



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL SUIT NO. 1 OF 2017

JOHN GITONGA ARITHI.....PLAINTIFF

VS

KINORO TEA FACTORY COMPANY LIMITED.....1ST DEFENDANT

KTDA MANAGEMENT SERVICES LIMITED.....2ND DEFENDANT

KENYA TEA DEVELOPMENT AGENCY LIMITED.....3RD DEFENDANT

ALOISE MUGENDI MBIJIWE.....4TH DEFENDANT

RULING

Application dated 9th day of January 2017 and filed on the same date was made by the plaintiff seeking that pending the hearing and determination of this application the court do issue orders of temporary injunction restraining the 1st, 2nd and 3rd defendants jointly and severally from either by themselves, agents, employees, servants or otherwise from conferring the 4th Defendant/Respondent as Director of the 1st Defendant or restraining the 4th Defendant/Respondent from taking up or acting in the Directorship of the 1st Defendant pending hearing and determination of the application and the suit. The applicant/plaintiff also sought for costs of the applications.

The application is based on the grounds on face of application and supported by the affidavit of the Applicant/Plaintiff John Gitonga Arithi. Application was certified urgent by Hon Justice Mabeya on 10.1.2017 for reasons the elections that were sought to be stopped were to take place the same day on 10th January 2017. Another application was placed before the Presiding Judge on 12th January 2017 and he made orders to stop the forth Respondent from taking up the position of directorship of the 1st Defendant company.

On 1.2.2017 the applications dated 9th and 12th January 2017 were argued together. Mr Gitonga appearing for the appellant explained that the Applicant/Plaintiff is a shareholder in 1st Defendant factory and that 1st Defendant is a Limited Liability Company. He further said that the day today affairs of the 1st defendant are bestowed on the 3rd Defendant whereas the 2nd Defendant is a subsidiary of the 3rd Defendant. He further said the tea factory is run by a Board of Directors elected by shareholders from various electoral areas within the jurisdiction of the 1st Defendant. The mater in question herein arose from Kinoro North Electoral Area.

He said the Plaintiff/Applicant and 4th Defendant/4th Respondent were nominated through a committee set up by 1st and 2nd Defendants and the 2 qualified to vie for positions of director of North Kinoro Electoral Area. He said the process of election is controlled by Election Procedure manual 2016/2017. Mr Gitonga Advocate argued on behalf of the Plaintiff/Applicant that the elections of the 4th Defendant was marred by fraud for reasons Powers of Attorney of some 6 shareholders were obtained fraudulently and used to elect 4th Defendant. It was argued that the fraud was reported to police vide OB No. 19/21/12/2016 and the Directorate of Criminal Investigations commenced investigations but no action was taken against 4th Defendant as provided for in the elections manual. It is contented that 1st, 2nd and 3rd defendants having established there was fraud by 4th Defendant they ought to have taken action and he should not have been allowed to participate in the elections contrary to the Elections Manual 2016/2017. It was argued that the Returning Officer had duty to investigate the complaint and communicate to the Company Secretary. The applicants counsel said they have raised serious issues of fraud on the part of 4th Defendant/ Respondent as evidenced by Report to Directorate of Criminal investigations, letter to 1st Defendant by Directorate of Criminal Investigations; Letter written by the 6 shareholders to 1st, 2nd and 3rd Defendant, that they didn't donate power of Attorney. He said the serious allegations of fraud can only be determined during hearing of the suit. He said issues of integrity as per Chapter 6 of the constitution should be given a chance to go to full hearing.

It was submitted that the Returning officer on realising the power of Attorney had been obtained fraudulently merely decided not to use them in the election instead of investigating and giving a verdict.

Mr. Gitonga further argued that the effect of failing to follow procedure will affect shareholders who are entitled to representations by a person of integrity. He said failure to follow procedure is grave and the damage will not just affect the plaintiff alone but wider public and therefore irreparable damage will be suffered. It was argued that Resolutions of the Board can be made in absence of one Director and therefore the running of the 1st Defendant will not be affected if order of temporary injunction is granted.

