



REPUBLIC OF KENYA



Wamalwa & 2 others v Nzoia Outgrowers Company Limited (Civil Suit 118 of 2012) [2022] KEHC 11679 (KLR) (30 June 2022) (Judgment)

Neutral citation: [2022] KEHC 11679 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL SUIT 118 OF 2012
SN RIECHI, J
JUNE 30, 2022**

BETWEEN

HENDRICKS SHIKUKU MUSUNGU WAMALWA 1ST PLAINTIFF

MOSES N WABWILE 2ND PLAINTIFF

LUKE MAINA WANELOBA 3RD PLAINTIFF

AND

NZOIA OUTGROWERS COMPANY LIMITED DEFENDANT

JUDGMENT

1. In their plaint dated July 30, 2012, the plaintiffs seek general damages and costs as well as interest from the defendant arising from an election for directorship in districts which supplied sugar cane to the defendant. The plaintiffs allege that they were duly elected to the position of directorship in districts 1, 4 and 5, took up the positions but were subsequently stripped off pursuant to a court order thus the claim for refund of the money spent in campaigns.
2. The defendant filed its defence and counterclaim basically denying that the plaintiffs were ever elected to the positions alleged. It also proffered a counterclaim seeking to recover the sum of kshs 3, 390,000/= from the plaintiffs being money received as allowances while serving as directors among other expenses.
3. The matter was heard *viva voce*. The 1st plaintiff testified as PW-1 stating that he initially worked as a liaison officer with the defendant before he resigned after an advert was put up for election of districts 1, 4 and 5 for Nzoia Outgrowers Company Limited. That pursuant to the advert, he resigned to vie for the directorship position in zone 5. He applied for candidateship and was cleared to vie whereupon he commenced campaigns and eventually emerged victorious.
4. He stated that he spent a total of kshs 316,000/= in the campaigns whereas he could have earned kshs 3, 990,000/= as a director for the 5 years he could have served and kshs 990,000/= had he continued



serving as liaison officer. He stated that after being elected, he learnt of an order issued by the High Court in Civil Suit no 54 of 2011 on June 22, 2011 stopping the elections though he was not a party to the suit.

In cross examination, he stated that he did not have documents showing that the agents received the money where he paid a total sum of kshs 16, 500/=. That he resigned from his position on May 22, 2011 to contest for the position of directorship.

5. PW-2 was Moses Nyongesa Wabwile. He stated that he saw the advert inviting candidates to vie to the position of directors of NOCO wherein he vied in district 1 after closing his timber business to contest. The elections were held on 11/6/2011 and he emerged the winner attending 2 meetings thereafter in his new position. He served in the position until June 22, 2011 when he learnt of an order issued by the High Court sitting in Bungoma in Civil Suit no 54 of 2011 stopping them from serving in the positions.

That as a result he incurred kshs 643,000/= in the campaigns leading to his election and his business lost kshs 55,000/= for the 17 days his business remained closed which expenses he now seeks to be paid by the defendant. He stated that had he served as a director for the 5 years, he could have earned a sum total of kshs 3, 990,000/=. That he has now been ridiculed and embarrassed as a result.

6. On cross-examination, he stated he participated in the elections after seeing the advert dated May 18, 2011 calling for interested candidates to offer their candidature. That at the time of the elections, he was not aware of the order stopping the elections where the defendant was fined kshs 2, 000,000/= for disobeying the order. That he could have served in the position of director for district 1 for 5 years and he now seeks compensation for the money he could have received serving in the position.

In re-examination, he stated that he got knowledge of the order on June 20, 2011 when they were having their Board meeting.

7. PW-3 Luke Maina Waneloba, a sugarcane farmer and a member of the defendant company stated that pursuant to advert for directorship of districts 1,4 and 5, he applied for directorship in district 4 by paying the sum of kshs 20,000/= nomination fees. Thereafter, he commenced campaigns and was finally duly elected unopposed on the elections held on June 11, 2011 to serve as a director for a period of 5 years.

After elections, he attended an induction course, attended a board meeting and another board meeting slated for June 22, 2011 could not take place due to an order issued by the High Court in Bungoma stopping their serving in the position whereas he had been aware of the order.

