Ogoti & 5 others v Kiamokama Tea Factory & another (Civil Appeal 137 of 2017) [2022] KECA 825 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 825 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 137 OF 2017

PO KIAGE, M NGUGI & F TUIYOTT, JJA

APRIL 28, 2022

BETWEEN

DAVID OGOTI .... 1ST APPELLANT

NYARAMBA NYAGWORA .... 2ND APPELLANT

OTWORI NYAKWARA .... 3RD APPELLANT

RUTHIA M. NYAMWANDA .... 4TH APPELLANT

ALFRED N. ONTERI .... 5TH APPELLANT

OKONE MIRIERI .... 6TH APPELLANT

AND

KIAMOKAMA TEA FACTORY .... 1ST RESPONDENT

KENYA TEA DEVELOPMENT AGENCY .... 2ND RESPONDENT

(Being an appeal from the ruling and decree of the High Court in Kisii (J.R. Karanjah, J.) dated 11th May, 2017 in Petition No. 6 of 2014)

JUDGMENT

JUDGMENT OF MUMBI NGUGI, J.A

1. The present appeal arises out of a decision of the High Court exercising its original jurisdiction on a petition brought alleging violation of the constitutional rights of the appellants. It is therefore a first appeal, and our duty under Rule 29(1)(a) of the *Court of Appeal Rules* on an appeal from a decision of the High Court acting in the exercise of its original jurisdiction is to re-appraise the evidence and to draw inferences of fact.

2. In their petition dated 3rd March, 2014, the appellants alleged violation of their right to information under Article 35(1)(b) of *the Constitution*. The petition was supported by an affidavit sworn by David Ogoti, the 1st petitioner, on 3rd March 2014. The petitioners' grievance arose following the elections of directors conducted by the respondents, specifically with respect to the Ikorongo Electoral Zone, on 7th January 2014.

3. The petitioners contended that as shareholders of the 1st respondent, they were entitled to vote in all the elections of the company and to participate in its key decision-making meetings. Further, that as shareholders, they were entitled to access any data and crucial information kept by the company which is in its sole and exclusive possession to enable them exercise their mandate in the activities of the company and to make informed decisions while deliberating and making resolutions as stipulated by the then *Companies Act*, Cap 486 Laws of Kenya and the Memorandum and Articles of Association of the Company.

4. The petitioners asserted that they had a constitutional right under Article 35(1) (b) of *the Constitution* to access and/or receive crucial and material information in the sole custody of the respondents when needed. They alleged that the elections organized and conducted by the respondents were predetermined and rigged in order to give the respondents' preferred candidates or directors of choice an advantage over other candidates for directorship of the 1st respondent. Due to mismanagement at the 1st respondent factory, dividends and bonuses payable have diminished, as a result of which they have suffered losses and their right to income and decent living have been violated.

5. The petitioners also alleged violation of their right to political participation guaranteed in Article 38 of *the Constitution*. They alleged that they had a right to participate in a democratic elective process within the ranks of the 1st respondent by voting for a candidate of their choice or offering their candidature. They had requested to be furnished with certified and/or officially declared results and a copy of the voter's register in respect of the said elections for purposes of verification that the elections were done in accordance with *the Constitution* and the Articles and Memorandum of Association of the 1st respondent. They had filed the petition upon failure of the respondents to furnish the information that they sought, and they asked the High Court to issue the following orders:

    a. A declaration that failure and/or refusal by the respondent to supply the petitioners with the voters register and the official results of the just concluded elections of Kiamokama Tea Factory Ltd (Ikoronga Electoral Zone) amounts to the violation of the Petitioners Fundamental and Constitutional Rights.

    b. A declaration that the petitioners being shareholders of Kiamakoma Tea Factory Ltd are entitled to the voters register and the result of the said election in accordance to Section 80 of the *Evidence Act* and Article 35(1)(b) of *the constitution*.

    c. Costs of the petition be borne by the respondents.

