



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**CIVIL CASE NO. 8 OF 2019**

**DAVID KARIUKI NDATHI.....PLAINTIFF**

**VERSUS**

**JAMES GITHINJI GUTU.....1<sup>ST</sup> DEFENDANT**

**KIMUNYE TEA FACTORY.....2<sup>ND</sup> DEFENDANT**

**KENYA TEA DEVELOPMENT AGENCY.....3<sup>RD</sup> DEFENDANT**

**RULING**

The application pending before this court is the one dated 14<sup>th</sup> November, 2019. The application is brought under Order 40 Rule 1 and 2 of the Civil Procedure Rules Section 3A of The Civil Procedure Act and all other enabling provisions of the law).

**It Seeks the following orders:**

1. Spent
2. An order to temporary injunction do issue restraining the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from confirming the 1<sup>st</sup> defendant/respondent as the duly elected director of Kimunye Tea Factory Co. Limited representing Muburi electoral area during the annual general meeting, pending the hearing and determination of this application.
3. An order of Temporary injunction do issue restraining the 1<sup>st</sup> defendant from accessing and transacting any business of Kimunye Tea Factory limited, either in his personal or official capacity, pending the hearing and determination of this application.
4. An order of temporary injunction do issue restraining the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from confirming the 1<sup>st</sup> defendant/respondent as the duly elected director of Kimunye Tea Factory Company limited representing Muburi electoral area during the annual general meeting, pending the hearing and determination of this suit.
5. An order of temporary injunction do issue restraining the 1<sup>st</sup> defendant from accessing and transacting any business of Kimunye Tea factory Limited, either in his personal or official capacity, pending the hearing and determination of this suit.
6. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants / respondents be authorized to produce before this court all the originals of the powers of attorney and the accompanying receipts which were used on 5<sup>th</sup> November, 2019 for the election of the director of Kimunye Tea Factory Co. Limited to represent Muburi electoral area.
7. Costs of the application be provided for.

**The application is based on the following grounds:**

- a. The elections for the directors of Kimunye Tea Factory Company Ltd were held on 5<sup>th</sup> November, 2019

b. The Rules required to be followed at the time of the elections were flouted, and the complaint by the plaintiff/applicant to the returning officer was ignored.

c. The defendants have organized for a general meeting for Friday 15<sup>th</sup> November, 2019 so as to confirm the 1<sup>st</sup> defendant as the duly elected director of Kimunye Tea Factory Limited to represent Muburi electoral area.

d. There is therefore need to have the application heard urgently.

The application is supported by the affidavit of David Kariuki Ndathi sworn on 14<sup>th</sup> November, 2019. He depones that he is a tea grower number KM15-294 Thiba Tea buying centre at Kimunye Tea factory company limited.

The factory has six directors who are elected on rotational basis, two each year for a term of three years, and one is eligible for re-election upon expiry of his term.

In 2019 he vied for the position of Director to represent Muburi electoral area and after vetting he was found suitable for the position.

He further depones that the farmer who is unable to vote on the date of elections can issue the power of attorney to another who will vote his behalf and the powers of attorney can be donated even to the candidates themselves.

The last day for the powers of attorney to be received was the 9<sup>th</sup> October, 2019 and they were to be returned to the Factory Unit Manager at the Tea factory and the manager upon receiving them is required to receive, and stamp all the powers of attorney as well as identity cards and pay slip copies of the donors.

The factory Manager failed to comply with the requirements as he did not stamp the identity cards (copies) and the payslips copies of the donors.

He further depones that the factory manager is supposed to receive a payment of non refundable fee of Kshs; 800/= per set of the power of attorney. He is then supposed to forward them to the Head office at Nairobi for final stamping and each donor is supposed to fill and sign two copies of the power of attorney which is supposed to be witnessed by either a magistrate, assistant county commissioner, chief, assistant chief or a commissioner for oaths.

The head office is supposed to return a copy of the power of attorney accompanied a copy of the donors identity card together with the payslip.

One copy of the power of attorney is then handed over to the donee by the Factory Unit Manager and the Power of Attorney to apply on the date of elections, and the donee must come with original power of attorney duly stamped by the factory unit manager as well as donors copies of identity card, pay slip duly stamped by the factory unit manager and the donees is supposed to be given copies of the national identity card, and pay slip by the shareholder himself and not get printout of the pay slip from the factory.

He depones that when the powers of attorney were returned from the head office there were about 92 of them which were said to be double issued.

He found that the signatures of the person who had allegedly given the power of attorney to two persons were different.

The issue of forgery of the signatures was reported to Kianyaga Police Station and is been investigated. On the day of Elections he objected to the power of attorney, pay slips and identity cards which were not stamped and were deemed as valid.

The 1<sup>st</sup> defendant had print outs obtained from the factory managers, instead of copies of the original pay slip of the share holders. He objected but he was over-ruled.

The 1<sup>st</sup> defendant is the incumbent and therefore got undue advantage over him. He raised a formal complaint which was received 6<sup>th</sup> November, 2019 but there was no reply.

He verily believes that due process was not followed, and hence the elections were not transparent free and fair and he believes that his right to equality before the law as enshrined in Article 27 of The Constitution was infringed, since the 1<sup>st</sup> defendant took the advantage of been the incumbent hence he could access the records and the office of the 2<sup>nd</sup> defendant.

He urges the court to grant the orders sought, he believes that he has a good case with chances of success.