On whether the High Court has jurisdiction in the matter, Mr Gitonga submitted that the issue of Power of Attorney is not one that falls under Dispute Resolutions as found at page 81 of the Election Manual 2016/2017 and the Resolution Committee doesn't have powers concerning complaints that arise on the elections day. Mr. Gitonga urged the court to grant the orders as he had demonstrated that Principles of Injunction have been satisfied.

Mr. Millimo Advocate for the Respondents opposed both applications and submitted that a suit had been filed in the lower court involving the same matter and same was withdrawn as admitted in plaintiff's amended plaint dated 9.1.2017 and the plaintiff was condemned to pay costs of Ksh. 23,475 for each of the defendants therein but had not done so and therefore ought not have filed this suit. He said pursuant to order 25 Rule 4 of Civil procedure Rules, the suit herein should be stayed pending payment of costs in the withdrawn suit.

John Kennedy Omanga swore an affidavit on behalf of the 1st to 3rd Defendants opposing the application dated 9th and 12th January 2017 and 4th Defendant also swore an affidavit on 19th January 2017, adding his voice to that the first three defendants in opposing the applications. Mr Millimo argued that the 2nd and 3rd Defendants are agents of 1st Defendant pursuant to the 1st Defendants Articles of Associations at pages 40-70 and therefore should not have been sued. He argued that 3rd defendant didn't involve itself in elections conducted and there can never be a cause of action against it that can be sustained and the two applications dated 9th and 12th January 2017 should collapse. He disclosed that plaintiff was immediate former director of 1st defendant and was aware of the relationship between the 1st and 2nd Defendants and 2nd Defendant can't be sued for acts done in pursuit of agency duties.

It was also argued that the Powers of Attorney were received by 1st Defendant from prequalified candidates who submitted them independently. It was admitted that the Directorate of Criminal Investigations sought for documents in respect of 6 Powers of Attorney which were allegedly obtained

fraudulently and which were taken by the Directorate of Criminal Investigations for investigations indicating they would communicate the outcome of the investigations. However, as the time of hearing of the applications the results of the investigations had not been communicated to the 1st Defendant. He therefore argued that allegations of fraud remain mere allegations as there is no finding made that the disqualified Powers of Attorney were fraudulent and disqualification can't be based on mere allegations of complaint to the police. It was submitted the Election Manual uses the word 'may' which connotes discretions on part of the 1st defendant in determining consequences of alleged fraud. It was argued that unless irregularity materially impacts an outcome of elections the same can't lead to disqualification. It was argued that the court cannot order a decision maker to decide in a certain way where discretion is being exercised. It was further submitted that the 6 Powers of Attorney were left out as a cautionary measure when it was learnt a report in their respect had been made to the police and they didn't affect outcome of the election conducted on 10th January 2017. He said 4 out of the 6 shareholders whose Powers of Attorney were disputed physically voted on 10.1.2017 and the register and ballots are annexed to the Replying affidavits.

The Respondents counsel drew the courts attention to the fact that this court is not court of 1st instance in respect to offences under the penal code and to nullify elections of 4th defendant would only be done upon investigations, prosecution and conviction of 4th defendant on allegations of fraud. It was urged that the court disregards issue of fraud. It was questioned how the 4th Defendant would have obtained the Powers of Attorney accompanied with copies of ID card if they are alleged to have been forged and yet there is no allegations of stealing.

Mr Millimo the Application dated 12th January 2017 was an afterthought and made in bad faith because the Plaintiff/Applicant and 4 out of the 6 shareholders whose Powers of Attorney were alleged to have been obtained fraudulently participated in the elections on 10th January 2017 which elections started at 8.30 am and were completed by 1 PM and 4th Defendant declared a winner at 3.31 PM. That the order to stop the election was served long after the results had been declared. It was argued that if it was true that court order had been disobeyed contempt proceedings should have been brought and not an application. Mr Milimo said the 1st application was overtaken by events and the 2nd application was brought to avoid standards of proof.

