on grounds of the suit offending the doctrine of exhaustion of internal dispute resolution mechanism.

36. In *Geoffrey Muthinja Kabiru & 2 Others –vs- Samuel Munga Henry & 1756 Others* the Court of Appeal provided the constitutional rationale and basis for the doctrine in the following words;

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside courts ... This accords with Article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.”

37. **Section 9(2)** of the **Fair Administrative Action Act** provides;

“S 9(2) 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.

This must be read with **Section 9(3)** which provides;

“S 9(3) The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

38. The applicant did not challenge the election of the 3rd respondent before the returning officer within 48 hours as per the prescription in the rules.

39. Secondly, even appreciating that the applicants' grouse with the 3rd respondent's election as a director is based on his suitability to contest and not the election process itself, it is clear that the issue was determined on appeal by a Dispute Resolution Appeals Committee. There is therefore a decision of a quasi judicial entity and which is now under challenge. This court cannot therefore exercise original jurisdiction on the matter. It can only be moved to review the decision either on appeal or judicial review. The rule that grants parties recourse to this court (The High Court) is not explicit that an appeal shall lie to the High Court. In those circumstances, the ready remedy available to the applicants should be under the realm of judicial review.

40. The applicants' appear to be alive to this as they ground their application on two broad themes;

1. **That the Dispute Resolution Appeals Committee gave no reasons for their decision.**
2. **That the decision was driven by selfish interests (That is to say, the decision was biased).**

41. Thus the applicants' remedy lay in moving the court under judicial review to demonstrate the failure to give reason by the Dispute Resolution Appeals Committee and to show bias. Instead, the applicants have invoked the original jurisdiction of the court seeking ordinary civil remedies. The absurdity that would be created by the unfolding scenario is easy to see. The court would have to run a parallel inquiry of the issues in controversy yet there already has been an inquiry of the same issues before a competent body whose decision exists. The proper route would have been to invoke the judicial review powers of the court.

42. From the foregoing, I am satisfied that the court has no jurisdiction to entertain the application herein for reason that the applicants have not exhausted the available mechanism of dispute resolution and secondly, since there is already a decision by a competent body operating under recognized rules/mechanism, the invocation of this court's original jurisdiction is in error.

43. Without jurisdiction the court must down its tools. This finding disposes off the application and I need not delve into other issues raised.

44. With the result that the application dated 18.11.2019 is dismissed with costs to the 3rd respondent.

Dated and Delivered at Kisii this 14th day of October, 2020.

A. K. NDUNG'U

JUDGE