## **RESPONDENTS SUBMISSIONS**

The respondents filed a joint replying affidavit sworn on 3<sup>rd</sup> December, 2019. The affidavit is sworn by Robert Kibargendi Maina who is the Factory Unit Manager conversant with the matters raised in this application.

He depones that the application has been overtaken by events as the 2<sup>nd</sup> defendant held its Annual General meeting on 15<sup>th</sup> November, 2019. In addition to the above there exists some conservatory orders issued on 7<sup>th</sup> November, 2019 by Honourable Justice Makau in constitutional petition number 442 of 2019. Joseph Mwangi Mbote & 3 others -vrs- Kenya Tea Development Agency Holding Limited & Another where the court particularly directed that the AGM should not deal with the issue of confirmation of all successful nominees for the position of Directors pending the hearing and determination of the matter.

The hearing was scheduled for hearing on 2<sup>nd</sup> December, 2019.

The order effectively restrained the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from confirming the 1<sup>st</sup> defendant's election in the AGM held on 15<sup>th</sup> November, 2019. As a result of the order the 2<sup>nd</sup> defendant's AGM held on 15<sup>th</sup> November, 2019 did not deal with the agenda of Directors election as the 2<sup>nd</sup> defendant had been restrained by this Honourable Court and court orders do not issue in vain.

He has explained at length the process of elections and I don't have to list it here and that he depones contrary to the allegations by the applicant the election conducted on 5<sup>th</sup> December, 2019 were free and fair void of any malpractices, accurate and without any legalities and that the same were carried out in a clear manner to determine that the 1<sup>st</sup> defendant indeed won the elections.

There is a dispute resolutions mechanisms established under the Elections Manual formed with the intention of hearing disputes or complaints emanating from the elections.

He depones that the application is immature and bad in law as the applicant should exhaust the defendant's internal mechanism before approaching this court.

That the application is an abuse of court process, it does not present an arguable case with chance of success. The applicant has not demonstrated that he will suffer irreparable loss in the event that the orders sought are not granted.

The balance of convenience tilts in favour of the factory as the orders sought if granted would have the potential of crippling the ordinary business of the defendants.

He submits that the application has no merit and it should be dismissed.

#### **APPLICANTS SUBMISSIONS:**

- The applicants filed a supplementary affidavit sworn on 24<sup>th</sup> January, 2020 and avers that he is not a party to the case at Milimani court at Nairobi Petition No. 442 of 2019, and his application sought courts intervention to stop the alleged elected Director during that Annual General Meeting of 15<sup>th</sup> November, 2019.
- The parties filed submissions which I have considered.

#### **The issues which arise for determination is;**

i. Injunctions.

#### **Having considered this application I find that;**

- The appellant has not disputed the fact that has been deponed by the respondent that the application has been overtaken by events, as the 2<sup>nd</sup> defendant held its AGM on 15<sup>th</sup> November, 2019.
- The defendants have demonstrated that AGM was indeed held on 15<sup>th</sup> November, 2019 as shown on annexure RKM 5.
- Secondly it is not disputed that there is indeed Constitutional petition number 442 of 2019 Nairobi Milimani where the Court issued conservatory orders and directed that AGM should not deal with the issue of confirmation of all successful nominees for the positions of the Directors.
- The order has been annexed and there is no dispute that it is a valid order issued by the court. The leading authority of the grant of injunction is case of ; **Giella -vs- Cassman Brown & company limited ( 1973) EA.**

#### **It was stated:**

**“The conditions for the grant of an interlocutory injunction re now, I think, well settled in East African. First, an applicant must show a prima facie case with a probability of success.**

**Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.**

**Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”**

- Injunctions are granted to prevent something from being done. It cannot be issued to restrain the event that has already taken place and in this case an injunction will not issue as what the applicant seeks to explain has already taken place.

There is an order issued by Court with concurrent jurisdiction. The straining the successful nominees for the position of directors from assuming office pending inter-parties hearing.

- The court has also ordered that the AGM should not deal with the issue but await the outcome of the inter-partes application hearing in that case.

Court orders are not issued in vain, and the order issued in relm.

- The applicant has not shown that he will suffer irreparable loss as the event he seeking to restrain has already taken place.
- The respondent has raised the issue of jurisdiction as there exists disputes resolutions committee established under the Elections manual formed with the objective of hearing disputes and complains emanating from the elections and which the applicant ought to have exhausted before lodging the instant case in court.
- The applicant has not shown that he has exhausted all the Internal disputes resolutions mechanism of the respondents.

Jurisdiction is everything and in the: Owners of Motor-vessel Lilians -versus- Caltex oil Kenya limited (1989) KLR where it was stated:

**“Jurisdiction is everything without it a court has no power to make one step and where a court has no jurisdiction there would be no basis for continuation of the proceedings in it the moment it holds the opinion that it is without jurisdiction.”**

- The dispute before this court is an Election dispute and the company has provided an Election dispute resolutions mechanism which the applicant has not exhausted and the Company should be able to deal with it and only after he has exhausted that system can he seek intervention by the Court. See the case of; Job Fellis Ndarera -vs- Nyamache Tea Factory limited & 2 others (2016) KLR.
- In this application, the application has not met the threshold for the grant temporary Injunctions.
- The application has been overtaken by events there is a subsisting court order which has issued orders similar to those the applicant is seeking and are issued in relm.
- The application is without merit and is dismissed with costs.

**Dated, signed at Kerugoya 29<sup>th</sup> day of May 2020**

**L. W. GITARI**

**JUDGE**