6. The 1st and 2nd respondents filed a document titled 'Reply to the Petition' dated 8th December 2014 in which they opposed the petition and denied that any of the petitioners' constitutional rights have been violated. They contended that the petitioners' rights as shareholders of the 1st respondent is qualified and is dependent on proof that they are indeed shareholders and intent on participating in due process governed by the Articles and Memorandum of Association and relevant attendant statutes. It was their assertion further that the management structure of the 1st respondent has provision for division of the management to various electoral areas represented by various directors. Decisions of the board are communicated by way of board resolutions and meetings of the committee of the buying centre.

7. It was the respondents' case that the petitioners are busy bodies intent on disrupting the otherwise proper management of the 1st respondent and have failed to state with certainty the documents required and the legal basis for such request. According to the respondents, they have held the operations of the company transparently and the disputed elections, which were conducted within the relevant ambit of the law have stood the test of time.

8. It was also the respondents' case that being private companies, they have their 'modus operandi' which the petitioners have failed to adhere to for purposes of channeling their concerns, if any. Finally, it was their case that the trial court had no jurisdiction to entertain the petition, and they prayed that it should be dismissed with costs.

9. In its decision, the trial court addressed itself to the question whether it had the requisite jurisdiction to hear and determine the petition. If it had, whether the petitioners' rights under Article 35(1)(b) of *the Constitution* were threatened with infringement or violation in view of the respondents' refusal to furnish them with the required documents, namely the official results of the concluded elections and the relevant voters register. The trial court found that in light of the provisions of Article 22, 23, 165 and 258 of *the Constitution*, it was vested with the jurisdiction to determine whether, as alleged by the petitioners, any of their constitutional rights had been violated or threatened with violation.

10. The trial court found, however, that the petition fell short of the threshold set for constitutional petitions in *Anarita Karimi Njeru vs. Republic* (1976 - 1980) KLR 1272 which requires a party alleging violation of a constitutional right to 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 trial court found the petition to be without merit. It noted that the petitioners had a duty to provide sufficient details and particulars of the alleged violation of their constitutional rights, and to show that the remedy for such violation was only available in the constitutional court as opposed to any other court. Further, that where an Act of Parliament provides a mechanism for resolving certain disputes in specified courts or tribunals, no person should be allowed to ignore such courts and tribunal to bring his dispute to a constitutional court.

11. The issues raised in the petition, in the trial court's view, related to information required by the petitioners for the purpose of exercising their mandate as shareholders in the activities of the 1st respondent in accordance with the *Companies Act* and the Company's Memorandum and Articles of Association. Accordingly, any dispute pertaining to the election of directors would fall within the jurisdiction of the ordinary civil courts.

12. The appellants were aggrieved by the decision. They have filed the present appeal in which they raise seven grounds of appeal in their Memorandum of Appeal dated 24th November 2017. They impugn the decision of the trial court on the grounds that it had erred in law and in fact in: failing to appreciate that their constitutional petition had sufficiently stipulated the details and specifics violations capable of enabling the court to discern the violations committed by the respondents; holding that the petition raised issues which were suitable for determination by a civil court while the documents sought were in the exclusive possession of the respondents and no suit could be mounted without the subject documents being furnished to the petitioners; holding that they were required to demonstrate that there was an existing suit and the information and documents sought were necessary for exercising rights in the said existing suit thereby failing to appreciate that Article 35 of *the Constitution* covers even situations where there is intention to exercise rights to access to justice by filing a suit and such information is necessary as a condition precedent.

13. The appellants further impugned the decision of the trial court on the basis that the court had failed to properly evaluate the evidence and material placed before it and thus reached the wrong decision; and in relying on technicalities to dismiss their case contrary to the mandatory provisions of Article 159 of *the Constitution*.