He stated that as a result of the elections, he incurred the sum of kshs 246,000/= in nominations and campaigns, he expected to earn kshs 3, 990,000/= had he served in the position of directorship for 5 years which he now seeks to be reimbursed by the defendant.

8. In cross-examination, he testified that it is the board which makes a resolution for the elections. That the elections were by secret ballot, that he gave his agents lunch and does not therefore ask for campaign expenses but compensation. He stated that he had not known of the existence of the court order.

For the defendant, Duncan Wekesa Wafula, the defendant's chief security manager testified as DW-1. His testimony was that the Kenya Sugar Board (KSB) seconded one Kingsley Mutali to the defendant as the general manager. That upon assuming office, the said Kingsley without calling the annual general meeting and before the expiry of the sitting director's term called for elections in districts 1, 4 and 5 wherein the plaintiffs were duly elected.



8. That upon the events stated above, farmers from the mentioned district filed civil suit 54 of 2011, got orders stopping the elections, served on the general manager who in flagrant disobedience of the order proceeded to conduct the elections. The farmers went back to court and obtained orders on June 20, 2011 stopping the directors from assuming office but the said general manager and the plaintiffs similarly defied the order and continued drawing allowances till December 2011.

That as a result of the disobedience, the company was fined kshs 2,000,000/= and the plaintiffs received kshs 1, 390,800/= in allowances which the plaintiffs ought to reimburse the defendant as stated in the counterclaim.

9. In cross examination, he stated that at the time of elections, he was a member of the management which implemented the decisions of the board. The general manager was the person who made decisions on elections. He stated that there were several court orders which was brought to the attention of the plaintiffs even though they were not parties to the suit. That payment of allowances was done by the cashier and approved by the general manager.

In re-examination, he stated that the general manger is not a director of the board thus his actions were not actions of the board. That the elections of the plaintiffs were illegal as there was an order in force stopping such elections and should not therefore be paid allowances but refund the company money received.

10. Thereafter, parties were directed to file written submissions. Only the defendant complied with the order.

In the submissions, counsel submits that damages can only be awarded on a contract or legitimate transaction and since the court disallowed the elections and the order properly served, general damages cannot be awarded in the circumstances. He urges the court to dismiss the plaintiffs' case and allow the counterclaim.

Having considered the pleadings, the oral testimony together with the exhibits as well as the defendant's submissions, the issue commending itself for determination is whether; given the evidence on record, the plaintiffs are entitled to the orders sought.

11. Having carefully perused material in this matter, it is not in dispute that the plaintiffs were duly elected to represent the defendant's stakeholders. That pursuant to that election, the plaintiffs were elected to represent districts 1, 4 and 5 respectively. Subsequently, the plaintiffs took up their positions attending an induction course and a few other board meetings before their stay in the position was called off by this court when it nullified their election thus the suit to have the defendant reimburse their money used in campaigns and compensate them for the money lost had they served in the position which is stated to be for a term of 5 years.

This court is therefore called upon to inquire whether the plaintiffs have made out a case befitting the award of general damages and or reimbursed their money spent on campaigns for the seat and or be paid for the remainder of the term they could have served. In the alternative, the court has to determine whether this is a case befitting the award of damages.

12. The *black's law dictionary* 8th edition defines damages as; the sum of money which a person wronged is entitled to receive from the wrong doer.

13. The question then is; have the plaintiffs been wronged by the defendant so that they are entitled to be awarded damages for the defendant's wrongful acts? It is common ground that the directors' term of office in the districts were coming to an end and there was need to elect new directors into office. The defendant put up notices inviting candidates to submit their applications. The defendants acting on



the information contested and were duly elected. After their election and the subsequent stay in office for a few months, the High Court invalidated the elections in a suit where the plaintiffs were not parties.

14. The plaintiffs allege that the defendant ought to compensate them for the remainder of the term they could have served in that capacity and reimburse them the money they spent in contesting for the seat in form of fees and campaigns expenditure. They have particularized such expenses which they seek from the defendant.

It is trite law that whoever alleges must prove. The burden of proofing the existence of such facts to entitle the court to make a finding in such party's favour lies on that party. These are the dictates of sections 107-109 of the *Evidence act* which provides;

107 (1) 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.

