



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL SUIT NO.1 OF 2016**

JOB FELLIS NDARERA.....1<sup>ST</sup> PLAINTIFF

THOMAS MAGEMBE AMENYA.....2<sup>ND</sup> PLAINTIFF

**VERSUS**

NYAMACHE TEA FACTORY COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT

KENYA TEA DEVELOPMENT AGENCY (MS) LIMITED.....2<sup>ND</sup> DEFENDANT

MAGUBO JOHN OTOKI.....3<sup>RD</sup> DEFENDANT

**RULING**

**Introduction:**

1. In their plaint dated 14<sup>th</sup> January 2016, the plaintiffs/applicants, who describe themselves as shareholders and farmers who supply tea leaves to the 1<sup>st</sup> Defendant/Respondent sued the respondents to challenge the manner in which the 1<sup>st</sup> respondent's elections for directors position was conducted.
2. The plaintiffs' case is that the said elections were not free and fair, were skewed and craftily manipulated to favour the 3<sup>rd</sup> respondent who emerged the winner.
3. The applicants/plaintiffs seek orders of permanent injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> respondents from admitting the 3<sup>rd</sup> respondent into the board of directors, of the 1<sup>st</sup> defendant company. The applicants also seek orders for scrutiny of the shares register and ballot papers cast for the Bassi Boitang'are electoral area in the 1<sup>st</sup> defendant company.
4. In an amended plaint dated 2<sup>nd</sup> February 2016, the plaintiffs added a prayer for the nullification of the election of the 3<sup>rd</sup> respondent as the director representing Bassi Boitang'are electoral area. Concurrently with the filing of the applicants' plaint, the applicants also filed an application dated 14<sup>th</sup> January 2016 which is the subject of this ruling.

**Background**

5. The application dated 14<sup>th</sup> January, 2016 is filed pursuant to **Order 40 Rules 2, 4 and 5 of the Civil Procedure Rules, Sections 1, 1A, 1B, 3 and 3A of the Civil Procedure Act**. The applicants seek the following orders:

**1. Spent**

**2. Spent**

**3. Spent**

**4. Pending the hearing and determination of this suit there be issued an order of injunction restraining the 3<sup>rd</sup> defendant from attending and participating in board meetings of the 1<sup>st</sup> defendant company as director representing Bassi Boitang'are electoral area.**

**5. The 1<sup>st</sup> & 2<sup>nd</sup> defendants be directed to deposit with the registrar of the High Court all ballot boxes, counter foils marked registers and serial numbers of the ballot papers used in the election held on 5<sup>th</sup> January, 2016 to elect the director representing Bassi Boitang'are electoral area in the 1<sup>st</sup> defendant company.**

**6. Pending the hearing and final determination of this suit the Honourable court be pleased to order a scrutiny and recount of the votes cast during the elections of the Director for Bassi Boitang'are electoral area in the 1<sup>st</sup> defendant company in the elections held on the 5<sup>th</sup> January, 2016.**

**7. Costs of this application be awarded to the applicant.**

6. The application is premised on the grounds that the impugned elections were conducted in flagrant breach of the rules contained in the elections manual issued by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and as a result, the 3<sup>rd</sup> respondent was fraudulently declared the winner.

7. The applicants contend that they have raised substantial issues of fact and law which are arguable and therefore the impugned elections ought to be suspended pending the outcome of the main case. The applicants state that the depositing of the election materials in court and their scrutiny by the court will assure the integrity of the electoral process.

8. The application is supported by the affidavit of the 1<sup>st</sup> applicant JOB FELLIS NDARERA sworn on 14<sup>th</sup> January 2016.

### **Applicants' Affidavit**

9. The 1<sup>st</sup> applicant depones that both he and the 2<sup>nd</sup> applicant contested in the 5<sup>th</sup> January 2016 elections for director's position in the 1<sup>st</sup> defendant's company in which the 3<sup>rd</sup> respondent was declared a winner after garnering a total of 14,282 votes against 10,582 and 9,896 votes for the 1<sup>st</sup> and 2<sup>nd</sup> applicant respectively.

10. The 1<sup>st</sup> applicant states that the 1<sup>st</sup> and 2<sup>nd</sup> respondents deliberately flouted the election rules in order to favour the 3<sup>rd</sup> respondent who then enjoyed the privileged position of incumbency.

