



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

HIGH COURT CIVIL CASE NO.1 OF 2017

DAVID MUNENE WAMWATI.....PLAINTIFF

VERSUS

1. KIMUNYE TEA FACTORY

2. KENYA TEA DEVELOPMENT AUTHORITY.....DEFENDANTS

3. JOHN MUCHIRI NGONDO

4. ANDREW OKIRO

RULING

The plaintiff/applicant DAVID MUNENE WAMWATI brought a notice of motion under **section 3A, Order 40 rule 1 Civil Procedure Rules of the Civil Procedure Act** seeking orders that;

1. That this application be certified as urgent and the same be heard ex-parte in the 1st instance.
2. That this Honourable court be pleased to issue a temporary injunction restraining the 1st defendant, its workers, agents, servants, employees and/or anybody else acting under its authority from confirming, swearing in and/or passing the 3rd defendant and/or restraining the 3rd defendant from taking over or acting in any capacity of the directorship pending the hearing and determination of this application.
3. That this honourable court be pleased to issue a temporary injunction restraining the 1st defendant, its workers, agents, servants, employees and/or anybody else acting under its authority from confirming, swearing in and/or passing the 3rd defendant/respondent as the duly elected director of Kianjogu Electoral area of the 1st defendant and/or restraining the 3rd defendant from taking over or acting in any capacity of the directorship pending the hearing and determination of this suit.
4. That the costs of this suit be provided for.

The application is based on the following grounds.

1. That on the 10th day of January, 2017, the plaintiff/applicant herein was among the candidates who were contesting for the position of directorship of the 1st defendant herein, Kimunye Tea Factory Ltd, in Kianjogu Electoral area.
2. That during the aforesaid election, the 1st, 2nd 3rd, and 4th defendants colluded to rig and did rig the elections in favour of the 3rd defendant who was the incumbent director.
3. That as a result of the aforesaid rigging, the said elections were not free and fair since the same were marred by irregularities.
4. That as a result of the aforesaid rigged elections the 3rd defendant was declared to have won the election and he is subsequently due to be sworn in as the 1st defendant's director under Kianjogu Electoral area on the 26th day of January, 2017. The plaintiff believes that he is the one who was duly elected in the afore said elections and if the 3rd defendant is sworn

in to office, this will be against the will of the voters.

5. That the applicant has attempted to have the 1st defendant supply him with a copy of the voters register and tallying register vide a court order in Gichugu PMCC No.2 of 2017 but the 1st defendant has totally refused to comply.

6. That it is in the interest of justice and fairness that the orders sought be granted since if the same are not granted, the applicant stands to suffer irreparable loss as the 3rd defendant is due to be sworn in on the 26th day of January, 2017.

Applicant's case:

He states that on 10/01/2017, the plaintiff was among the candidates contesting the position of directorship of 1st defendant in Kianjogu Electoral area. That during the election, the respondents colluded to rig and did rig the elections in favour of the 3rd respondent therefore the elections were not free and fair. That names of deceased voters and those unable to vote were used in voting process and the 3rd respondent used proxies to vote against the laid down procedure. As a result the 3rd respondent was declared the winner and was to be sworn on 26/01/2017. That the 1st respondent has refused to supply him with the voters register and tallying register vide court order **Gichugu PMCC No. 2 of 2017**. That he believes that he is the one who was duly elected but the defendants rigged the elections. That the orders be granted in the interest of justice.

Respondent's case:

In their response, they stated that the elections of Kimunye tea factory are governed by KTDA elections manual. That the elections were conducted in a free and fair manner in full compliance with the elections manual. That they are not privy to participation of deceased voters and the applicant should submit the list of deceased voters for further action. That the orders issued under **Gichugu PMCC No. 2 of 2017** was served upon factory unit manager Kimunye tea Factory and presiding officer and not being custodians of the election and tallying registers they were not able to comply which information was communicated to the applicant.

That none of the voters used proxies as alleged. That the election manual allows shareholder to cast a vote equal to the number of shares he possesses therefore the number of votes are representative of the number of shares by shareholders. That the complain is contrary to the provisions of elections manual which require complaint be made to returning officer within twelve hours after declaration of victor but no complaint was ever received.

I have considered the application and the submissions.

The applicant seeks an order of injunction. The leading authority in determining whether to grant an injunction is the case of **GIELLA Vs. Cassman Brown (1973) E.A 358** where the conditions for granting an interlocutory injunction were settled. It was held.

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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.

