



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

PETITION NO. 4B OF 2019

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 ARTICLES 22 AND 23

AND

IN THE MATTER OF COMPANIES ACT

AND

IN THE MATTER OF ARTICLES OF ASSOCIATION OF KEBIRIGO TEA FACTORY COMPANY LIMITED

AND

DISHON B. ONGONDI.....PETITIONER

VERSUS

1. KEBIRIGO TEA FACTORY CO. LTD.....1ST RESPONDENT

2. DAUDI M. KIREKI.....2ND RESPONDENT

JUDGMENT

On 19th November 2019 the petitioner filed a petition against the 1st and 2nd respondents challenging the elections held by the 1st respondent whereby the 2nd respondent was declared as the winner for the position of Director for Bonyamatuta Chache Electoral Zone and sought the following reliefs: -

“(a) An order declaring that the elections for the purposes of director for Bonyamatuta Chache Electoral Zone to the 1st respondent on 5th November, 2019 was irregular and improper.

(b) An order directing the 1st respondent to hold a fresh election for the director representing Bonyamatuta Chache Electoral Zone to the 1st respondent.

(c) Costs of this petition.

(d) Any other order this court may deem fit to grant.”

The petitioner’s case is that the elections were tainted with irregularities; that several farmers/shareholders who were deceased cast their votes; that there was an exaggerated number of farmers/shareholders who opted to vote by proxy and that all those irregularities led to the 2nd respondent being declared as the duly elected Director of Bonyamatuta Chache Electoral Zone on 21st November, 2019. It is the petitioner’s contention that should the agenda item be passed and voted the shareholders and farmers of the said zone will be deprived of their rights and freedoms.

In their replying affidavit sworn on 20th January 2020 the respondents vehemently denied all the allegations by the petitioner. It is their case that elections for the Director of Bonyamatuta Chache Electoral Zone were guided by proper principles of governance and the rule of law and that the 2nd respondent was lawfully declared the winner. Further, that no irregularities were noted during and after the elections and no rights and interests of the shareholders in Bonyamatuta Chache Electoral Zone were infringed as alleged by the petitioner.

The petition was canvassed through written submissions. Those of the petitioner were filed through the firm of J.O. Soire & Company Advocates who submitted that by virtue of Article 165(3) of the Constitution this court has jurisdiction to hear and determine this petition as the petitioner herein alleges that his rights as a shareholder/member of Kebirigo Tea Factory Company Limited were infringed by the manner in which the elections for Director for Bonyamatuta Chache Zone were conducted. Secondly, that the material presented and tabulated in the petition are sufficient and weighty enough to grant this petition as there are instances of exaggeration of votes that were cast through proxy and that there were incidences of deceased shareholders/farmers voting and participating in the election.

The 1st and 2nd respondents filed their submissions through the firm of Nyachiro Nyagaka & Company Advocates who stated that a list of prequalified candidates was issued to the shareholders after successful vetting of the candidates by the vetting committee and the petitioner was not one of the contestants. It was also submitted that the election manual was supplied to all contestants and shareholders and that the said manual comprises a mechanism for challenging the voting process which provides that any complaints/disputes/petitions/appeals arising out of the voting process on the voting day should be made to the returning officer within 48 hours of the conclusion of the election. Therefore, that all issues at the first instance would have to be laid before the returning officer who would thereafter carry out investigation and make his verdict. Furthermore, the returning officer would also be at liberty to consult the Group Company Secretary for clarification and advice on what action to be taken. It was contended that the internal mechanism laid down by the 1st respondent must be exhausted before coming before this honorable court. Relying on the case of **Paul Chemunda Nalyanya v Messina Kenya Limited (2015) eKLR** Counsel for the respondents submitted that for that same reason this court does not have jurisdiction as the internal mechanisms provided for in the Election Manual guiding the impugned election was not exhausted. The 1st and 2nd respondents urged this court not to entertain this petition for to do so would defeat and undermine the mechanisms which are underpinned in the 1st respondent Memorandum and Articles of Association. They further urge that the provisions of Article 86 (g) of the 1st respondent Memorandum and Articles of Association have vested the Company Secretary with power to appoint and mandate presiding and returning officers with general powers to oversee elections and that the Company Secretary in exercising his official mandate has to breathe life to the said provision through the development of election guidelines. Further, that Section 20 of the Companies Act, 2015 establishes the Articles and Memorandum of Association as the constitution of companies. Thus though the constituting documents companies have a free hand in developing their own rules of engagement and for that reason the election manual has proper legal backing. Placing reliance on the cases of **Paolo Murri v Gian Battista Murri & Another [2000] eKLR** and **Edwards and another v Halliwell and others (1950) 2 ALL ER 1064**. Counsel for the respondents submitted that courts will only interfere with internal management of companies where the acts complained of are ultra vires or of a fraudulent character or not rectifiable by ordinary resolution and that the petitioner has failed to demonstrate any illegality that was occasioned by the 1st respondent and its Company Secretary in publishing the Elections Manual 2019 and the conduct of the October 2019 elections to warrant the orders sought in the petition hence the petition must fail.