14. The appellants filed submissions dated 20th November 2020. At the hearing of the appeal, Mr. Nyachiro for the respondents informed this Court that he had filed the respondents' submissions that morning. Given that the parties had been given directions to file submissions on 27th October 2021, more than a month prior to the hearing, the failure by the respondents to file submissions in time is inexcusable. In any event, the respondents' submissions were not placed before this Court.

15. In highlighting the appellants' written submissions, their Learned Counsel, Mr. Otieno, reiterated the petitioners' case that their right to information had been violated, as had their right, as shareholders, to participate in the annual general meeting of the 1st respondent. The appellants contended that the trial court had erred in holding that they ought to have demonstrated that the information sought was required for use in an existing court case against the respondents yet there is no indication that the appellant had indeed filed a suit.

16. It was also their contention that the trial court had misapprehended the provisions of Article 35 of *the Constitution*, and in finding that they had not given adequate explanation and particulars of how their rights had been infringed. They cited in support of their contention the case of *Elisabeth Kurer Heier & Another vs County Government of Kilifi & 4 Others* (2020) eKLR. In their view, the trial court had failed to appreciate the unchallenged position that it is a preserve of the respondents to organize and supervise election and all material and records which relate to the electoral exercise are solely within their exclusive custody.

17. The appellants further contended that as shareholders, they had a right to access such material in order to verify and challenge the entire electoral process in court. The irregularities and illegalities in the elections could only be discerned from the vital documents which contain such information, which were in the exclusive possession of the respondents. According to the appellants, the *Companies Act* does not provide a mode of compelling furnishing of the information from the electoral process, from registration, casting of votes and verifying the subject election and democratic and political rights protected by *the Constitution*. As shareholders, the petitioners were entitled to all the electoral materials which was in the possession of the respondents as the custodians of the said information.

18. In oral submissions on behalf of the respondents, Mr. Nyachiro submitted that the trial court was correct in finding that it had no jurisdiction as the petitioners had not particularized which rights had been violated. Further, that the respondents had provided a mechanism for dispute resolution and so the appellants should have referred the matter to arbitration. Mr. Nyachiro submitted that the present appeal has been overtaken by events as it related to elections held in 2014. There had been three more elections since the impugned elections, and the terms of office of the previous leaders had already expired. Indeed, according to the respondents, some of the present appellants are the current officials of the 1st respondent. Mr. Nyachiro informed this Court that the respondents were willing to furnish the information that the appellants were requesting for as long as the appellants were willing to pay the photocopying charges.

19. I have read and considered the record of the trial court, including the pleadings of the parties. I have also read and considered the written submissions of the appellants and the oral submissions made by Mr. Nyachiro for the respondents. From the submissions made before us at the hearing, I ask myself three questions. First, given that the appeal relates to elections held in 2014, eight years ago; that there have

been three other elections since; that some of the petitioners are currently directors of the respondent, was there a point to this appeal? Should not the appellants have withdrawn it instead of engaging the Court in what is essentially an academic exercise? Indeed, by the time the petition was heard and determined in 2017 and the present appeal filed in November of that year, were the issues that it raised not already moot?

20. Mr. Nyachiro submitted that the respondents were willing to furnish the information that the appellants were seeking, provided that they paid the photocopying charges. Which leads me to the second question: was there a point to the petition in the trial court at all? What stopped the respondents then from engaging the appellants in 2014, soon after the demand for the information was made or after the filing of the petition, and informing them that they could have the information they were seeking so long as they were willing to meet the cost of copying the documents in question? Was there a point in using valuable judicial time in litigating a dispute that had already been overtaken by events?

21. The third question goes to the core of the appeal before us, and it speaks to the understanding and appreciation of Counsel appearing before courts of the well-settled principles emerging from jurisprudence from our courts. There is no dispute that the appellants are or were shareholders in the 1st respondent at the time of filing of the petition. The 1st respondent, from the material before us, is a limited liability company. It is governed by the law regulating companies in Kenya. In 2014, that law was the *Companies Act*, Cap 486 of the Laws of Kenya. Under the law, the 1st respondent had a Memorandum and Articles of Association, which regulated relations between shareholders inter se, and with the company. In the event of a dispute, the provisions of the *Companies Act* then in force, as well as the Memorandum and Articles of Association of the company, provided the dispute resolution mechanism. As was held in the case of *Speaker of the National Assembly vs. James Njenga Karume* [1992] eKLR:

> "In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed."

