



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL CASE NO. 4 OF 2016

AMOTA NYASAE NYANG'ERA & ASSOCIATES.....PLAINTIFF

VERSUS

1. SANG'ANYI TEA FACTORY CO. LTD.....1ST DEFENDANT

2. KENYA TEA DEVELOPMENT AGENCY LTD.....2ND DEFENDANT

JUDGEMENT

1. The plaintiff's claim against the defendants is for: -

“(a) Declaration that the of the Plaintiff's removal as the Company's Auditor of the 1st Defendant for the financial year 2013/14 was contrary to the laid down provisions and, in particular, the provisions of Section 159(2) as read together with Section 160(1) of the Company's Act, Chapter 486, Laws of Kenya.

(b) Payment of the sum Kshs. 240,000/= only, being the Annual Professional Fees, which would have accrued payable to the Plaintiff for Professional services, in line and/or in accordance with the automatic re-appointment envisioned by Section 159(2) of the Company's Act, Chapter 486, Laws of Kenya.

(c) Interest on (ii) above at Court rates.

(d) Costs of this suit be borne by the Defendants.”

2. The claim is premised on an agreement between the plaintiff and the defendants which saw him act as the 1st defendant company's Auditor from 27th April 2011 until 27th May 2013 when his services were terminated. The plaintiff who is by profession a Certified Public Accountant licenced and registered with ICPAK (Institute of Certified Public Accounts of Kenya) and an Advocate of the High Court, gave evidence that on 27th April 2011 he was appointed as the 1st defendant's Auditor for the financial year 2010/2011. He duly and dutifully executed that mandate culminating in his re-appointment in the same capacity in the following year 2011/2012. He stated that once again he dutifully executed his duties and by the end of his term remained eligible for reappointment under **Section 159 (2) of the Companies Act (now repealed)**. He stated that his services were however terminated without the requisite notice at the 1st defendants Annual General Meeting held on 16th January 2013. He stated that although no other Auditor was appointed in that meeting he was later served with a letter dated 27th May 2013 appointing Hedrick Omanwa & Associates. He contended that his removal as the 1st defendant's Auditor for the financial year 2013/2014 without notice was not only irregular but also unprocedural, illegal and unlawful. The particulars of irregularities and illegalities being set out in Paragraph 11 of the plaint to be: -

“(a) Failing to issue and serve Special Notice of the intended resolution to appoint some other person as the Company's Auditor.

(b) Failing to notify the Plaintiff of the intended appointment of some other person.

(c) Denying and or depriving the Plaintiff of Automatic re-appointment.

(d) Denying and or depriving the Plaintiff of the opportunity to make Representations and or Objection (s) to his intended removal under section 160 of the Company's Act, Chapter 486, Laws of Kenya.

(e) Failing and or ignoring to notify the Plaintiff of the reasons for his removal.

(f) Violating and or breaching the Plaintiff's right to information.

(g) Subjecting the Plaintiff to mistreatment and or discrimination.

(h) Failing to enquire from the Plaintiff about his willingness or otherwise to be re-appointed."

3. He averred that by that unprocedural removal he was subjected to unfair treatment, contempt and discrimination and that he suffered financial loss in the form of the earnings he was entitled to in that year. He therefore urged this court to grant him the prayers sought. In support of his case, the plaintiff tendered in evidence documents evidencing inter-alia his professional qualifications, the Audit reports for the years prior to his removal, his practicing certificates for the period in issue, the Notice of the Annual General Meeting held on 16th January 2013 and his response to the appointment of Omanwa & Associates as his successor.

4. In summing up, Counsel for the plaintiff submitted that the plaintiff demonstrated to this court that the defendants did not invoke, walk through and or comply with the procedures set out in and by **Section 160** of the **Companies Act, Cap. 486 (repealed)**. That as such the plaintiff was by law, deemed to have been reappointed as the Auditor of 1st defendant for the 2013/2014 financial year in accordance with **Section 159(2) of the repealed Companies Act, Cap 486** without any resolution being passed at the 1st Defendant's Annual General Meeting scheduled for and held on 16th January 2017. This because he had met all the other conditions and or requirements stipulated in that particular section and his subsequent removal from office by the defendants herein purporting to appoint somebody else was unprocedural, unlawful and illegal and contrary to the laid down express provisions and requirements of **Section 159(2)** read together with **Section 160** of the **Company's Act, Chapter 486 (repealed)**. Counsel urged this court to uphold his submissions and hence grant the prayers sought.