The respondents further submitted that the alleged names of deceased voters does not exist in the voters' register and the petitioner has not attached any documentary evidence to show that the names listed in paragraph 3 of the petition are of deceased persons and there is no sworn affidavit by any shareholder to confirm that indeed there was any rights that were infringed by the 1st respondent. The respondents submit therefore that the petitioner has not proved the petition and that moreover as this court does not have jurisdiction to deal with the petition the same should be dismissed with costs to the respondents.

Issues for determination

Having considered the petition, reply to the petition, submissions filed by the parties and the cases cited the issues that call for determination are: -

- a) Whether this court has jurisdiction to entertain this petition.**
- b) Whether the petitioner's rights and fundamental freedoms were violated or infringed by the election of the 1st respondent as the Director for Bonyamatuta Chache Electoral Zone.**

The question of jurisdiction goes to the heart of every matter in any litigation. This has been the position in many cases over many years. In the leading case of **The Owners of Motor Vessel "Lillians" Vs. Caltex Oil Kenya Ltd (1989) KLR** it was held that: -

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

In its Advisory in the case of **In the Matter of the Speaker of the Senate & another [2013] eKLR** the Supreme Court also held that jurisdiction in any matter coming up before a court, is a fundamental issue that must be resolved at the beginning. It is the fountain from which the flow of the judicial process originates.

The 1st and 2nd respondents argued that they have a dispute resolution mechanism that is engraved in the company's Memorandum and Articles of Association. It is their argument that there is an Election Manual which provides for a clear procedure and mechanism for electoral dispute resolution and as such, the applicant should have channeled his dispute through that mechanism.

The said elections rules are the **November 2019 Tea Factory Company Directors Rules** provided for in annexure "SM2" to the affidavit sworn by Susan Musyoka on 17th January 2020. The said rules provide for a wide variety of issues regarding the elections including but not limited to the date, nomination, verification, fees payable, notices, presiding/returning officers/election clerks, agents and the actual casting of votes. The document also sets out rules for Complaints/Dispute/Appeals resolution and in regard to that provides for what it refers to as a **Dispute Resolution Committee Rules** which state: -

"COMPLAINTS/DISPUTE, APPEALS RESOLUTION RULES

DISPUTE RESOLUTION COMMITTEE RULES

These procedures/Election Manual provides for a dispute resolution mechanism.

These Rules shall be known as the Dispute Resolution rules.

1. All appointments to this Committee shall be appointed by the Managing Director of the Managing Agent,
2. There shall be a Chairman of the Committee.
3. There shall be a Secretary of the Committee.
4. There shall be at least seven (7) members to the Committee and the quorum shall be (4). The Committee would be multi — disciplinary in its set LIP
5. The Committee shall receive complaints/disputes/petitions/appeals arising out of the prequalification verification exercise carried out.
6. Complaints/disputes/petitions/appeals must be lodged within 24 hours after communication of the decision of the Verification Committee. The same shall be lodged through the Regional Manager.
7. The Regional Manager shall submit the complaints/appeals to the Committee, through the office of the Head of Secretarial & Governance, which office shall register them, will prepare the same and any supporting documents for consideration by the committee.
8. The Committee shall sit between 2nd and 3rd October, 2019 and conclude its business within the two days to enable the preparation and printing of the ballots for the nomination elections.
9. Subject to (8) above, the Committee shall determine its sitting timetable.
10. The Committee shall sit in an open sitting save for when they are deliberating on the decision once all evidence/statements have been made.
11. A complainant/appellant/petitioner may be requested to appear before the committee and highlight his/her position. The complainant may request for personal appearance in the complaint/appeal letter.
12. The Decision of the Committee shall be in writing and shall be communicated through the Factory Unit Manager from the Factory Company that the complainant/disputant/appellant has applied from. Such decision shall be prepared and sent not later than 4th October, 2019.
13. In the event the election process is suspended through a court process, the life of this committee would be extended, for that electoral area only.
14. The Committee shall cause minutes of the deliberations to be recorded and the members shall append their signatures to the decision.
15. The decision of the Committee shall be final save for a decision of a court of competent jurisdiction (High Court) reversing the same.
16. Where the Articles of a Company refer to Arbitration proceedings before Court process, the same should apply.