11. The 1<sup>st</sup> applicant accuses the 3<sup>rd</sup> respondent of manipulating the electoral process by silencing his opponents or anyone questioning the integrity of the election process. In this regard, the 1<sup>st</sup> applicant deponed that the 3<sup>rd</sup> respondent engaged his supporters to mete out violence on his perceived opponents thereby compromising the integrity of the election. The 1<sup>st</sup> applicant attached annexures "JFN- 4 (A) & (B)" a medical documents in respect to the 2<sup>nd</sup> applicant as proof of his being assaulted by the 3<sup>rd</sup> respondent's supporters.

12. The 1<sup>st</sup> applicant states that having raised concerns about the validity of the electoral process, it is only fair and just that the 3<sup>rd</sup> respondent be barred from participating in any meetings, deliberations and

activities of the 1<sup>st</sup> respondent company pending the outcome of this case. The applicants claim that they will suffer irreparable damage if denied a fair chance to be heard on merit.

13. The 1<sup>st</sup> applicant further states that the respondents will suffer no prejudice if the orders sought are granted because farmers in the 1<sup>st</sup> respondent's company had for a long time been demanding for change in the 1<sup>st</sup> respondent company's management.

14. It is the 1<sup>st</sup> applicant's case that the applicants had a legitimate expectation that the directorship elections in the 1<sup>st</sup> respondent's company would be conducted in a transparent manner and in accordance with the Company's Articles of Association and election regulations formulated by the 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondent exhibited a copy of the 2<sup>nd</sup> respondent's election manual as annexure "JFN-3".

### **Respondents response**

15. On 15<sup>th</sup> January 2015, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed Grounds of Opposition to the applicants said application in which they state that the application is an abuse of the court process, has been overtaken by events, has been compromised, lacks merit and does not disclose the prevailing state of affairs in the 1<sup>st</sup> respondent's company.

16. On 18<sup>th</sup> April 2016, FLORENCE MITEY, who describes herself as the Head of Legal and Regulatory Affairs of the 1<sup>st</sup> and 2<sup>nd</sup> respondent filed a replying affidavit in opposition to the instant application in which she depones that the entire election process was conducted in a fair manner, in compliance with all the relevant rules and to the satisfaction of all the interested parties. She further depones that the 2<sup>nd</sup> respondent's elections manual expressly provides for the process of addressing any complaints arising from the election process which, she states, are to be presented to the Company Secretary or Returning Officer and therefore, the applicants were in breach of the provisions of the said elections manual by presenting this case before the court. She contends that the applicants had not exhausted all the local remedies provided for in the elections manual before moving to file the case in court.

17. The respondent's deponent emphasizes that the Company's **Articles of Association** and **Election Manual** clearly provides for the mode of dispute resolution through referral to arbitration under the confines of the **Arbitration Act**. She reiterates that the impugned elections were free, fair and have since withstood the test of time since no irregularities were reported before, during or after the said elections.

18. She contends that the elected directors have already been confirmed by the shareholders/members at the Annual General Meeting held January, 2016 soon after the elections.

19. The respondent's deponent annexed the said elections manual, the notice of candidature sent to the 2<sup>nd</sup> applicant and candidates' clearance/pre-qualification document to her affidavit as annexures "FM1", "FM2" and "FM3" respectively.

20. When the application came up for hearing before me on 20<sup>th</sup> April 2016, counsel for the applicants and the 1<sup>st</sup> and 2<sup>nd</sup> respondents agreed to canvass their arguments by way of written submissions.

### **Applicants submissions**

21. Through their advocates M/s Aboki Begi & Company Advocates, the applicants submitted that the subject elections were not free and fair and were conducted in breach of the rules governing the said elections thereby necessitating the prayer that the elections materials be deposited in court for preservation, safe custody, scrutiny and recount. The applicants have highlighted examples of instances that make them believe that the elections were manipulated thereby casting aspersions on the integrity of the subject election.

22. The applicants argue that the anomalies that allegedly occurred in the elections process resulted in an

outcome that was not credible, verifiable or transparent. It is the applicants' case that the highlighted breaches of the election rules and regulations substantially affected the results of the said elections thereby making the election of the 3<sup>rd</sup> respondent invalid.

23. In support of their case, the applicants relied on the cases of **Alexander Ojera Vs Returning Officer South West Acholi & another [1962] EA 532** and **Yoana Matoru vs Kitikiro [1957] EA**.

24. During the highlighting of the submissions, the applicants stated that they only sought for orders in prayers number 4, 5, 6 and 7 of the application as the rest of the prayers had already been overtaken by events.

