

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

HC.MISC.CIVIL CASE NO. E156 OF 2025

SAMSON GITONGAPLAINTIFF

-VERSUS-

MICHIMIKURU TEA COMPANY LIMITED

.....DEFENDANT

RULING

1. By an application dated 5/11/2025, the applicant has sought the following orders:

a) Spent

b) Pending the hearing and determination of this application, this Honourable court be pleased to issue a temporary injunction restraining the respondent, its agents, servants, or any persons acting under its authority from conducting or proceeding with the Tea buying Centre Committee elections scheduled on 6th November 2025.

c) That pending the hearing and determination of this application, the honourable court be pleased to issue

conservatory orders suspending any election preparations, nominations, or related processes scheduled under the notice dated 16th October 2025.

- d) That pending the hearing and final determination of this suit, the honourable court be pleased to issue an order declaring the eligibility requirement contained in the said notice restricting candidature to persons “not in dispute with the company as unconstitutional, unlawful, discriminatory, ultra vires Articles of Association, and null and void.
- e) That this honourable court be pleased to direct that any lawful elections for Tea Buying Centre Committees shall be conducted across all the 52 Buying Centres in accordance with the Articles of Association of the respondent.
- f) That this honourable court be pleased to issue such further, other, or consequential orders as may be necessary to safeguard the member’s rights and ensure compliance with the law.
- g) That costs of this application be provided for.

2. The application is supported by the grounds on the face of it and the applicant's affidavit sworn on even date.
3. In a nutshell, the applicant states that he is a shareholder in the respondent and registered as grower No. 010544. That as such he is entitled to participate and benefit from all governance and decision-making processes in the company including elections of the Tea Buying Centre Committees.
4. That the respondent issued a notice dated 16/10/2025 convening elections of Tea Buying Centre Committees scheduled for 5/11/2025 which notice was only issued on 31/10/2025, just four days prior to the elections. That this short notice denied members reasonable and adequate notice.
5. It is further stated that the respondent has invoked an additional eligibility requirement that any person vying for election must be of good standing and not in dispute with the company, a condition not provided for in the company's Articles of Association or Memorandum of Association. That the impugned condition violates Article 27 of the Constitution.

6. It is also averred that the respondent's decision to restrict the elections to only 23 out of 52 tea Buying Centres is manifestly unlawful and contrary to the principles of the representation and equality in participation.
7. The respondent opposed the application through a replying affidavit sworn by Kathiri Kobia Stephen the director and chairman of the respondent.
8. In a nutshell he states that the application offends the doctrine of exhaustion and discloses no lawful basis for judicial interjection in the company's affairs.
9. It is further deponed that the application offends section 239 of the Companies Act as it is in essence a derivative action brought against the company without leave being sought.
10. It is further averred that in addition to the Articles of Association, there are also Buying Centre By-laws and Election Guidelines which set out the eligibility criteria for the Buying Centre Committees which have been in use.
11. It is further averred that the applicant has not demonstrated what particulars harm he stands to suffer.

12. It is also pointed out that there is no substantive suit accompanying the application, hence no prima facie case has been established.
13. Parties were directed to file submissions. Only the respondent had filed its submissions at the time of writing this ruling.
14. The respondent submitted that this Application offends the doctrine of exhaustion and the principle of subsidiarity and therefore this Honourable Court lacks jurisdiction to hear and determine it. That Elections Guidelines establish the Dispute Resolution Committee which has full powers to address any grievances arising from the elections in question pursuant to the Dispute Resolution Committee Rules. That consequently, this Court lacks jurisdiction at this stage, to hear and determine the Application. To buttress this point the respondent referred the court to the decision of the Court of Appeal in **Muthinja & another v Henry & 1756 others [2015] KECA 304 (KLR)**. Also cited was **Isaiah Gichu Ndirangu & 2 others v Independent Electoral and Boundaries Commission & 4 others [2016] KEHC**

7364 (KLR) and Gabriel Bukachi Chapia v Orange Democratic Movement & another [2017] KECA 391 (KLR).

15. It was further submitted that the application offends the provisions of section 239 of the Companies Act in that it is in essence a derivative action against the decision of the directors and shareholders of the Respondent, and leave has not been sought as required. That the Applicant has not demonstrated that the application falls within the exceptions to the Rule in ***Foss v. Harbottle (1843) Hare 461***. Cited in support of this submission was the decision in **David Langat v St. Lukes Orthopeadic & Trauma Hospital Ltd & 2 Others [2013] KEELC 95 (KLR)**.

