

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E318 OF 2024

BETWEEN

VINCENT MARIITA

OMAO.....PETITIONER

VERSUS

**KENYA TEA DEVELOPMENT AGENCY.....1ST
RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES
COMMISSION..2ND RESPONDENT**

**PRINCIPAL SECRETARY, MINISTRY OF
AGRICULTURE & LIVESTOCK
DEVELOPMENT.....3RD RESPONDENT**

J U D G M E N T

Introduction

1. The Petition dated 28th June 2024 is supported by the Petitioner’s affidavit.

2. The core of the Petitioners grievance in this Petition is that the 1st and 2nd Respondent conducted the 1st and 2nd Respondent elections contrary to the principles set out in **Manual of Elections of Directors, Small Holder Factories** and violated the rights of voters. Articles **32** and **38** of the Constitution.

3. For this reason, the Petitioner seeks the following reliefs:

- i. A declaration that the Notice issued on 28th June, 2024 at 6.30pm of intention to conduct elections on 29th June, 2024 was defective and unlawful for want of compliance with the law.**
- ii. A declaration suspending the elections slated for 29th June, 2024 and/or effecting the resolutions passed by the 2nd Respondent on 28th March, 2024. (SPENT)**
- iii. An order of certiorari be issued to remove to this court and quash the Notices issued by the 2nd respondent on the 28th June, 2024 purporting to conduct sham and shambolic elections.**
- iv. An order of prohibition do issue prohibiting the 2nd Respondent from gazetting and or publishing a gazette notice appointing any person to office of the 328 Directors of the 1st Respondent.**
- v. A declaration that the actions of the Respondents in this cause violated the constitutional provisions under Articles 27, 32, 35(1) (b) and (2), 47, 50 (1) and (2) of the Constitution.**
- vi. An order to protect, preserve and/or conserve the status of the current 328 directors and in particular, barring the Respondents jointly and severally from gazetting new directors until new date is set to conduct fresh elections. (SPENT)**
- vii. An order compelling the intended 328 Directors of the 1st Respondents to refund the allowances, remuneration and personal emoluments expended during the illegal tenure.**

- viii. A declaration that the scheduling of the 1st Respondent's elections on Saturday 29th June, 2024 is unconstitutional and amounts to discrimination against aspirants and voters who conduct their religious activities on a Saturday.**
- ix. A permanent injunction restraining the 2nd Respondent and/or their agents from proceeding to conduct the 1st Respondent's elections on Saturday 29th June 2024. (SPENT)**
- x. An order of certiorari quashing the 2nd Respondent's notice dated 28th June 2024, directing that 1st Respondent's elections be held on Saturday, 29th June, 2024.**
- xi. This Court do order that the costs of this Petition be borne by the Respondents.**
- xii. Such other orders as this honorable court shall deem fit and just to grant in the circumstances.**

Petitioner's Case

4. By way of background, the 1st Respondent on 8th June 2024 contracted the 2nd Respondent to conduct elections of directors for the 54 small-holder tea factories in various stations across Kenya. It is stated that this is the first time the 2nd Respondent will be overseeing this election where over 600,000 tea farmers are expected to participate.
5. On this premise, the 2nd Respondent issued a Notice informing tea farmers that the elections would be conducted on 28th June 2024 as follows:

'Elections will be held between 7 am to 3 pm and we expect to have 328 elected directors for the 54 small holder tea factories who will serve for the next three years. IEBC will be conducting the elections in all 54 factories in the country, and as TBK, we shall just oversee to make sure justice and preparedness for free and fair elections prevail for the farmers.'

6. The Petitioner avers that on the material day, the 2nd Respondent vide another Notice, postponed the elections to 11:00 am. He claims however that the 600,000 tea farmers who availed themselves at the various polling stations were left stranded as even by 6:00 pm no ballot papers had been delivered. It is averred that the 2nd Respondent proceeded to postpone the elections to 29th June 2024.
7. He asserts that this move will prejudice most of the aspirants and voters as will curtail them from exercising their constitutional right to vote and to vie for the elective positions.
8. He informs that the most affected region is Kisii and Nyamira counties where most of the tea farmers are members of the Seventh Day Adventist Group. He contends that holding the election on a Saturday violates their right to worship and right to vote.
9. Further to this, the Petitioner argues that the Notice issued is inadequate and violates Article 32 of the Constitution. He adds that their Elections Manual, Manual for Elections of Directors of Small Holder Tea Factories, provides that elections are to be held from 7.00 am to 3.00 pm.