The three principles that govern the grant of an injunction are:

- i. **The Prima facie Case**
- ii. **Balance of Convenience;**
- iii. **Irreparable injury**

In the case of **Mrao Vs. First American Bank of Kenya Limited and 2 others (2003) KLR 125** a prima facie case was described as follows:

A prima facie case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

The applicant while relying on the case of **Symon Philip Koech Vs. Litein Tea Factory & 5 others (2014) eKLR** submits that he has established a prima facie case. This is based on his averments that the defendants colluded to rig and did rig the impugned elections and the elections were marred with irregularities.

The applicant is stating that the elections were not conducted in a free and fair manner. That he deceased voters were appearing in the voters register and 3rd respondent used proxies contrary to laid out regulations. That there was voter bribery and strangers were allowed to vote. The applicant submits that annexure DMN 1 to the further affidavit supports the averments and the depositions have not been controverted. DMW 1 are copies of the special powers of Attorney showing the donor and the donee for both of the plaintiff and 3rd defendant and one power of attorney was used to vote whereas they were supposed to cancel each other.

The plaintiff in the further affidavit depones that some shareholder's shares were exaggerated when filling the ballot papers and the growers

number recorded on the ballot papers cannot tally with respective voter's actual number of shares.

Elections clerks allowed irregularities to take place whereby ballot papers were left with blank spaces to allow voters loyal to 3rd respondent to insert their own figures. His complaints that none members were voting were not considered. He further depones that his signature at Muratiri polling station was forged to indicate that he had consented to the election results. The applicant depones that the election was not free and fair.

The respondents submit that the elections are governed by Elections manual whose provisions they have enumerated.

That the elections were free and fair and not rigged, were in full compliance with the Elections Manual.

The respondents filed affidavit sworn by Willis Odhiambo who was the returning officer. He depones at paragraph 5.

- a) **The founder shareholders of the company cast their votes to the extent of the shares they possess;**
- b) **The Returning officer, Presiding officers and Deputy presiding officers are appointed by the Group Company secretary. The Returning officer who oversees the election within a zone or a region, must not emanate from the zone or region in which they normally operate. Likewise, the Presiding officer and Deputy presiding offices must not be from the affected factory.**
- c) **Contestants in an election are entitled to have agents at the polling stations who observe the election process, including assistance given to shareholders who request for any assistance. They observe the counting/tallying of the shares after the exercise is complete.**
- d) **The elections must be carried out through the ballot. The ballot papers must possess the names of the contestants that have passed the pre-qualification stage.**
- e) **During the voting process, election clerks are required to verify the shareholders documents, and once verified, are required to strike out the name of the shareholders from the register using a ruler and a biro pen. The election clerk thereafter issues the shareholder with the ballot papers.**
- f) **A shareholder who is unable to attend the voting day may appoint another by way of a special power of Attorney, to vote on his behalf. The special power of Attorney must clearly state the beneficiary (donee). It must be made in duplicate. All copies are at the first instance submitted to and retained by the Factory Unit Manager who stamps them. The Factory unit Manager then sends them to the Head office, the Group Company Secretary's office, for final stamping. One original copy is then returned to the done who uses it at the nomination process.**
- g) **During the polling day, the done must come with the special power of Attorney together with copies of the shareholders documents, including original identification documents which correspond to their names on the Power of Attorney.**
- h) **Once presented, the Power of Attorney is retained by the presiding officer.**
- i) **A shareholder cannot issue more than one Special power of Attorney in an electoral area and cannot participate in the elections where he has issued a power of Attorney to another to represent him.**
- j) **A proxy form does not apply as it relates to Annual General meetings, not the nomination exercise.**
- k) **In the event of a complaint arising out of the election process, the complaint should be presented before the Returning officer within 12 hours of the declaration of the victor by the Presiding officer. The Returning officer should make a decision on the complaint. The decision of the Returning officer is final but can be appealed against in a court of competent jurisdiction. The Returning officer should inform the Group Company Secretary of the complaint and the conclusion on the same.**

He depones that applicant and 3rd respondent were qualified candidates for position of Kianjogu Electoral Area Kimunye Tea Factory. Shareholders were notified that the elections would take place on 10.1.2017 between 8.30am and 1.00pm and would be held at two polling stations. That shareholders who could not attend the polling station had given special powers of Attorney to respective candidates and both the applicant and 3rd respondent had obtained special powers of attorney, annexures WO 5 & 6.