SUBPARA (2)

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108 The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109 The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

15. From the pleadings and the evidence in this court, the plaintiffs pray for general and special damages. They were duty-bound to adduce sufficient evidence to warrant such findings by court. As regards the award of general damages, it is trite law that this is a set of damages awarded to a party to bring it to the position it was before had it not been for the defendant's breach. In other words, was there a relationship between the parties that entitles the wronged party to compensation due to the breach?

In this case, the damages sought by the plaintiffs is a refund of monies allegedly spent in campaigns. Receipts in proof of alleged expenses relating thereto were availed and or the tabulated figures presented in evidence in handwritten sheets of paper. The plaintiffs also sought damages in form of salaries they could have earned had they served their entire term as directors.

17. The court finds that the sums sought by the plaintiffs if recoverable ought to be in form of special damages. This head of damages should be specifically pleaded and proved as buttressed in the case of *Hahn v Singh*, [1985] KLR 716, where it was held:

Special damages must not only be specifically claimed(pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.

18. The plaintiffs' claim is akin to what was stated by Lord Goddard CJ in *Bonhan Carter v Hyde Park Hotel Limited*(1948) 64 TLR 177 cited in by the Court of Appeal in *David Bagine v Martin Bundi* (1997) eKLR, where the learned judge had observed:

19. It is trite law that the plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it.



20. Even if the damages stated above were to be recovered, was it probable that the same is awardable due to the defendant's wrongful acts of which it bore a duty of care to the plaintiffs? It is their case that the defendant ought to pay damages since the elections were nullified by the High Court in the above-stated case which order was presented in evidence. It is the court's view that the court having nullified the elections, there was no way the plaintiffs could continue occupying office through an electoral process that had been nullified. The plaintiffs and the defendant were not both to blame for the nullification and the defendant cannot be faulted and or penalized for that.
21. The plaintiffs are duty bound to adduce evidence establishing the nexus between the damages sought and the defendant's actions to entitle it to be awarded the classes of damages sought. It is not enough for the plaintiffs to just present to court a tabulation of damages and assert that they ought to be paid by the defendant. The nexus is very crucial.

From the pleadings, the defendant has filed a counterclaim praying that the plaintiffs do reimburse the defendant monies received on account of allowances paid during their tenure as directors and secondly, for the money the defendant could have made before the plaintiffs leased out the defendant's machines to West Kenya Sugar factory and finally the sums of money the defendant was fined for disobedience of a court order.

22. It is the court's finding that these sums of monies were spent and or incurred in the course of the plaintiffs' discharge of his duties as directors. The second batch of the money was said to have been paid to court after the defendant was found in contempt of court of which the plaintiffs were not parties. No evidence was led in the contrary though it was said the orders were served on the General manager who nonetheless proceeded to hold the impugned elections.

The above therefore means that the subsequent disobedience of the court order was not directly attributable to the plaintiffs.

23. Regarding the money allegedly earned by the plaintiffs earned by the plaintiffs in allowances while serving as directors, it is the court's finding that indeed the plaintiffs were elected to office and attended board meetings and even an induction course at Kakamega Golf Hotel and monies paid as sitting allowances. There was no evidence adduced showing that at the time the plaintiffs attended such meeting, they were illegally in office or the illegality of their elections had been brought to their attention.

Even if the order had been brought to the attention of the general manager, the plaintiffs were not in any way responsible for the day-to-day management of the defendant and any sums paid to them was approved by the said general manager. If any money is to be recovered from the plaintiffs, the same ought to be recovered from the general manager or whoever was responsible for the payment. This applies to the money that was allegedly lost due to the lease of machines to West Kenya Sugar Factory. No evidence was led showing any procedural impropriety or illegal dealings on the part of the plaintiffs. The responsibility of making such decision is within the purview of the board of directors where even DW-1 served.

24. In sum total, having carefully reviewed the evidence on record, the court is of the view that the plaintiffs have not proved a case for the awards as prayed and the claim is hereby dismissed. I find the defendant's counterclaim is without merit and is hereby dismissed. In the interest of justice and taking note costs are within the discretion of the court, each party shall bear its own costs.

DATED AT BUNGOMA THIS 30TH DAY OF JUNE, 2022

S N RIECHI



JUDGE.