10. He claims that the elections by the 2nd Respondent are in violation of the Constitution by committing funds to conduct sham elections. Equally that the Respondents unlawfully committed public funds of the over 600,000 tea farmers in violation of the Constitution and Section 162(2)(b) of Public Finance Management Act.

1st and 2nd Respondents' case

11. Opposing the Petition, the 1st and 2nd Respondents filed their Replying Affidavit through the 1st Respondent's Group Company Secretary, Matthews Odera, sworn on 20th August 2024.

12. The 1st and 2nd Respondents contended that the Petition is premature as the Petitioner did not first exhaust the existing dispute resolution mechanism provided for in the **Manual for Elections of Directors of Small Holder Tea Factories**.

13. He depones that the postponement of the elections was grounded on legitimate reasons which were communicated to all the participants. He observes that no evidence was adduced by the Petitioner to demonstrate that the candidates and voters were disenfranchised and their right under Articles 32 and 38 of the Constitution. That notwithstanding, it is argued that the prayers sought have been overtaken by events.

14. To appreciate the context of this matter, he informs that the 1st Respondent a public company draws its membership from

small holder tea factory companies, at present, being 54. In accordance with Article 86 of its Memorandum and Articles of Association, the 1st Respondent is managed by a Board of Directors who are elected by shareholders to represent the different electoral zones.

15. He depones that while each zone contributes one director to this pool, the voters participating in the election of the Board of Directors are drawn from the Small holder Tea Factory Companies' directors, following elections conducted in each electoral zone.
16. With reference to its elections, he informs that prior to institution of this Petition, several others had been filed in relation to the elections of both the Directors of the smallholder tea factory companies on the one hand, and the 1st Respondent's Board of Directors on the other hand. These are: *Nairobi High Court Consolidated Constitutional Petition No. E254 of 2020, Kenya Tea Development Agency (Holdings) Limited & 55 Others versus the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Cooperatives & 26 Others; and Nairobi High Court Consolidated Constitutional Petition No. E016 of 2021, Kenya Tea Growers Association & 55 Others versus the Attorney General & 24 others.*
17. He avers that during the subsistence of these suits, the parties therein engaged in a mediation session in which they arrived at a Mediation Settlement dated 2nd April 2024. This

was subsequently adopted as an order of the Court on 11th April 2024. The terms of the Mediation Settlement were:

- a) *Smallholder Tea Factory Companies Directors elections shall be held by end of June, 2024.*
- b) *Kenya Tea Development Agency (Holdings) Limited director's elections shall be held not more than one month after elections of directors of the smallholder tea factory companies.*

18. As a consequence, he depones that the 1st Respondent and involved parties were obligated to ensure compliance with the said order. On this premise, in line with Article 4 of their Election Manual the Tea Board of Kenya, the body mandated to oversee elections for the Directors of Small Holder Tea Factories, nominated the 2nd Respondent, to conduct elections at the Tea Factories.
19. The 2nd Respondent was required to organize and conduct elections in accordance with their Election Manual. Considering this and the strict timeline issued in the Mediation Settlement, the 2nd Respondent set the elections for 28th June 2024.
20. He depones that the set elections were postponed as highlighted by the Petitioner. He states that these delays were occasioned by the the late certification of the register of voters and unforeseen public demonstrations that interrupted the printing and movement of ballot papers, as seen in the internal memo from the 2nd Respondent's National Returning Officer addressed to the Returning Officers.