The applicant has not shown that the caused complaints within 24 hours of the declaration of a victor as required in the elections manual. He makes allegations without prove of irregularities. The respondents have shown that elections are governed by KTDA – Kenya Tea Development Agency Elections manual whose aim is to ensure that the elections are conducted in a free and fair manner. The salient features highlighted in the affidavit show that it allows voting by way of special power of attorney if one is unable to attend on the voting day. It also shows that the votes are calculated based on the number of shares one holds.

The applicant needed to prove a prima facie case with a probability of success. The case must be clear on the material presented before the court for the court to find that the applicants right will be violated unless the court prevents it by an order of injunction. The applicant has failed to prove this as the allegations made have been rebutted with the averment that the regulations were complied with. His contention that the respondents failed to comply with a court order in Gichugu P.M.CC No.2 /2017 is a matter which should have been dealt with in the said

court to hold them in contempt.

The court has to consider whether the applicant is likely to suffer irreparable loss. The loss must be such that damages would not be adequate compensation. The applicant is seeking a declaration that the elections were null and void. The applicant has not shown what loss he is likely to suffer. The 3rd respondent was declared winner. Most of the allegations have been disapproved and require prove. The balance of convenience does not tilt in favour of the applicant. It is averred that no complaint was made to the Presiding Officer or the company secretary as alleged as the letter DMW3, its receipt was never acknowledged. The balance of convenience does not tilt in his favour as he never raised any complaint as provided in the provisions of the elections manual. It would not be fair to deny the 3rd defendant who on the face of it won the elections the opportunity to serve as director and deprive the 1st defendant the power to conduct its affairs lawfully. The applicant has not offered security. **Order 40 rule 2 (2) Civil procedure Rules** requires a party to provide security where an injunction has been ordered. The applicant has never offered to provide security.

The applicant is raising issues on the validity of the elections and seeks this prayer in the application and in the plaint. The application is brought **under section 3A of the Civil Procedure Act** which provides for the inherent powers of the court and **order 40 rule 1 Civil Procedure Rules 2010** which a party can rely on to seek restraining orders from court after a person has been elected as a director. The 1st defendant Kimunye Tea Factory Limited is a company. The elections relates to elections of a director. The elections of directors are internal issues which must be regulated by rules and regulations of the company. The companies **Act, Cap.486 Law of Kenya** governs the management of companies whether private or public.

The respondent annexed the Elections Manual **annexture No.-2**. It provides for complaints, dispute, appeals, resolution Rules, dispute resolution committee Rules. It provides for a dispute resolution mechanism. It establishes a committee to deal with election any complaints/Appeal Rules. The applicant did not prove that he submitted to the internal dispute mechanism before coming to this court. Courts of Law have shied away from disputes arising from internal management of companies and more so where mechanism for dealing with such disputes are shown to exist. This position was stated by Justice Limo who followed with approval the decision in **Milka Adhiambo Otieno & Another Vs. Attorney General & 2 others (2012) eKLR and Paulo Murii Vs. Gian Battista Muri & Another (2000) eKLR in the case of William Njiraini Nguru Vs. Mununga Tea Factory & Others Election Pet. NO.1/2015.**

In Milka's case it was held:

“We therefore find and hold that the issue squarely lies within the jurisdiction of Sugar Tribunal. It therefore follows that the Petitioners ought to have referred any complainants of election malpractices to the said tribunal in the first place”

In **Paulo's** case it was held that the appointment of directors in a company is regulated by the companies Articles of Association. It was stated.

“The petition makes no allegation that the Articles of Association have been breached or any appointment made unlawfully. Upon careful consideration of the petition it is plain and obvious that basically this is a dispute about internal management of the company acting within its powers: See Rule in Foss Vs. Harbon Ace (1843) 2 HAKE 261 to see exceptional circumstances where courts intervention is allowed e.g ultra-vires fraud etc which have not been pleaded” (sic).

Based on these authorities, this court will hesitate from granting an injunction that would interfere with the internal affairs and operations of the company. The applicant has made various allegations touching on the conduct of elections. These have been denied by the respondents who have also offered explanations on some of these allegations. The applicant has the burden to prove these allegations which in my view can only be made by adducing evidence which has not been made at this stage. I am of the opinion that this court will refrain from issuing an injunction which would amount to interfering with the internal affairs of the company. It is presumed that the 3rd respondent was validly elected and is free to assume office unless the contrary is proved.

In Conclusion

The applicant has failed to prove that he exhausted dispute resolution mechanisms of the company. The allegations of irregularities have not been proved. The applicant has not made out a prima facie case with chances of success. The application lacks merit and is dismissed.

Dated and delivered at Kerugoya this 19th day of April, 2018

L. W. GITARI

JUDGE