Respondents further argued that the 1st Respondent and its Shareholders have internal mechanism for resolving internal disputes – pages 33 paragraphs 24-35 of Election Manual 2016/2017- and courts have always shied away from interfering with internal management of companies – page 17 of list of authorities. It was argued that plaintiff had never lodged any complaint with the 1st defendant in respect of the dispute claimed herein. It was argued that letter by Directorate of Criminal Investigations on 4th January 2017 was not a complaint by plaintiff but by shareholders who claimed their Powers of Attorney had been forged. It was argued that plaintiff had failed to raise a prima facie case and that fraud unless proved can't be ground to find prima facie case.

Mr Millimo proceeded with submissions on 9th February 2017 and said that Directors allowances can be gratified and therefore plaintiff cannot claim that he will suffer irreparable loss. He also said that balance of convenience tilts on the side of 4th defendant because he was already elected and declared a winner despite the fact that the 6 disputed powers of Attorney were not used. Ref. Page 103 of list of Authorities. Mr Millimo argued that 50,000 shareholders participated in the elections and ought to be allowed to have their representative discharge his mandate as Director as opposed to plaintiff's private rights of seeking to occupy that office. He urged the court to dismiss the 2 applications filed by plaintiff and award costs to the defendants.

Mr Gitonga in response said that the Plaintiff had not been served with Notice to pay costs in the lower court and in any case order 25 Rule 4 is not mandatory provision. It was also argued that the 1st to 3rd Respondent/Defendants are Limited Liability Companies and therefore bound separately with the Rules in Election Manual. He argued that the 1st to 3rd Defendants share same company secretary and therefore

the actions of one affects all directly and omissions of 3rd defendant directly affects the 1st and 2nd Defendants under the agency agreement between the 1st and 3rd defendant – page 17 paragraph 2 and 305 – the obligations to institute and defend any civil suit against 1st defendant is specifically given to the 3rd defendant. He argued that 3rd defendant was the right party to be sued and can't be omitted. He said exhibits have been annexed with specific complaints and not mere allegations and therefore annexures 10(a) to 12(a) show probable proof. Applicants counsel submitted and reiterated that power given to Returning Officer is specific mandate on how to deal with any complaint that arises during the voting day and it was incumbent upon the Returning officer to investigate complaint and make conclusions and inform the Company Secretary; That the Returning officer failed to do any of the above.

It was also argued that letter from CID Nkubu was a proper complaint in knowledge the Returning officer.

It was argued that the Returning officers discretion had to be exercised fairly and openly and failure to exercise discretion was outright breach of mandate and tilted the field in favour of 4th defendant who ought to have been disqualified.

It was also argued complaint arising during Election Day was not an issue falling within jurisdiction of Dispute Resolution Committee and therefore within the jurisdiction of the court.

Mr Gitonga also argued that fraud is a cause of actions which has been pleaded and can be brought before criminal proceedings are filed.

He urged that the court be guided by Chapter 6 of the Constitution which requires the integrity of the 4th defendant to be above board as he is going to represent shareholders. The court has to investigate claim of dishonesty and the public needs to be sure that the person representing them is honest. Applicants advocate urged that orders sought be granted.

Upon consideration of the submissions by the respective advocates for the parties herein as well as the authorities cited and pleadings this court finds the issues for determination as follows:-

- a) Whether this court has jurisdiction to entertain and adjudicate upon the dispute herein.
- b) Whether the applicant has satisfied the principles for granting an injunction as enunciated in the case of *Giella vs Cassman Brown and Company Ltd* [1973] EA 358
- c) Whether failure by the plaintiff to pay costs in a previous suit is a ground for striking out or staying the current suit.
- d) Whether the application dated 9th January 2017 has been overtaken by events.
- e) Whether the 2nd and 3rd defendants were properly joined in the suit being that the 3rd defendant was alleged to be an agent of the 1st defendant.

The main relief sought is that of an injunction and the principles of injunction are well spelt out in the landmark case of *Giella vs Cassman* [1973] EA 358 as follows:-

1. The applicant must show that he has a prima facie case with high chances of success.
2. That he might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages if orders sought are not granted.
3. If the court is in doubt it will decide the application on the balance of convenience.

