REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL SUIT NO. 28 OF 2015

PAUL GITONGA WANJAU.....……..……..…….....PLAINTIFF/APPLICANT

VERSUS

GATHUTHI TEA FACTORY COMPANY LTD…….…….....1ST DEFENDANT/RESPONDENT

THE CHAIRMAN, VERIFICATION COMMITTEE

FOR GATHUTHI TEA FACTORY DIRECTORS ELECTED…….....2ND DEFENDANT/RESPONDENT

CHAIRMAN., DISPUTE RESOLUTION COMMITTEE

FOR GATHUTHI TEA FACTORY COMPANY LTD……..…..…..3rd DEFENDANT/RESPONDENT

RULING

By a plaint dated 18th December 2015, the plaintiff (hereinafter referred to at the applicant) instituted these proceedings against the defendants (hereinafter referred to as the Respondents) seeking orders that the rejection of his candidacy as director of the first defendant was illegal and unconstitutional, that the second defendant issues a certificate verifying his nomination as a director of the first defendant, that the decision of the third defendant was unlawful and unconstitutional and costs of the suit.

The plaint was accompanied by a Notice of Motion dated the same day expressed under the provisions of Order **40** Rules **1** and **2** of the Civil Procedure Rules, 2010 and Sections **1** & **3A** of the Civil Procedure Act[1] seeking orders *inter alia* that:-

> *a. **That** the Respondents be restrained from continuing with the process of nomination of directors until the suit herein is heard and determined.*
>
> *b. **That** the decision of the verification committee and dispute resolution committee in relation to the application be stayed until the hearing and determination of the suit herein.*

The crux of the applicants case against the Respondents as enumerated in the plaint is that he is a tea farmer and a shareholder of the first Respondent, that in the said capacity he submitted his candidacy for directorship of the first Respondent for nominations which were scheduled to take place on 5th January 2016 and that his candidacy was rejected on 9.12.2015 on grounds that he had a pending case against the first Respondent. The applicant avers that at the material time he had no case against the company as alleged, hence the said allegation was misplaced and unlawful and further his appeal to the third Respondent was dismissed. It's the applicants' case that the said rejection was unlawful and had no basis, the process was biased and he was never afforded an opportunity to present his case, that he withdrew the alleged case by a notice dated 24.10.2015 and that he is duly qualified for nomination for directorship, hence the reliefs sought in the plaint.

Essentially, the grounds in support of the application are stated on the face of the application and the supporting affidavit. These can be summarized as follows:- that the decision complained of had no basis and was unfair, the applicant was never called to defend himself and that the decision was made by interested parties.

The affidavit in support of the application reiterates the averments in the plaint and states *inter alia* that the plaintiff submitted his application for nomination for Mahiga Electoral ward on 8. 12. 2015, and attached copies of the required documents, namely, certificate of good conduct, KRA Tax Compliance Certificate, "O" level certificate, copy of identity card and pay slip. The applicant also submitted and bound himself to the requisite conditions for nomination of directors. By a communication dated 9th December 2015 the first plaintiff declined the plaintiffs nomination on grounds that his candidacy was not successful for pre-qualification as it did not meet the conditions required in that he had a pending court case against the first defendant.

The applicant has exhibited a notice dated 24th October 2015 duly signed by himself stating that he had withdrawn from civil case number **19** of **2015** filed against the first Respondent by **22** persons (where the applicant was the fourth plaintiff) and his affidavit sworn on 28th October 2015. The said notice and affidavit were filed in court on 29th October 2015 in the said case. There is also an affidavit of service dated 30th November 2015 showing that the said documents were served upon the Respondents advocates on 18th November 2015. Indeed annexed to the applicants aforesaid affidavit is a letter from the Respondents advocates dated 19th November 2015 in which the said advocate wrote:- *"we have no objection to the withdrawal of the 4th plaintiff's claim against the defendant, but pray for an order of costs to the defendant".*

The applicant extracted the court order showing that he had indeed withdrawn from the said case in which he was the fourth plaintiff and attached it to his appeal to the third Respondent who nevertheless up held the decision of the second Respondent and stated that his appeal had no merit prompting these proceedings.

The Respondents filed a replying affidavit on 28.12.2015 sworn by a one **John Kennedy Omanga** in opposition to the applicants application details of which are summarized as follows:-

i. *The nominations in question were guided by the election manual and procedures for the year 2015/2016 annexed to the said affidavit.*

ii. *That among the conditions that would bar a candidate from contesting the position in question is if the candidate had an on-going case or un concluded litigation with the first respondent.*

iii. *That the applicants application was rejected because he had a pending case against the first Respondent and there was no court order attached to the application confirming the alleged withdrawal.*

iv. *That the third Respondent dismissed the appeal because the court order was not presented to the second respondent and "described it as additional evidence which was not admissible" at the appeal stage.*

v. *That following the rejection of the appeal only one candidate was validly nominated as a director for the Mahinga Electoral Area, a one Jeremiah Ndiritu Minjire who now remains the sole nominee, and was issued with a certificate as the sole nominee for the position of director, hence the process was completed even before this suit was filed.*

At the hearing of the application, counsel for the applicant adopted the grounds and affidavit in support of the application and took the court through the exhibits annexed to the application and submitted that there was no basis at all for rejecting the applicants' application for nomination. Counsel further submitted that the applicant had satisfied the tests for granting injunctions, that the decision complained of affects not

only the applicant but also other shareholders whom the applicant was to represent, and if the application is not allowed the applicant stands to suffer irreparable harm, that the decision in question is a denial of his constitutional right to himself and other shareholders who will be denied the right to be represented.