### **Respondents' submissions**

25. M/s Nyachiro Nyagaka & Co. Advocates for the respondents submitted that the operations of the 1<sup>st</sup> respondent, being a Limited Liability Company were governed by the provisions of the **Companies Act** (Cap 486 Laws of Kenya) and the elections of directors regulated by the rules set out in the **Memorandum and Articles of association of the Company**. According to the respondents, the **Company Memorandum and Articles of Association**, together with the elections manual expressly provide for an in-house dispute resolution mechanism which the applicants ought to have exhausted before lodging the instant case in court.

26. The respondents argued that the court ought not to intervene in the Company's internal dispute resolution affairs where mechanisms for dealing with such disputes have been set out in the **Memorandum and Articles of Association of the Company**.

27. In this respect, the respondents cited the cases of **Paolo Murri Vs Gian Battisha Murri & Another (2000) eKLR**, **Paul Mogaka Magoma Vs Gianchore Tea Factory Company (2010) eKLR** and **Paul Chumunda Nalyanyu Vs Messina Kenya Ltd [2015] eKLR**.

### **Analysis & Determination**

28. Upon considering the pleadings filed by the parties herein, their respective submissions and the authorities cited, I note that the following issues require this court's determination.

- a) **Whether this court has jurisdiction to entertain this matter in light of the respondents' claim that the company's election rules provide for a clear dispute resolution mechanism that precluded court action in the 1<sup>st</sup> instance.**
- b) **Whether the application has been overtaken by events.**
- c) **Whether the applicants have made out a case to warrant the granting of the orders sought.**

29. The prayers sought by the applicants can be summarized as follows:

- a) **Orders of injunction to restrain the 3<sup>rd</sup> respondent from taking up directorship position and participating in board meetings of the 1<sup>st</sup> respondent.**
- b) **The depositing of all the election materials in court.**
- c) **An order for scrutiny and recount of the votes cast during the said elections.**
- d) **Costs.**

30. The main relief sought is that of an injunction. The principles governing the grant of orders of injunction were well stated in the celebrated case of **Giella Vs Cassman Brown & Co Ltd [1973] E.A**

**358** to be firstly; that an applicant must show that he has a prima facie case with high chances of success; secondly, that he might otherwise suffer irreparable injury which would not be adequately compensated by award of damages if the orders sought are not granted and lastly, if the court is in doubt it will decide the application on the balance of convenience.

31. In the instant case, the applicants have presented a case against the respondents, however, the chances of success in the case cannot be ascertainable at this initial stage of the case because the respondents have on their part put up a formidable defence by denying all the allegations made by the applicants. The applicants claim that the elections conducted by the respondents were marred by violence and irregularities that resulted in an outcome that favoured the 3<sup>rd</sup> respondent, who was an incumbent director, are mere allegations that are not backed by any concrete facts or evidence that can prompt this court to make a drastic order of injunction to stop the 3<sup>rd</sup> respondent from taking up directorship functions of the 1<sup>st</sup> respondent company. For example, the applicants did not prove that the injuries sustained by the 2<sup>nd</sup> respondent, as shown in annexure "JFN-4 (a) and (b)" were as a result of violence meted out on him by the 3<sup>rd</sup> respondent's supporters. In this regard nothing could have been easier than for the 2<sup>nd</sup> applicant to avail a police OB report or a charge sheet to show that a crime of assault had been committed against him. Even though proof in civil matters is always on a balance of probabilities, these lapses make me conclude that the applicants have not established a prima facie case with high chances so as to fulfill the first condition for the grant of an order of injunction.

32. Furthermore, the respondents have, in the replying affidavit sworn by FLORENCE MITEY stated at paragraph 19 that the 3<sup>rd</sup> respondent, among other directors, had already been confirmed in his position as a director during the Annual General meeting held after the elections. This position on confirmation of the 3<sup>rd</sup> respondent as a director has not been rebutted by the applicants. Clearly therefore, the 3<sup>rd</sup> respondent cannot be restrained, by order of injunction, from conducting his functions as a director of the 1<sup>st</sup> respondent company as this would be tantamount stopping an event which has already taken place. The 3<sup>rd</sup> respondent's election as a director, even though disputed, has not been nullified. The 3<sup>rd</sup> respondent has already taken up his office as a director in the 1<sup>st</sup> respondent company and therefore, stopping him from performing the functions of his office will, in my view, amount to suspending or dismissing him from his office under the guise of an injunction not to mention the fact that the electoral area that he represents in the said company will suffer due to lack of a representation.