22. The dispute between the petitioners and the respondents arose out of the conduct of elections for directors of the 1st respondent. It did not, as correctly found by the trial court, rise to the level of a constitutional issue to be litigated under the Constitutional provisions. However, even if it had, the appellants did not meet the test set in the jurisprudence on constitutional litigation. This test is to the effect that where a party alleges violation of constitutional rights, he is required to demonstrate, with a reasonable degree of precision, the provision of *the Constitution* which have been violated and the manner of such violation-see *Anarita Karimi Njeru Vs. Republic* (supra) and *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR

23. The appellants alleged violation of their rights under Article 35(1)(b), which provides that:

    (1) Every citizen has the right of access to—

    (a) ...

    (b) information held by another person and required for the exercise or protection of any right or fundamental freedom. (Emphasis added.)

24. A perusal of the petition shows that the appellants did not demonstrate the manner of violation, nor did they disclose which rights and fundamental freedom they wished to protect with the information that they sought from the respondents, though a reference was made to Article 38 on protection of political rights, and is self-evidently not applicable in the circumstances of this case.

25. In *Cape Metropolitan Council vs. Metro Inspection Services Western Cape and Others* (2001) ZASCA 56 the court stated that:

> "Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information...an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right." (Emphasis added.)

26. The appellants did not meet this requirement, and the trial court was therefore justified in reaching the conclusion that their petition was without merit. Similarly, I find no merit in this appeal. I would accordingly dismiss it with costs to the respondents.

JUDGMENT OF KIAGE,JA

1. I have had the advantage of reading in draft the judgment of my learned sister Mumbi Ngugi, JA with which I am in full agreement.

2. This is yet another of those appeals that should never have reached this Court. Indeed, the very litigation that gave rise to it was little more than legal adventurism, speaking more to ill-advised resort to courts over matters that are easily and effectively sorted out by mechanisms quite within the control of the parties themselves.

3. We have on many occasions decried the knack for constitutionalization of simple and straight-forward disputes that can be resolved by application of statutory law by way of ordinary suits. It bears repeating that where remedies exist under a statute, it is impermissible that parties should by creative drafting squeeze and contort the issues so as to lend them a constitutional hue and character. The courts will be vigilant to put a resolute stop to such experimentation.

4. It boggles the mind why in the present case, the appellants should be so intrepid about pursuing this appeal when it relates to issues surrounding internal elections which have since been followed by three other elections. Moreover, some of the appellants having been elected into office and therefore in pole and controlling positions to do the very thing they seek from the 1st respondent, whose directors and alter ego, they now are. I am unable to tell whether it is a case of litigation-mania on the part of such parties or a failure of their advocates to provide legal counsel. I am firmly persuaded that advocates are not mere mouth pieces for their clients: they play a (perhaps more) critical role of providing advice. In this case, the advice should have been in short form: "This appeal has no legs to stand on. It has long been overtaken by events. We have a snowball's chance in hell. Let us cut our losses. There is a time for everything. And it is time to stop."

5. I cannot tell if such advice was given. If it was given, it clearly was unheeded. If it was not given, it shows. At any rate, this is an appeal that sealed its own fate the day it was lodged.

6. As Tuiyott, JA is of the same view, the appeal is dismissed in the terms proposed by Mumbi Ngugi, JA.

JUDGMENT OF TUIYOTT, JA

1. I have had the advantage of reading in draft the judgment of Mumbi Ngugi, JA, with which I am in agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF APRIL, 2022.

MUMBI NGUGI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR