



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U J

CIVIL CASE NO 12 OF 2019

DAVID NYAKENGO NYAKWAMA.....1ST PLAINTIFF/ RESPONDENT

SAMWEL OGATO ATWORI.....2ND PLAINTIFF/ RESPONDENT

VERSUS

KENYA TEA DEVELOPMENT AGENCY LTD.....1ST DEFENDANT/APPLICANT

NYAMACHE TEA FACTORY COMPANY LTD.....2ND DEFENDANT/APPLICANT

ROBERT ARAKA ARORI.....3RD DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. The application for determination is the Motion, dated 25th February 2020, brought under **order 40 rule 7 and order 51 rule 1 of the Civil Procedure Rules** seeking stays of the orders issued on 4th December 2019. The applicants further seek that the ruling and subsequent orders issued by this court upon hearing the application dated 18th November 2019 be set aside.

2. The grounds upon which the Motion is premised are as follows:

i. THAT the applicant/respondent was legally listed as a candidate to vie for the Tea Factory Companies Directorship for Nyamache Tea Factory Company Limited.

ii. THAT the orders staying confirmation of directorship of the 3rd Respondent/defendant were issued in bad faith.

iii. THAT the applicants/respondent's application dated 18/11/2019 was ill conceived from the onset.

iv. THAT there are orders arising from the judgment dated 20/2/2020 by the High Court in NAIROBI PETITION NO. 442 OF 2019 that are applicable to the 3rd respondent's application herein.

v. THAT this court's ruling on the applicants/plaintiff's application dated 18/11/2019 is directly in contradiction with the High Court judgment in Nairobi Milimani petition no. 442 of 2019.

vi. The respondent has good grounds to raise to the said application.

vii. It is in the interest of justice that this application is allowed.

3. The plaintiffs despite being served did not file any Reply to the application.

BACKGROUND

4. The elections for the director in respect to the 2nd defendant representing Masige electoral area had been scheduled for 5th November 2019. Before the elections were conducted, the verification committee disqualified the 3rd defendant on ground that he had failed to deliver 2000 kilograms of green leaf in the preceding year as required under Article 88(4) of the 2nd Defendant's Articles of Association.

5. Despite the 3rd defendant failing to file an appeal against the decision of the verification committee, the appeal's committee cleared the 3rd defendant, purporting that he was qualified to contest the seat. The elections were held and the 3rd defendant declared to have garnered the majority of the votes for the seat.

6. The plaintiffs' herein aggrieved by the decision of the appeal's committee instituted suit against the defendants.

7. Contemporaneously filed with the plaint was the Notice of Motion dated 18th November 2019 in which the plaintiffs' sought the following orders;

1. ...

2. *That pending inter parties hearing of this application, there is and is hereby issued an order of temporary injunction barring the 1st and 2nd respondent/defendants from admitting the 3rd defendant to the board of directors of Nyamache Tea Factory Limited as factory Director and /or nominee director representing Masige electoral area.*

3. *That pending the hearing of the suit, this Honourable Court be pleased to issue an interim injunction restraining the 1st and 2nd defendant from allowing the 3rd defendant to transact any business as directors for Nyamache Tea Factory Company Limited representing Masige electoral area and/or as nominee director of the 2nd defendant.*

4. ...

8. The application was opposed by the defendants who filed their grounds of opposition claiming that the application had similar prayers to that of **High Court Petition No 442 of 2019** filed at Nairobi.

9. After hearing arguments from both counsel for the plaintiff and defendant, this court issued an order in favour of the plaintiff in terms of prayer 2 of the Notice of Motion dated 18th November 2019.

10. Following the decision by Korir J in **Joseph Mwangi Mbote & 2 others v Kenya Tea Development Agency (Holdings) Ltd & another; Kiru Tea Factory Limited (Proposed Co-Petitioner) [2020] eKLR**, PETITION NO. 442 OF 2019, the applicants now seek that this court's interim orders made on 4th December 2019 be discharged, varied, or set aside pursuant to **order 40 rule 7 of the Civil Procedure Rules**.

ANALYSIS AND DETERMINATION

11. At the center of the defendant/applicant's application is that this court's ruling on the plaintiff's earlier application dated 18th November 2018 contradicts the decision by Korir J in **Joseph Mwangi Mbote case (supra)**.

12. Odunga J on the power of the court to discharge, vary or set aside any interlocutory order in the case of **Leah Nyambura Mburu v Barclays Bank Of Kenya Ltd[2012] eKLR** stated as follows;

"However, it is my view that an application under Order 40 rule 7 may be based on the events subsequent to the grant of the injunction such as the conduct of the applicant which conduct make the sustenance of the injunctive orders unwarranted. This may occur where for example the applicant's subsequent conduct is meant to frustrate the hearing and determination of the suit or where the applicant goes to sleep after the grant of the said injunctive orders. The Court does recognise that injunction is an equitable remedy and the subsequent events may render the continued retention of the injunction unreasonable or unjustifiable.