These principles have been discussed widely in other land mark case like R.J.R MacDonald vs Canada Attorney General in which questions as to whether the applicant has a serious case, whether the applicant will suffer irreparable harm if order is not granted; Which party will suffer greater harm from granting or refusing to grant orders pending a decision on merits have been discussed.

In the case of Mrao Ltd vs 1st American Bank of Kenya and 2 others the Court of Appeal held:

“A prima facie case in civil application includes but not limited to a genuine or arguable case. It is a case which on the material presented to the court or a tribunal properly directing itself will conclude 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 plaintiff/Applicant in seeking for orders to stop elections in application dated 9th January 2017 and 12th January 2017 claimed at paragraph 11 of his supporting affidavit to 1st application that 6 shareholders had denied having donated/signed any special Power of Attorney in favour of 4th Respondent and that the 4th Respondent had presented the same to used in elections of Directors that was scheduled for 10th January 2017. He averred that the complaint of fraud was being investigated by DCI as per annexures 4(a) and (b) - OB number and investigations diary but the Respondents had totally ignored the objection by the said shareholders and had vowed to proceed with elections.

The elections of the 1st Respondent are governed by the Elections Procedures Manual 2016/2017 which both parties annexed to their affidavits in support and opposition to the applications herein. The procedures manual provides dispute resolution mechanisms to be employed internally where a dispute arises in the course of an election.

The plaintiff was immediate former director of the 1st Respondent Tea Factory and as a shareholder and therefore having annexed the manual as part of his evidence is conversant with the said procedures. Letters allegedly written to 1st Respondent and allegedly ignored are annexed to plaintiffs supporting affidavit in the 1st application but there is no evidence that they were received by the 1st Respondent.

In the contrary, the Respondents have shown that they got information from Directorate of Criminal Investigations and gave out the disputed Powers of Attorney for investigations. They also acknowledged a letter dated 4th January 2017 from DCI notifying the Company Secretary that the Powers of Attorney were under investigations and that the results will be given to them.

As at the time of the elections no results of the investigations had been communicated. In the meantime the Applicant had filed a suit to stop the Respondents from accepting the 6 Powers of Attorney allegedly obtained by fraud but withdrew the case from Meru Chief Magistrates Court Civil Case No. 2 of 2017 with costs to the Respondents.

The application dated 9th January 2017 and orders issued on 10th January 2017 were served on the Respondents long after the election had been conducted and concluded and results declaring the 4th Respondent as a winner announced.

It was submitted and applicant didn't dispute that as he filed suit herein he went ahead and participated in the elections and from the elections documents annexed to Respondents Replying Affidavit and in the absence of the 6 Powers of Attorney the plaintiff appears to have obtained more votes where the disputed Powers of Attorney were obtained from i.e 12984 against 4th defendants 6992.

On 9th January 2017 when the applicant had withdrawn the suit from the Chief Magistrates Court the Company Secretary issued a Notice to confirm the elections would proceed but taking caution decided that the 6 questionable Powers of Attorney would not be used in the elections of Directors of the 1st Respondents Tea Factory.

The overall outcome shows that 4 out of the shareholders who are alleged to have claimed their powers of Attorney were obtained fraudulently physically voted and only 1 out of the 4 voted for the 4th defendant. The votes garnered by the plaintiff and the 4th defendant had a margin of 1070 votes excluding the person who voted for 4th defendant and the 2 powers of Attorney which were not utilised and whose owners didn't vote physically. This would mean literally that the applicant's quest that the Powers of Attorney should not be utilised was actually already met by the notice of the Company Secretary that they would not be used. This ultimately means that one way or the other whether orders herein are granted or not the Plaintiff/ Applicant has not proved that he has a case with high chances of success.