33. On the issue of whether or not the applicants will suffer irreparable loss if the orders sought are not granted, I note that the applicants have not shown what loss, irreparable or otherwise, they would suffer if the orders of injunction sought are not granted. I am of the considered view that the position of a director attracts a salary with benefits and remuneration that can be quantified or ascertained with some degree of accuracy. In this regard it is my finding that any damage or loss suffered by the applicants will be capable of adequate compensation in the event of their success in the main case.

34. From the above foregoing, it is abundantly clear to me that the applicants have not met the first two conditions set in the **Giella case** (supra) for the grant of orders of injunction. That being the case, I do not find it necessary to make findings on the third limb of the principles of injunction regarding the case being determined on a balance of convenience should the court be in doubt whether or not the first two conditions have been met.

35. Turning to the first issue of whether or not this court has jurisdiction to entertain this case, the question is, does this court have the jurisdiction? The question of jurisdiction goes to the heart of every matter in any litigation. This position has been upheld over the years in many cases. Nyarangi J in **The Owners of Motor Vessel "Lillians" Vs Caltex Oil Kenya Ltd [1989]KLR**, opined thus:

**“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 tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”**

36. Similar sentiments were echoed by the Supreme Court in Advisory opinion Reference No. 2 of 2013, **Speaker of Senate and another Vs the Attorney General and others** as follows:

**“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.”**

37. Further, in the case of **Macharia & Another Vs Kenya Commercial Bank Ltd & 2 Others. Civil Application no. 2 of 2011**, the Supreme court held:

**“(68) A court’s jurisdiction flows from either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the court cannot entertain any proceedings.”**

38. Even though **Article 165 (3) (a) of the Constitution**, gives the High Court “unlimited original jurisdiction in Criminal and Civil matters”, the case before me is unique because the management of companies whether public or private is governed by the Companies Act (Cap. 486 Laws of Kenya).The elections of directors is an internal affair that is regulated by the rules contained in the articles and memorandum of association, which rules expressly exclude the jurisdiction of the court in dealing with their management affairs in the first instance.

39. The respondents have argued that they have an in-house dispute resolution mechanism that is ingrained in the **Company’s Memorandum and Articles of Association** which is the guiding law recognized by the Companies Act. It is the respondents’ argument that their **Articles and Memorandum of Association** provides for a clear procedure and mechanism for electoral dispute resolution and as such, the applicants ought to have directed their claim before the provided dispute resolution body first rather than approaching court directly. This provision for internal dispute resolution mechanism in the Articles and Memorandum of Association is what has led the respondents to argue that the court lacks jurisdiction to entertain this case.

40. Mr. Begi advocate for the applicants, on his part, argued that the respondents did not attach the Articles and Memorandum of Association to their replying affidavit and therefore, the respondents argument that the said Articles and Memorandum of Association provide for an in-house dispute resolution mechanism is untenable and neither here nor there.

41. I do not find the applicant's argument plausible because even though the 1st respondent's Articles and Memorandum of Association were not attached the respondents replying affidavit, both the applicants and respondents have, in their respective affidavits filed before this court, attached the 1st respondent's elections manual with the title, “the Elections of Tea factory Company Directors Nominees and Buying Centre Committee Members Procedures- 2015/2016”, which was a circular containing the rules that would apply to the nomination exercise for director of the Factory and Buying Centre Committee Elections. The said elections manual is annexed to the applicants’ affidavit in support of the application and marked “JFN-“3” and as annexure ‘FMI’ to the respondents’ replying affidavit. I have perused the said rules and noted that at preamble, the manual clearly states as follows:

**“The Rules draw from the Company Law, the Factory Company’s Articles of Association and the Management agreement.”**

42. A further perusal of the said elections manual at the last page (page 14) reveals that it provides for the forum for elections disputes resolution as follows:

43. **“ELECTION DAY COMPLAINTS/APPEALS RULES**

**Any dispute arising out of the voting process on voting day would be made to the Returning Officer. All issues would have at the first instance require to be laid before the deputy presiding officer and the Returning Officer. The Returning Officer would carry out his investigation and make his verdict.**

**The Returning Officer should however inform the Election Coordinator (Group Company Secretary) at KTDA Limited Head Office of any complaint/appeal made and the conclusion of the same. The Returning Officer would be at liberty to consult the Group Company Secretary for clarifications and advice on what action to be taken.”**

44. My understanding of the above stated election complaints rules is that they do not *per se* stop an aggrieved party from lodging a case in court. All that the rules state is that such a dispute, at first instance, be tabled before the Deputy Presiding Officer and the Returning Officer.