21. He depones that the election exercise on 28th June 2024 was conducted in 9 out of 54 electoral zones. With regard to the other zones, the 2nd Respondent reported that the exercise could not be conducted as a result of logistical hitches which affected the production and delivery of the election materials. This is why the same postponed to 29th June 2024. He emphasizes that this was a day to the last ordered day being 30th June 2024.
22. He depones that the elections scheduled for 29th June 2024 were conducted in the remaining electoral zones including Nyamira and Kisii Counties being, Nyamache; Amabuko; Bonchari; Esami; Girango; Machoge Borabu; Machoge Chache; Magena; Magombo; Moturumesi; Rigoma; Sengera; and South Mugirango.
23. He opposes the Petitioner's assertion that the voter turn out would be lacking in these counties. Further to this, he informs that there was no complaint from any candidate or voter that they were excluded. For this reason, he asserts that the Petitioner's allegation that their constitutional rights were affected is unfounded.
24. He depones that according to **Article 8 of the Election Manual**, any dispute arising from the elections *is to be submitted in writing to the Chairman of the Election Dispute Resolution Committee within 48 hours, from the date of declaration of the election results and such a dispute is to be determined within 7 days*. In absence of such a dispute, the

names of the elected officials will be presented to the General Meeting of the tea factory for confirmation and appointment as directors, within a period of 21 days after the elections in line with Articles 15 (12) and (13) of the Election Manual.

25. He depones that all disputes arising from the cited elections were heard and determined by the Election Dispute Resolution Committee. Thereafter, the validly elected directors were confirmed during the individual factory Special Annual General Meeting.
26. In light of this, he argues that the Petitioner ought to have lodged his complaint with the Dispute Resolution Committee for resolution. Considering this, he urges the Court to decline exercise of jurisdiction over the matter as the same is vested in the Election Dispute Resolution Committee.
27. Finally, he asserts that the prayers sought by the Petitioner in the Petition are incapable of being granted by the Court, as they have been overtaken by events. Specifically, the election and subsequent gazettelement of the directors who have since assumed office. He argues therefore that the Court should dismiss the Petition.

3rd Respondent's Case

28. The 3rd Respondent's response and submissions to the Petition are not in the Court file or Court Online Platform (CTS).

Petitioner's Submissions

29. On 30th January 2025, the Petitioner through Sam N. Mainga and Company Advocates filed submissions and highlighted the single issue for determination as: *whether the notice of 28.06.2024 leading to the elections of Saturday 29.06.2025 as purportedly conducted are constitutionally sound and tenable.*
30. To commence with, Counsel submitted that Saturday is a day of worship. It was stated that the said elections were conducted on 29th June 2024, a Saturday, leaving Sabbath day worshippers two unconstitutional options, either forfeit their right to worship or suffer exclusion from the said elections. On this ground, Counsel argued that the Respondents' action of conducting the elections in this manner is constitutionally untenable with respect to sabbath day worshippers.
31. Counsel further asserted that the Respondents references to the Elections Manual as the mechanism for the resolution of the 1st Respondent's electoral disputes is misplaced since the issues raised herein relate to the violation of the Bill of Rights.
32. Furthermore, Counsel contended that the Respondents' references to the Mediation Agreement and orders issued in **Nairobi High Court Consolidated Constitutional Petition No. E254 of 2020** is of no consequence to this Petition. This is because the Respondents did not reference

any particular Clause in the Mediation Agreement that sanctioned them to callously, hurriedly and unconstitutionally on short notice conduct elections on a Saturday. Counsel reasoned that any mediation agreement or court order must at all times comply with the constitutional dictates and tenets.

33. Reliance was placed in **Juliana Mulikwa Muindi v Board of Management Yangua Mixed Secondary School & another (2018) eKLR** where it was held that:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

1st and 2nd Respondent’s Submissions

34. Edam Associates Advocates filed submissions dated 16th September 2025 on behalf of these parties and sought to discuss the following issues:

“Whether the Petition is premature, whether the postponement of the elections was for a legitimate reason and whether the Respondents violated any of the candidates/voters’ rights under Articles 32 and 38 of the Constitution and whether the prayers sought in the Petition have been overtaken by events.”

35. On the first issue, Counsel answered in the affirmative. Counsel submitted that the Petition is premature owing to the dispute resolution mechanism contained in the Manual for Elections of Directors of Small Holder Tea Factories, which the Petitioner failed to first utilize before invoking this Court's jurisdiction. Counsel asserted therefore that the Petitioner violated of the exhaustion doctrine by failing to first resort to the Dispute Resolution Committee established in the Election Manual under Article 6 and 8.