Whether plaintiff will suffer irreparable loss it was argued that the loss is not just to the plaintiff but to a wide public being shareholders who are entitled to representations by a director with high standards of integrity. Whether the Powers of Attorney were fraudulently obtained or not is a matter that Directorate of criminal Investigation is still investigating and it can't be concluded that fraud was committed either by 4th defendant or anyone else. One of those whose power of Attorney was said to have been obtained by fraud actually physically voted for the 4th defendant. The 4th defendant was declared a winner beating the plaintiff with over 1070 votes and the shareholders who voted for him who are the majority also have a right of representation. Considering allowances and other remuneration for the office of the Director is quantifiable, I think that plaintiff/applicant will not suffer any irreparable loss. He has not proved he will suffer any loss. He participated in the elections and the 6 powers of Attorney he wanted to be rejected were not utilised during the elections. The participation of the applicant in the election when he was at the same time filing a suit in court to stop use of the powers of Attorney is to this court a conduct of a litigant who does not act in good faith. The 4th Defendants affidavit in reply to plaintiffs application dated 12th January 2017 has annexures of affidavits and 2 letters withdrawing complaint from police and denouncing allegations of obtaining the powers of Attorney by fraud. This courts view of the analysis of the facts as presented in the submissions and pleadings filed is that plaintiff has not satisfied the first 2 principles that would warrant this court to make an order of injunction in his favour.

Considering the issue of whether this court has jurisdiction to adjudicate upon the matter herein, it is admitted that elections of directors of 1st defendant company is governed by Election Procedures Manual 2016/2017 and each party has annexed the said manual to the affidavits in support or opposition of the applications. It was argued for the applicant that the complaint about the Powers of Attorney were made to the 1st defendant but same was not investigated and that made the applicant approach the High Court. The Rule requires complaint to be made to the Returning officer who should investigate and make a verdict and also inform the Company Secretary for clarification and advice on what action to be taken. There is no evidence the 6 shareholders complained to 1st Defendant or the Returning officer before allegedly going to police station because letters written are not shown to have been received by the 1st Defendant or their agents 2nd and 3rd Defendants. From annexure JK 9(a) in Replying affidavit to 1st application, the 6 original special Powers of Attorney were handed over to DCIO Imenti South on 3rd January 2017. On 4th January 2017 DCIO Imenti South wrote informing 1st defendant of investigations in respect of the said powers of Attorney and promised to communicate the results.

That was acting formal and acknowledged communication about the alleged frauds. On 9th January 2017, after the plaintiff withdrew matter from Meru Chief Magistrates Court Civil Case No. 2 of 2017, the company secretary issued a Notice confirming that election would go on 10th January 2017 because there was no court order barring the elections. He however decided to give instructions that the disputed Powers of Attorney which were still under investigations would not be utilised. This court views that as one of the discretionary actions expected of the Returning officer or the Company Secretary under Elections Manual 2016/2017. The Plaintiff/Applicant relied on the case of Paul Gitonga Wanjau, but in the matter applicant approached the Internal Dispute Resolutions Mechanism twice and in both instances he failed to get his grievances redressed and he therefore decided to go to the High Court. In the case of Joseph Kobia Ngutha vs Kiegoi Tea Factory Co. Ltd and 2 others Meru H.C.C.C No 29 of 2016, the applicants complaint and appeal to the Dispute Resolution Committee established under the Election Manual had been dismissed for reasons that the applicant had an active case against factory unit Manager and had therefore exhausted all the Internal Dispute Resolution Mechanism before approaching the High

Court and orders sought were therefore granted. The 2 authorities relied upon by the applicant support the position that has been held and now settled that as much as the High Court is conferred with unlimited original and appellate jurisdiction under Article 165 (3) (a) in civil and criminal matters, the constitution also provides for subordinate courts under Article 169(1) (a) to (d) which are established by Acts of Parliament conferring jurisdiction functions and powers in certain circumstances. Article 159 (2) (c) urges that the courts uphold and promote alternative dispute Resolution subject to Article 159(3). The constitution being the supreme law of the land clearly recognizes the role of independent Tribunals and quasi-judicial bodies in dispute resolution and to realise the letter and spirit of Article 159 (2) the High Court should not readily entertain disputes which ought to be resolved in other legal forums. The authority of Job Fellis Ndarera & Thomas Magembe Amenya vs Nyamache Tea Factory & 2 others in which Lady Justice Okwany echoed the holding of Nyarangi J In “ The Owners of Motor vessel “Lillians” vs Caltex Oil Kenya Ltd [1989] KLR is instructive on the issue of jurisdiction and Justice Odunga in High Court of Kenya at Nairobi Misc. Civil Application No.2 and 11 of 2013 also quotes with approval Mwera J as he then was in Safmarine containers vs N.V of Antwerp vs KPA and Justice Majanja in Dickson Mukweluine vs AG & 4 others where they have emphasized in no uncertain terms that where the courts established that there is an internal remedy and procedure available for resolution in the dispute the mechanism ought to be fully exhausted.