16. It was further submitted that even if leave was granted or the application was found to be within the above said exception, it would still be defective as no substantive suit exists. That as such, the Applicant would not be able to establish a *prima facie* case which is capable of being heard even if leave was granted. That no cause of action with a *prima facie* case can be said to have been made sufficient to

meet the threshold set out in **Giella v. Cassman Brown & Co. Ltd [1973] EA 358**. Reliance on this point was placed on the decisions in **Galot v Galot & another [2025] KEHC 16623 (KLR)** and in **Amin Akberali Manji & 2 others vs. Altaf Abdulrasul Dadani & another [2015] eKLR**:

17. The issues for determination are:
 - a) Whether there is a competent suit before the court.
 - b) Whether the suit is barred by the doctrine of exhaustion.
 - c) Whether the applicant has brought out a case to warrant a grant of the orders sought.
18. It is noted that this matter was commenced through a miscellaneous application. There is no plaint.
19. In my view, this is not a type of matter that can be hinged on an application only.
20. An application for an injunction must be hinged on a suit that discloses a prima facie case in line with the principles set out in **Giella vs Cassman Brown (supra)**.
21. Even if the application is hinged on the cited articles of the Constitution, there ought to be a basis for issuing an injunction or conservatory orders and this is through a

petition. In this case, there is no such petition. As such the application has nothing to support it.

22. Whereas the constitution at Article 159 enjoins the court to do substantive justice over technicalities, this is not just a question of technicalities. It goes to the root of the case, that is a discernible cause of action which can only be set out in a plaint or petition.
23. In **Galot vs Galot and another(supra)**, the court dealt extensively with the nature and function of miscellaneous applications. It held as follows;

***“Jurisprudence on this point is unequivocal on the procedural limitations of miscellaneous applications. These applications are designed to address straightforward, non-contentious matters, typically of a procedural nature. They are not intended to serve as substitutes for properly instituted suits, nor can they be used to seek substantive reliefs unless anchored in a substantive suit supported by appropriate pleadings.*”**

Substantive claims such as declarations of rights, appointment of directors, or shareholder disputes, as raised in the application dated 5th December 2024, must be grounded in a suit that clearly articulates the cause of action and frames the legal and factual issues for determination. Such an irregularity cannot be dismissed as a mere technicality. It strikes at the very heart of the Court's jurisdiction. As affirmed by the Court of Appeal in Scope Telematics International Sales Ltd V Stoic Company Ltd & Another, [2017] eKLR, where a party seeks substantive reliefs without the support of a plaint or proper pleadings, the application is deemed to be "totally incurably defective." Accordingly, on this ground alone, the preliminary objection succeeds and the application must be struck out."

24. Similarly in ***Witmore Investment Limited V County Government of Kirinyaga & 3 Others [2016] eKLR*** the court dealt with a miscellaneous application. It was held:-

“So where a party such as an applicant herein seeks an order that in effect appears to resolve with finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this court for a final resolution of the issues in controversy raised in the application, it should have moved this court properly in the manner provided by law.”

25. On this issue, I totally agree with the respondent’s submission and I find that the suit/application herein is incompetent.

26. Counsel for the respondent has also raised another important issue, that of leave being obtained to file derivative suit.

27. The applicant is a member of the respondent. For a member to sustain a suit against the company he or she has to file a derivative suit which is provided for under section 239(1) of the Companies Act as follows:

“ In order to continue a derivative claim brought under this Part by a member, the member has to apply to the Court for permission to continue it.”

28. The purpose of such leave is to weed out vexatious suits and to ensure that members of a company only come to court on genuine and bona fide claims against the company or its directors.

29. In the instant case, no leave has been sought, yet the applicant has sought substantive orders in his application.

30. On this ground again, I find that this application is incompetent.

31. Having found the above, I don't think that it will be necessary to look at the other grounds raised by the respondent in opposition to the application.

32. In conclusion, I find that this application or suit is hopelessly incompetent. It cannot be cured even by an amendment.

33. The application is therefore struck out with costs to the respondent.

34. Having struck out the application, the respondent is now at liberty to implement the results of the elections of the Tea Buying Center Committees, if they were conducted on 6/11/2025.

35. Orders accordingly.

Dated, signed and delivered at Meru this 29th day of April 2026.

H. M. NYAGA
JUDGE