Counsel for the Respondents adopted the Respondents replying affidavit referred to above and took the court through the manual governing the said process which the applicant had submitted himself to and argued that the applicant never availed the court order and that the nomination process was completed and the sole candidate was declared a winner and submitted that the application had been overtaken by events. Counsel also submitted that the applicant had not demonstrated that he would suffer irreparable loss.

At this juncture, it is necessary for this court to briefly examine the legal principles governing applications of this nature.

In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. An injunction, being a discretionary remedy is granted on the basis of evidence and sound legal principles.

In the celebrated case of *Giella Vs Cassman Brown and Co .Ltd**[2]* the Court set out the principles for Interlocutory Injunctions. These principles are:-

*i. The Plaintiff must establish that he has a **prima facie** case with high chances of success.*

ii. That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.

iii. If the court is in doubt, it will decide on a balance of convenience.

The above principles were authoritatively captured in the famous Canadian case of *R. J. R. Macdonald Vs. Canada (Attorney General)**[3]*where the three part test of granting an injunction were established as follows:-

i. *Is there a serious issue to be tried?;*
ii. *Will the applicant suffer irreparable harm if the injunction is not granted?;*
iii. *Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience").*

Also of useful guidance in the application before me is the criteria considered in granting an injunction laid down in the decision in *American Cynamid Co. vs Ethicom Limited*[4]which established the test in the English courts in deciding if an injunction should be granted. This test was followed in Ireland in the case of *Camus Oil vs The Minister of Energy*[5]. The test has three elements:-

i. *there must be a serious/fair issue to be tried,*
ii. *damages are not an adequate remedy,*
iii. *the balance of convenience lies in favour of granting or refusing the application.*

The said principles have been reiterated in numerous cases in Kenya. In *Mbuthia vs Jimba Credit Corporation Ltd*[6] **Platt JA** echoed the position adopted in the *American Cyanamid* case cited above and stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the parties cases.

In *Moses C. Muhia Njoroge & 2 others Vs Jane W Lesaloi and 5 others**[7]* the court while making a determination on the issue of a *prima facie* case with a probability of success cited the Court of Appeal decision in the case of *Mrao Ltd Vs First American Bank of Kenya and 2 others**[8]* where the Court of Appeal held that:-

“A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

I stand guided by the said passage. **Steven Mason & McCathy Tetraut** in their well researched article entitled *"Interlocutory Injunctions: Practical Considerations"*[9]have authoritatively stated as follows:-

*"With some exceptions, the first branch of the injunction test is a low threshold. As stated by the Supreme Court in R. J. R. Macdonald Vs. Canada (Attorney General)**[10]**"Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at the trial. Justice Henegham of the Federal Court explained the review as being "on the basis of common sense and a limited review of the case on the merits."**[11]** It is usually a brief examination of the facts and law.*

In certain circumstances, the court will impose a more restrictive standard and require the moving party to demonstrate that it has a more strong prima facie case. If the injunction will likely end the dispute between the parties, then the court may hold the plaintiff to this higher standard. Similarly, where the nature of the relief sought is mandatory, or when the question is a question of mere law alone, then this higher standard will apply..."

In *Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another*[12] *Bosire J* held that *“to succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.”*

Also *Bosire J in Njenga vs Njenga*[13] held that *“an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.”*

The second test for determination is whether the applicant will suffer irreparable loss. The following paragraph in *Halsbury’s Laws of England*[14] is instructive. It reads:-

“It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”

In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured.[15] But what exactly is *"irreparable harm"?*. **Robert Sharpe**, in *"Injunctions and Specific Performance,"**[16]* states that *"irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."*

Where any doubt exists as to the applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should

ultimately turn out to be right.[17] The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant.[18]

Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction.[19]The court will seek to maintain the *status quo* in determining where the balance on convenience lies.

An injunction is an equitable remedy, meaning the court hearing the application has discretion in making a decision on whether or not to grant the application. The court will consider if it is fair and equitable to grant the injunction, taking all the relevant facts into consideration.