5. In their joint statement of defence, the defendants vehemently denied that the plaintiff was eligible for reappointment as the 1st defendant's Auditor for the period 2013/2014. They averred that **Section 159(2) of the Companies Act** was inapplicable to this suit and stated that the 2nd defendant convened the Annual General Meeting held on 16th January 2013 in accordance with the law. They disputed that the plaintiff's removal was unprocedural and unlawful and averred that his term of contract had expired as provided in **Section 744 (1) (sic) of the Companies Act 2015** and his reappointment was not automatic. They denied that all procedures pertaining to removal of an Auditor were followed and contended that he was not subjected to any unfair treatment or discrimination as alleged. They also denied that he suffered loss and damage.

6. At the hearing the defendants called two witnesses. Paul Kegara Maina (Dw1) a Senior Accountant at the 2nd defendant conceded that the appointment of the plaintiff as the 1st defendant's Auditor for the period in issue constituted one of the agenda in the Annual General Meeting of the company held on 16th January 2013. He stated that however when the agenda was put to the meeting it was rejected by the shareholders. He recalled that the plaintiff was present during that meeting and for that referred this court to defendant's list and bundle of documents annexed to the defendants' defence. He stated that the company pays only for services rendered. He contended that the plaintiff was paid for the period worked and he was not entitled to payment for the year he was rejected by the shareholders. In cross examination, Dw1 stated that a special notice for the AGM was served upon the plaintiff on 7th December 2012. This was reiterated by Dr. John Kennedy Omanga (Dw2) the 2nd defendant's Group Company Secretary of which the 1st defendant is a member. Dw2 stated that the notice dated 7th December 2012 was issued pursuant to **Section 159 (2)** of the then **Companies Act**. He stated that the plaintiff would have been deemed as automatically appointed if at the Annual General Meeting there was no agenda for appointment of the Auditor. He contended that it was the prerogative of the shareholders to either accept or reject any agenda put before them. He further contended that **Section 159 (2) (b)** gave the shareholders power to reject the reappointment of the Auditor and that they did so at minute 5 of the meeting. Regarding notice, Dw1 stated that special notice is covered under **Section 160** read together with **Section 142 of the Act**. He contended that the notice period 7th December 2012 to 16th January 2013 was well beyond 28 days. He testified that the plaintiff was well aware of the Annual General Meeting and its agenda and the fact that the shareholders could either accept or reject his reappointment. He however disputed that the deliberations of the impugned Annual General Meeting were for the year 2013/2014 and stated they were for the year 2012/2013. He contended that the period 2013/2014 came two years after the plaintiff's rejection and he was not entitled to any fees. In cross examination, Dw2 confirmed that the plaintiff had expressed his willingness to continue as the 1st defendant's auditor and that the agenda for the meeting was to appoint him but not another person and would have been reappointed but for the rejection by the shareholders. Dw2 urged this court to dismiss the suit with costs to the defendants.

7. In summing up, Counsel for the defendants submitted that the law was clear that a retiring Auditor would be automatically reappointed in terms of **Section 159(2)** unless he fell within the exceptions. He submitted that the resolution of the shareholders at the Annual General Meeting fell within those exceptions. Counsel submitted that the shareholders having exercised their right as envisaged in the law cannot be faulted. He contended that the notice dated 7th December 2017 met the statutory threshold of 21 days set by the law. Counsel further submitted that in so far as the plaintiff's claim was for reliefs in respect of the year 2013/2014 the same was not tenable as he did not render services for the years ending 30th June 2014. He submitted that the claim is farfetched and not tenable in law and urged this court to dismiss the suit with costs to the defendants.

8. That the 1st defendant is one of the factories falling under the shareholding of the 2nd defendant is not in dispute. There is also no dispute that prior to the Annual General Meeting of the 1st defendant held on 16th January 2013 the plaintiff was the duly appointed Auditor having been so appointed at the Annual General Meeting for the year ended 2011/2012. There is also no dispute that his services were terminated at the 1st defendant's Annual General Meeting held on 16th January 2013.