Dispute/Complaint/Petition/Appeal - Requirements

1. A petition/dispute/appeal shall be in writing, dated and signed by the person(s) petitioning/disputing/appealing,
2. The petition/dispute/appeal must attach therein the letter communicating the decision of the verification committee (in the event that it emanates from a prospective applicant),
3. The petition/dispute/appeal must state the reason why the Committee should consider reversing the decision of the verification committee.
4. In the event that the issue is in respect of lack of submission of required documents,
 - *Original Certificate of Good Conduct (CID)* - The petitioner/disputant/appellant MUST attach the Valid certificate, indicating validity to 5th November, 2019
 - *Original Tax Compliance Certificate (KRA)* - The petitioner/disputant/appellant MUST attach the Valid certificate, indicating

validity to 5th November, 2019

- **Original “O” level qualification Certificate** - The petitioner/disputant/appellant must attach the Original Certificate (Regional Manager will attest that the original certificate has been seen by him and attach a copy duly stamped with the stamp of the Regional Manager.
5. A petition/dispute/appeal in respect to (4) above without the documents mentioned therein attached shall not be entertained,
6. A petitioner/disputant/appellant, not being an applicant and in respect to issues raised in (4) above, must provide documentary evidence rebutting/challenging the documents therein.”

The election of directors is part of the internal affairs of a company and whereas **Article 165 of the Constitution** vests this court with unlimited original jurisdiction in criminal and civil matters this court would be hesitant to interfere with such elections more so where, as in this case, the company itself has provided a mechanism for resolution of election disputes and the same has not been exhausted. As a shareholder the petitioner is bound by the election rules laid down in the company’s Election Manual and he should have exhausted the dispute resolution mechanism set out therein before coming to this court. This has been the position held by the courts in a long line of cases. In **Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR** the Court of Appeal stated: -

“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 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 the courts.....”

This accords with Article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.”

The rationale behind this was explained as follows in the case of **Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR**: -

“84. It is important to point out, as Justice Majanja did in Dickson Mukwelukeni vs Attorney General & 4 Others (Nairobi High Court Petition No. 395 of 2012), that in reaching this position, the Courts are not merely being formalistic or mechanical. The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Justice J.B. Ojwang’ has felicitously called an “Ascendant Judiciary.”^[1] The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases. It expressly envisages that some of these regimes will be mainstreamed (and, hence, at certain prudential points intersect with the Judicial system) while some will remain parallel to the Judicial system.....”

There exists an elections dispute mechanisms in the 1st respondent’s election Rules which the petitioner ought to have exhausted before coming to this court and for that reason this court cannot grant the prayers sought.

Moreover, the petitioner has not demonstrated the manner in which his rights or fundamental freedoms provided in the Constitution were violated or infringed and in my view this petition which is an election petition disguised as a constitutional petition is an abuse of the court process. The case of **Anarita Karimi Njeru v Republic [1979] eKLR** set the bar in constitutional petitions and the court was emphatic that:

“.....If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

The petitioner herein has done none of the above and for that reason the petition must also fail. The petition also appears to have been overtaken by events by the determination of other disputes in **Joseph Mwangi Mbote & 2 others v Kenya Tea Development Agency Ltd & another** and **Kiru Tea Factory Limited (Proposed Co-petitioner) [2020] eKLR**.

In the upshot I find that not only is this petition not properly before this court but that it has no merit. It is therefore dismissed. Costs follow the course and the petitioner shall therefore bear the costs of the petition.

Signed, dated and delivered in Nyamira via video link (Microsoft Teams) on this 3rd day of December 2020.

E. N. MAINA

JUDGE