36. To buttress this point, reliance was placed in **Geoffrey Muthinja and Another v Samuel Muguna Henry and 1756 others (2015) eKLR** where it was held that:

"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 the fora of last resort and not the first port of call... 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 of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

37. Further reliance was placed on the **County Assembly Forum & 6 others vs the AG and others (2021)eKLR , William Odhiambo Ramogi and 3 others v Attorney General and 4 others; Muslims for Human Rights and 4 others (Interested Parties) (2020) eKLR, Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others; SC Petition No 3 of 2016, [2019] eKLR** and

United Millers Limited v Kenya Bureau of Standards & 5 others [2021] KESC 72 (KLR).

38. On the second point, Counsel referring to the averments made in the 1st and 2nd Respondent's replying affidavit submitted that the postponement of the elections was occasioned by legitimate reasons. These were the late certification of the register of voters and unforeseen public demonstrations that interrupted the printing and movement of ballot papers.
39. Counsel relying of the right to a fair administrative action submitted that the Respondents communicated the delay expeditiously to the parties and postponement was only done when it was determined that it was ideal to push it to the following day. Counsel pointed out that the postponement was not done in violation of any law and was based on relevant considerations.
40. According to him, it was procedurally fair because the Respondents complied with the procedure in the Election Manual and the Court Order. On this basis, he argued that the Respondents actions were taken in line with the principles of fairness, justice, reasonableness and legality as enshrined in Article 47 of the Constitution.
41. Reliance was placed in **Garissa County Government v National Land Commission & 3 others [2016] KEHC 7950 (KLR)** where it was held that:

“An action would be considered expeditious if it is undertaken without wasting any time and therefore entirely achieved within a quick time as is possible. In similar token, an action would be considered efficient if the best possible results are achieved therefrom, and under the subsisting circumstances, without wasting any effort or resources that are required to undertake the activity. Lawfulness of an action alludes to the action being undertaken in accordance with and in adherence to the law that sanctions that precise action.”

42. Further reliance was placed on **Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB.**
43. Counsel further submitted that while the Petitioner claimed that postponement of the election was in violation of the candidate and voters’ right under Article 32 and 38 of the Constitution, he did not demonstrate how rescheduling the elections interfered with his religious belief and practice. Additionally, he argued that no evidence was presented on how voters were disenfranchised by the postponement of the elections. In view of this, Counsel argued that the Petitioner’s allegations were unsubstantiated and unproved hence a waste of Court’s time.
44. That said, he urged the Court to appreciate that the 1st and 2nd Respondents’ actions were dictated by the issued Court Order in line with the Mediation Agreement with regard to the timelines in spite of the prevailing challenging circumstances.
45. On the final issue, Counsel submitted that the prayers sought by the Petitioner are incapable of being granted by

the Court, as they have been overtaken by events. In that, the elections were conducted and subsequently gazettelement of the directors who have since assumed office. Counsel stressed that Court orders cannot be issued in vain. Reference was made to **C.A. 366/1999 - Kenya National Examination Council vs Republic**, where it was held that prohibition cannot quash a decision already made; it can only prevent a contemplated decision.

46. In sum, Counsel submitted that public interest supersedes the private claims of an individual as held in **Kenya Guards & Allied Workers Union vs Security Guards Services and 38 others and another (IP) H.C. Misc. 1159 of 2023** and thus it necessitated the appointment of directors to prevent hampering of services and operations of the 54 factories in the Country.

Analysis and Determination

47. Having regard to the pleadings and submission of the parties, this Court considers the following to be the issues for determination:

- i. Whether the Petitioner exhausted the 1st Respondent's internal dispute resolution mechanisms before filing this suit.***
- ii. Whether the Petitioner's rights under Article 32 and 38 of the Constitution were violated by the Respondents.***
- iii. Whether the Petitioner is entitled to the relief sought.***

Whether the Petitioner exhausted the 1st Respondent's internal dispute resolution mechanisms before filing this suit.

48. The Respondents contended that the Petition is incompetent as it was filed in violation of the doctrine of exhaustion of remedies. Elaborating on the doctrine of exhaustion, the Supreme court in Waity vs Independent Electoral & Boundaries Commission and Three Others [2019] KESC 54 (KLR) guided as follows:

“[63] Where the Constitution or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in Geoffrey Muthinja Kabiru & 2 Others; [2015] eKLR; wherein the Appellate Court observed:

“It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be 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 the Courts.”