9. The issues for determination in my view are **whether or not his removal was unprocedural hence irregular, illegal and discriminatory and whether he is entitled to the reliefs sought.**

10. The appointment of auditors and their remuneration were at all material times to this suit regulated by **Section 159 (1) to Section 162 of the Companies Act Cap 486 Laws of Kenya** (now repealed). **Section 159 (1)** stated: -

“159 (1) Every company shall at each annual general meeting appoint an auditor or auditors to hold office from the conclusion of that, until the conclusion of the next, annual general meeting.”

11. A reading of **sub-section 2** of that Section makes it clear that once appointed the reappointment of an auditor was automatic unless as provided in **sub-section 2 (a) (b) or (c)** which provided: -

“(2) Notwithstanding the provisions of subsection (1), at any annual general meeting a retiring auditor, however appointed, shall be deemed to be reappointed without any resolution being passed unless—

(a) he is not qualified for reappointment; or

(b) a resolution has been passed at that meeting appointing somebody instead of him or providing expressly that he shall not be reappointed; or

(c) he has given the company notice in writing of his unwillingness to be reappointed.”

This in my view meant that an auditor could be removed because either he was not qualified for reappointment or because a resolution had been passed on the floor of the Annual General Meeting to appoint somebody else or a resolution was made on the floor of the meeting expressly rejecting his reappointment or if he himself gave notice in writing that he did not wish to be reappointed.

12. **Section 159 (2)** however contained a proviso which in my view created a whole different scenario. It stated: -

“Provided that where notice is given of an intended resolution to appoint some person or persons in place of a retiring auditor, and by reason of the death, incapacity or disqualification of that person or of all those persons, as the case may be, the resolution cannot be proceeded with, the retiring auditor shall not be deemed to be automatically reappointed by virtue of this subsection.”

13. The above proviso envisaged a situation where there existed a notice of an **intended resolution** by the company to appoint some other person other than the retiring auditor. In that case failure to appoint somebody else did not make the retiring auditor’s reappointment automatic. This in my view was different from **Section 159 (2) (b)** because as provided under **sub-section 2 (b)** a resolution could be passed on the floor of the Annual General Meeting not to reappoint the auditor but under the proviso there must have been an indication that a resolution would be brought to the Annual General Meeting to appoint a person or persons in place of a retiring auditor.

14. It is my finding that in respect of the first scenario (the proviso) **(sub-section 2 (b))** no special notice was required but in the second scenario **Section 160 (1) of the Companies Act** would require a special notice to have been served upon the retiring auditor. **Section 160 (1)** provided: -

“160 (1) Special notice shall be required for a resolution at a company’s annual general meeting appointing as auditor a person other than a retiring auditor or providing expressly that a retiring auditor shall not be reappointed.”

Upon receipt of the intended resolution the company would then have to send the notice of such an intended resolution to the retiring auditor and the retiring auditor would then be at liberty to make representations in writing to the company – **see sub-section (3)** which representations would then be circulated to the shareholders and the retiring auditor would have a right to a hearing. It is my finding that the procedure set out in **Section 160 of the Act** was not applicable to the plaintiff in this case as there was no indication of an intended resolution to appoint some person or persons in his place. If there was such indication the same was not availed to this court and indeed the notice of that Annual General Meeting which he himself annexed was to appoint him but not another person. The agenda of the meeting in so far as the appointment of auditor which is contained at ordinary business no. 4 reads: -

“1.

2.

3.

4. To appoint Messrs Nyasae & Associates as Auditors, having expressed their willingness to continue in office as the company auditors in accordance with section 159 (2) of the Company’s Act, Cap. 486, Laws of Kenya and authorise the Directors to fix their remuneration.

5. (a)

(b)”

15. It is my finding that in the circumstances therefore there was no necessity for a **special notice** and the one for the Annual General

Meeting which was evidently received by the plaintiff sufficed.

16. Section 159 (2) (b) empowered the shareholders to reject the reappointment of an auditor on the floor of the Annual General Meeting and this is what happened at the meeting held on 16th January 2013. I am not therefore persuaded that the plaintiff's removal as the auditor of the 1st defendant was unprocedural, irregular, illegal or discriminatory. Moreover, the plaintiff's claim is premised on the period 2013/2014 yet he was not reappointed after 2011/2012 financial year.

17. The upshot is that the plaintiff has not proved his case against the defendants on a balance of probabilities and the same is dismissed with costs to the defendants. It is so ordered.

Signed, dated and delivered in Nyamira this 28th day of November 2019.

E. N. MAINA

JUDGE