*Again the Court may be justified where there is evidence that the orders of injunction were obtained without disclosure of material facts or by distortion or deliberate misrepresentation of the facts. To obtain equitable orders of injunction by misleading the Court would justify the court in setting aside the orders. In **Devani vs. Bhadresa and Another [1972] EA 22** the East African Court of Appeal held that the learned judge was right in holding that he would never have granted the injunction had the appellant made a full and fair disclosure of the material facts at the time of granting the ex parte order of injunction and that the judge was entitled to set aside the injunction if satisfied that the status quo could be preserved without the injunction."*

13. In the **Joseph Mwangi Mbote case (supra)**, it is now plainly clear that the petitioners therein were contesting the elections of directors of the Kenya Tea Development Agency (Holdings) Ltd in regard to zones 2,4, 7 and 8. The petitioners therein also contested the validity of the document titled, '*Election of Tea Factory Company Directors Nominees and Buying Center Committee Members-Procedures-November, 2019*'. In his judgment Korir J held as follows;

"130. In the circumstances, the Elections Procedure Manual 2019 is not applicable to the election of the directors of the 1st Respondent. Whatever complaint the petitioners may have had with the election of the 1st Respondent's directors, they cannot hinge that complaint on the Elections Procedure Manual 2019.

131. It is difficult to address the legality or otherwise of the Elections Procedure Manual 2019 in the absence of the owners of that document to wit the 54 tea factory companies. However, a perusal of the Memorandum and Articles of Association of KTFC which was provided to this court by the petitioners shows that the returning officers and presiding officers for purposes of the directors' elections shall be appointed by the Company Secretary. Even assuming that the Elections Procedure Manual 2019 was facing a valid challenge before this court, the petitioners have failed to show why a document that is meant to guide the exercise of the power donated to the Company Secretary by the memorandum and articles of association of the various tea factory companies to oversee election of directors of the tea factory companies can be said to be ultra vires. It should be remembered that the Company Secretary of the 1st Respondent is also the Company Secretary of each and every one of the 54 tea factory companies.

132. This then takes me back to the question as to whether this is a matter to which the exceptions to the Foss v Harbottle rule is applicable.....

....

137. In the instant case, I find that the matters complained of can be resolved by the company itself. My humble view is that the orders sought by the petitioners in this case, to declare who is or who is not a duly elected director of the company or who should prepare the company's election manual are clearly the company's internal affairs which this court should not interfere with. Furthermore, I am inclined to hold the view that a company is justified in setting up the rules and guidelines to govern its elections. Owners of companies usually run their affairs based on voting. Once the majority decides, their decision should carry the day. Such a decision should not be subjected to court scrutiny where there is no evidence of violation of the country's Constitution."

14. However, in this case, the plaintiffs in their application of 18th November 2019 were neither contesting the validity of the elections of directors of the Kenya Tea Development Agency (Holdings) Ltd nor the validity of the document titled 'Election of Tea Factory Company Directors Nominees and Buying Center Committee Members-Procedures-November, 2019'. The application was on the election of the 3rd Defendant as a director in the 2nd defendant and whether the election of the 3rd defendant was in accordance to the election rules, that is, 'Election of Tea Factory Company Directors Nominees and Buying Center Committee Members-Procedures-November, 2019'.

15. While I recognize that this court has the discretion to discharge, vary, or set aside interlocutory injunctions pursuant to **order 40 rule 7 of the Civil Procedure Rules**, having carefully read **Joseph Mwangi Mbote case (supra)** I find that the issues raised in the said case have no relation to the issues raised in the notice of motion dated 18th November 2019.

16. It must always be remembered that each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect of a case. Mativo J cited with approval the decision of **High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, Prashant Vats Versus University of Delhi & Anr.** in his decision in **Republic v Kenya Bureau of Standards & 4 others; Exparte United Millers Limited; Department of Health Services, Nakuru County (Interested Party) [2019] eKLR, JUDICIAL REVIEW NO. 396 OF 2018** where he stated as follows;

"21. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. [19]In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[20] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[21] My plea is to keep the path of justice clear of obstructions which could impede it."

17. While I appreciate that at the time the temporary injunction barring the 1st and 2nd defendant from admitting the 3rd defendant to the board of directors of Nyamache Tea Factory Limited as factory Director was granted, this court, had been led to believe that the two matters were similar as they were challenging the elections of directors of Kenya Tea Development Agency (Holdings) Ltd. Having fully appreciated the facts of the application dated 18th November 2019 and pointed out the different issues raised by the application, I find that it would be in the interest of justice not to interfere with the court orders of 4th December 2019 either by way of discharge, varying, or setting aside the said orders.

18. The defendants' application to discharge, vary, or set aside the orders of 4th December 2019 is only anchored on the decision by Korir J in **Joseph Mwangi Mbote case (supra)**, thus the Notice of Motion dated 28th February 2020, is thus one for dismissal. It is hereby dismissed.

19. I further direct that the application dated 18.11.2019 be set down for hearing on a priority basis.

Dated and Delivered at KISII this 3rd day of August 2020.

A. K. NDUNG'U

JUDGE