49. Further, in **Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] KESC 83 (KLR)** the Supreme Court restated the principle as follows:

“...We hold that if indeed the appellant had any dispute with the RBA, he ought to have followed the route prescribed by the RBA, before proceeding to the High Court. We hold like the court below, and for the reasons we have given, that the appellant’s petition lacked merit and was for dismissal.”

[118] In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.

[119] Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to

enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action."

50. The doctrine is also given the Constitutional underpinning in Article 159 (2) (c) of the Constitution which obligates Courts, in exercising judicial authority, to ensure that the alternatives forms of dispute resolution, mediation, arbitration and traditional dispute resolution are promoted. Further, it finds support in Section 9 (2) of the Fair Administrative Action Act which provides:

Procedure for Judicial Review

- 1) *Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.*
- 2) ***The High Court or a subordinate court under sub-section (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.***
- 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).***

- 4) *Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.*
- 5) *A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.*

51. According to the 1st and 2nd Respondents, the **Manual for Elections of Directors of Small Holder Tea Factories** establishes the Dispute Resolution Committee under Articles 6 & 8 that has the mandate of resolving disputes relating to conduct of elections hence it was premature for the Petitioner to turn to this Court without first giving the said forum the opportunity to deal with the alleged election dispute.
52. The Petitioner's submission to this contention was that it is misplaced because the Elections Manual that the Respondents was mentioning can only be relied upon to resolve pure election disputes whereas this Petition is about violations under the the Bill of Rights, in that, elections were held on 29/6/2024, which was a Saturday, a day of worship thereby leaving Sabbath keepers with the choice of either forfeiting their right of worship or being disenfranchised by being unable to vote.
53. Seen from this perspective, the dispute is not just an ordinary elections dispute, it raises an arguable constitutional question, since it is not just about the

rescheduling the elections for the Directors to Saturday, it goes beyond that and extends to the question of whether this action violated the rights to religion under Article 32 and by extension, the right to vote under 38 of the Constitution for the Sabbath keepers. I would thus agree with the Petitioner that confining the issue to the Election Dispute is to miss the point, there is a constitutional question that is beyond the competence of the Election Dispute Committee to adjudicate. I thus decline to defer to the said body. In the circumstances, this Court that it has the jurisdiction under Article 165 (3) (b) and 23(1) of the Constitution to resolve the constitutional question raised.

Article 165 (3) provides- Subject to clause (5), the High Court shall have-

b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

Article 23 (1) - The High has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

54. I thus find the contention by the 1st Respondent that the primary mandate to determine this issue fell on the Election Dispute Resolution Committee to be a mis-characterization of the core issue in this petition. The doctrine of exhaustion of remedies has no place in the matter that is before the Court as it transcends the ordinary election dispute that the Election Dispute Committee could handle.

55. This therefore takes me to the next issue.

Whether the Petitioner's rights under Article 32 and 38 of the Constitution were violated by the Respondents.

56. It is trite law that a Constitutional Petition must be articulated with sufficient precision indicating the Articles of the Constitution that were violated, the manner in which the violation was carried out and the specific reliefs that the Petitioner seeks. A Constitutional Petition that fails to satisfy this threshold risks being thrown out by the Court. In **Julius Meme v Republic & another [2004] KEHC 2623 (KLR)** the Court stated as follows:

“Where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant's instant application had not fully complied with the basic test of constitutional references, as it was founded on generalized complaints without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellants”.

57. Over and above pleading the Petition with clarity and provision of sufficient particulars, the Petitioner must also discharge the burden of proof by tendering credible evidence that establishes the allegations put forth in the Petition on a balance of probabilities. In **Edward Akong'o Oyugi & 2**

others v Attorney General [2019] KEHC 10211 (KLR)

held as follows:

“72. Section 107 (1) of the Evidence Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Sub-section (2) provides that “when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.” Additionally, I have severally stated that all cases are decided on the legal burden of proof being discharged (or not). Lord Brandon once remarked:-

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd* :-

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in improper use of judicial authority and discretion. It will be a recipe

for ill - considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.”

58. Has the Petitioner proved that his right to worship was infringed by reason of having the Board of Directors Elections take place on Saturday, 29/6/2024?

59. According to the Petitioner, the rescheduling of the election from 28/6/2024 to 29/6/2024 violated the right of voters enshrined under Articles 32 and 38 of the Constitution.