The plaintiff also relied on the case of Symon Phillip Koech vs Litein Tea Factory and 5 others where an order of interlocutory injunction was granted by Hon Justice Serгон.

The issues in this particular matter are totally different as applicant pleaded that elections were riddled with a lot of irregularities including rigging, flouting laid down procedures, strangers being allowed to vote. Verification of votes was also an issue. The applicant's the complaint was expressed in letters of protest by himself and another person and the 1st defendant therein although denying having received the letters of protests claimed that applicant raised general unsubstantiated complaints which would have been very difficult to address even if the letters were received. They also acknowledged the complaints related to only one polling station whose votes could not materially affect the final result.

Judge Sergon remarked as follows;

“I find the 1st defendants’ response to the plaintiffs allegation to be curious.”

He didn't believe the denial that defendant didn't receive the complaint. It is clear in that authority that had the 1st Defendant taken action to investigate complaints raised by the applicant, the applicant would either have gone to the High Court to appeal against the decision of the Internal Dispute Resolution Committee or would have been satisfied with it. As much as the issue of court's jurisdiction didn't come up to play it is obvious in that matter that the applicant had attempted to draw the attention of the Respondent to his complaints but they were ignored and the Respondents refers to those complaints as unsubstantiated and therefore didn't investigate and come up with a verdict. The respondents relied on many other authorities but I think that what has been discussed is sufficient in so far as issue of this court's jurisdiction is concerned.

The results is that where the court finds that a matter ought not have been presented before it ab initio, the court as in the case of the owners of Motor Vessel “Lillians” would down its tools as it doesn't have power to make one more step. What this means is that the proceedings herein can't go on and same are therefore discontinued with costs to the Respondents.

Regarding order 25 Rule 4 on payment of costs on a previous withdrawer suit, I would state that it is a discretion which in my view should be exercised to meet the ends of justice and substantive matter cannot be rendered fatal by mere failure to pay costs. In any case the applicant counsel explained that they were served with Notice to pay costs a day before the hearing of the application and didn't have sufficient Notice to pay.

On the issue of whether or not an agent should be joined in a suit where the principal has been disclosed, I do not think this court needs to belabour the point beyond the holding of the Court of Appeal in Victor

Mabachi and David Oliwa vs Nurtun Bates Ltd Nairobi C.A Civil Appeal No 247 of 2005 where an application was brought under order 6 Rule 13(1)(b) and (d) orders 1 Rule 1 and 10(2) of the Civil Procedure Rules and Section 3A of CPA and it was held that in the absence of factors initiating the liability of the principal the joinder of the appellant in the plaint is unwarranted. In the plaint filed on 9th January 2017 the 2nd defendant is described as a subsidiary of the 3rd Defendant and its role is to manage the operations of the 1st Defendant. The plaintiffs/Applicant did not controvert that fact and the Respondents produced an agreement that brought into force the agency contract between the Respondents herein. Had this court not found it didn't have jurisdiction, it would still have dismissed the suit against the 2nd and 3rd Respondent/Defendants for they were wrongly joined in the suit.

The applications dated 9th January 2017 and 12th January 2017 as well as the suit herein are dismissed with costs to the Respondents.

Order Accordingly.

Ruling Signed Delivered and Dated this 23rd Day of March 2017, in the presence of:-

Court Assistant – Penina

In the presence of Mr Ochieng Advocate for Respondents

Mr Gitonga Advocate for Applicant.

A.ONG'INJO

JUDGE