45. I have perused the applicants’ annexure “**JFN-3**”, to the affidavit in support of this application, which is a copy of a manual providing for the procedures of conducting the elections. The said manual provides for elaborate and comprehensive complaints/dispute, appeals resolution rules specifying the composition of the dispute resolution committee and the procedure to be adopted in the presentation and resolution of elections dispute. The applicants chose to come to court directly without even attempting to explore the provided dispute resolution mechanism. The applicants have not demonstrated that they lodged their complaint with the said officers or that the rules were not applicable to their case or binding on them. It is my finding therefore, that as shareholders of the 1<sup>st</sup> respondent company, the applicants are bound by the rules and regulations laid down by the said company. The clause on elections disputes resolution is very clear on the forum for the resolution of such disputes, in the first instance. It is the provisions contained in the elections manual that divests this court of the jurisdiction to hear and determine the election dispute and vests that mandate on the deputy Presiding Officer and the Returning Officer.

46. Companies, under the **Companies Act, (Cap 486 Laws of Kenya)** have a free hand in developing their own rules of engagement in the Memorandum and Articles and it is for this reason that I hold that the 1<sup>st</sup> respondents elections manual has a proper legal backing.

47. In the case of **Abdirahaman Abdalla Vs Osupuko Service Station Ltd & Another [2012] eKLR**, the court while interpreting a similar clause in the Articles of Association stated as follows:

**“With respect, Mr. Chalang’as contention overlooks one fundamental principle of Company Law. That principle ordains that a Company’s Articles of Association give rise to a contract not only between every member and the company, but also among the members of the company *inter se*. The logical conclusion to be drawn from that principle is that the member of the 1<sup>st</sup> plaintiff company are bound by that Company’s Articles among themselves, and therefore Article 31 becomes an arbitrating agreement among all the members.”**

48. The elections of directors is an internal affair of the 1<sup>st</sup> respondent. Courts have held time and again that they would not interfere with the internal management of companies acting within their powers. See **Paolo Murri Vs Gian Batisha Murri & Another (supra)** . Courts will only enter into the arena of disputes arising from the internal management of companies where it is shown that the act complained about is *ultra vires*, or is of a fraudulent character or not rectifiable by ordinary resolution. See **Foss Vs Harbottle (1843) 2 Hare 261**.

49. In the case of **Milka Adhiambo Otieno & Another – vs Attorney General & 2 Others (2012) eKLR**, the respondents raised a jurisdictional point that the court lacked jurisdiction to entertain allegations of election malpractices that were alleged to have occurred during the election of directors to the board of directors. Their argument was based on **Regulation 13 (2) of Sugar (Elections) Regulations 2002** which provided that all disputes arising out of an election under sugar (elections) Regulations shall be lodged with a tribunal set up under the regulations. The court held as follows:

**“We therefore find and hold that the issue squarely lies within the jurisdiction of the Sugar Tribunal. It therefore follows that the petitioners ought to have preferred any complaints of election malpractices to the said Tribunal in the first instance”.**

50. The matter before me is purely an election dispute which, as I have already stated in this ruling, is an internal affair of the company that the said company should be able to deal with. The applicants have not shown that they had any difficulty or reservations in presenting their complaint to the company’s dispute resolution body.

51. It is therefore my finding that the rules contained in the elections manual speak for themselves and are derived from the Company Law, the Company’s Articles of Association and Management agreement. It is my finding that the said election rules were therefore binding on the applicants in so far as the elections dispute resolution forum is concerned and therefore, the respondents did not have to produce the Memorandum and Articles of Association to prove the existence of the internal dispute resolution mechanism.

52. Having regard to the observations and findings that I have made hereinabove, my ruling is that this court lacks jurisdiction to deal with the application and grant the orders sought. The order that commends itself to me therefore is an order to dismiss the application dated 14<sup>th</sup> January 2016 with costs to the respondents.

**Dated, signed and delivered at Kisii this 8<sup>th</sup> day of September 2016**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

Soire for Begi for the Applicant

Nyachiro for the Respondent

Omwoyo: court clerk