60. In the supporting affidavit of the Petitioner sworn on 2nd June, 2024; he swore as follows in paragraphs 14, and 15.

‘14. That most tea growers more specifically from Kisii and Nyamira Counties are Seventh Day Adventists. Holding an election on this day violates their rights to worship and they will be denied the right to elect a person of their choice.

15. That it is worthy to note that some of the agents for the candidates are Church elders who shall be presiding over the Lords Passover.’

61. In answer to these specific allegations, the 1st and 2nd Respondents countered that the postponement of elections from 28/6/24 to 29/6/2024 was occasioned by legitimate reasons which were communicated to all the participants in accordance with tenets of fair administrative action. According to the Respondent, the postponement was occasioned by late certification of the register of voters and

unforeseen public demonstrations that interrupted the printing and movement of ballot papers as per the memo of the returning officer annexure -MO 6.' Further, the Respondent contended that the Petitioner claim that candidates and voters were disenfranchised and their right to religion violated was not supported by evidence.

62. This Petition is primarily anchored on the right under Article 32 which focuses on protecting personal spiritual and intellectual freedom and Article 38 which safeguards democratic participation.
63. In a nutshell, Article 32 - (on freedom of conscience, religion, belief and opinion) provides that every person has right to freedom of conscience, religion, thought, belief and opinion. They are thus free to manifest, practice or express it through worship, practice, teaching or observance either individually or in community, publicly or privately -including observing a day of worship. No one can be denied access to institutions, job or facilities or right because of belief or religion and none can be forced to act against their belief or religion.
64. On the other hand, Article 38 is on protection of political rights or democratic participation. In brief, it provides that every citizen is free to make political choices, including forming or participating in political parties, recruiting members, campaigning for political party or cause. That every citizen has right to free, fair and regular elections based on universal suffrage and free will for voters (for

choosing leaders, referendums). That every adult citizen has the right to register as a voter without unreasonable restriction, vote by secret ballot, stand as a candidate for public office or party position, and to hold such office if elected.

65. I have very carefully examined the facts deponed to by the Petitioner in support of the Petition. Fundamentally, the Petitioner makes the statement *'That most tea growers more specifically from Kisii and Nyamira Counties are Seventh Day Adventists. Holding an election on this day violates their rights to worship and they will be denied the right to elect a person of their choice'*.
66. This statement is not backed even by any official or statistical data that shows that indeed, most of the small-scale tea growers in the named region are in fact Seventh Day Adventists to give it some measure of credence. It is merely a sweeping statement.
67. The Petitioner then makes another statement, this time more specific *'That it is worthy to note that some of the agents for the candidates are Church elders who shall be presiding over the Lords Passover.'*
68. However, he does not bother to provide, even a single affidavit from any of the affected agents to establish that fact.

69. In my view, all the Petition relies on as proof are bald allegations incapable of establishing the claims of the violations pleaded in the Petition on a balance of probabilities.
70. In any case, even assuming that the Petitioner had in fact provided sufficient evidence that the election day fell on a Sabbath Day which is a day of worship for Seventh Day adherents, the Court would still have weigh the same against the justification given by the Respondents and determine whether the reasons given were reasonable and proportionate to satisfy the conditions of Article 24.
71. The Respondents adduced uncontroverted evidence that showed the last-minute change from 28.6.2024 to Saturday 29.6.24 was necessitated by unforeseen circumstances in which public demonstrations made safe delivery and distribution of ballot materials impossible; hence the only workable option was to conduct the elections the following day of which immediate notice was given. The reaction by the Respondent was therefore not arbitrary but dictated by circumstances obtaining. It was a proportionate response to an unpredictable situation after weighing all the options. It is manifest that the Respondents did not plan to interfere with the Sabbath Day for Seventh Day Adventists, but that it was dictated by the compelling circumstances and was thus was proportionate and justifiable it did not amount to unjustifiable violation of the rights to worship under Article 32 or breach of political right under Article 38.

72. The upshot is that this Petition lacks merit and is hereby dismissed. I make no orders as to costs.

Dated, signed and delivered virtually at Nairobi this 19th day of February, 2026.

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L N MUGAMBI

JUDGE

ORIGINAL