Turning to the facts of this case, and applying the above tests, the first question to address is whether the applicant has disclosed a *prima facie* case with a reasonable probability of success. Does his case raise triable issues? If yes, then he will have satisfied the first test. The applicant states that he submitted his application for nomination as a candidate for directorship of the first Respondent and that the same was declined on grounds that he had an active case against the first Respondent. The applicants case is that he was a party in a suit against the first Respondent and that he withdrew from the said proceedings and filed a notice of withdrawal and even served the same upon the Respondents advocates. The notice of withdrawal is dated 24th October 2015 and the same was filed in court on 29th October 2015 and it was served upon the Respondents advocates on 18th November 2015 and the said advocates promptly acknowledged it on 19th November 2015. The Respondents advocates clearly stated that they had no objection to the said withdrawal, but prayed for costs.

The communication declining the applicants application is dated 9th December 2015 long after the notice of withdrawal was filed in court and served upon the Respondents advocates. The reason advanced by the Respondents in declining the applicants application for nomination was that there was an un concluded/pending court case against the first respondent in court and that court order was not availed.

A court order dated 10th December 2015 has also been annexed to the applicants affidavit and was among the documents relied upon by the applicant in his appeal to the 3rd Respondent who nevertheless rejected the appeal on grounds that the said order was *"new evidence"* and could not be adduced at the appeal stage and cited the nomination rules in support of the said position.

I am alive to the fact that at this stage, I am not determining the main suit and my role is to determine whether the applicant has established a *prima facie* case against the Respondents so as to qualify for the orders sought in the application under consideration. In so doing, it is necessary to examine the pleadings filed in court, the affidavits and annextures filed in court and the arguments advanced by both parties. After carefully analysing the said documents and upon due consideration of the rival arguments advanced by the counsels for the parties herein, I am persuaded that applicants case raises several issues of law and fact which can only be resolved at the full hearing. Some of issues include:-

i. *What is the legal effect of the applicants notice of withdrawal filed in court on 29th October 2015?*

ii. *When did the aforesaid withdrawal take effect?*

iii. *What is the true construction, meaning and effect of the phrase "we have no objection to the withdrawal of the 4th plaintiff's claim against the defendant, but pray for an order of costs to the defendant" contained in the Respondents advocates letter dated 19th December 2015? Or*

iv. *Did the Respondents advocates endorse the said withdraw by the said letter?*

v. *Where the Respondents duly aware of the said withdrawal by the time they declined the applicants*

application for nomination and if so, what are the implications?

vi. *Was the Respondents decision to decline the applicants application reasonable in the circumstances or did it have any justifiable basis at all?*

vii. *What is the proper construction of the rules cited by the respondents and or can the rules or the construction adopted by the Respondents' stand the acid test of reasonableness?*

viii. *Whether the decision complained of was tainted by bad faith, malice and biasness and whether the persons making the decision had vested interests.*

ix. *Whether or not the alleged election process was free and fair.*

x. *Whether the purported nomination of the applicants opponent was free and fair or whether there was any nomination at all?*

In my view, all these are triable issues which can only be determined after a full hearing upon hearing both parties, their witnesses and after testing the said evidence by way of cross-examination to determine its veracity or otherwise. After considering the said issues I am persuaded that the applicant has satisfied the first test, that is, he has established a *prima facie* case worth proceeding for trial and determination.

On whether or not the applicant can be compensated by way of damages, I take the view that the inconvenience or loss that may result if the orders prayed are declined cannot be quantified into damages and consequently I find that the applicant has satisfied this test also.

As for the balance of convenience, I reiterate what I stated above, *"the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction.**[20]**The court will seek to maintain the status quo in determining where the balance on convenience lies."* Considering the facts of this case in totality, I find that the balance of convenience demands that the *status quo* be retained.

Consequently, I find that the application has merits and that the applicant has satisfied the tests for granting the injunction sought as laid down in the above cited authorities. Accordingly, I allow the application dated 18th December 2015 and order as follows:-

i. *That an injunction be and is hereby issued against the Respondents jointly and severally restraining them from continuing with the process of nomination of directors of the first Respondent or in any manner carrying on or undertaking the nominations, elections or any process that may lead to the nominations or elections of the said directors until this suit is heard and determined.*

ii. *The decision of the second and third Respondents declining the applicants application for nomination be and is hereby stayed until the hearing and final determination of this suit.*

iii. *Since the applicant did not pray for costs in the application under determination and even though costs is a matter for the discretion of the court, I make no orders on costs.*

iv. *That the parties are directed to move with speed and take steps to fix the main suit for hearing and determination.*

v. *Pursuant to (iv) above, the defendants are hereby directed to file and serve their defence to this suit (if any) within 14 days from today.*

vi. *That the plaintiffs do file and sere their reply to defence (if any) within 7 days from the date of service of the defence.*

vii. *That within 15 days from the date of close of pleadings, the parties herein shall list this suit for pre-trial directions to pave way for a hearing date for the main suit.*

Right of appeal 30 days.

Dated at Nyeri this 6th day of January 2016.

John M. Mativo

Judge

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[1] Cap 21, Laws of Kenya

[2] {1973}{EA358

[3] {1994} 1 S.C.R. 311

[4] {1975} A AER 504

[5] {1983} 1 IR 88

[6] {1988} KLR 1

[7]High Court ELC case Number 514 of 2013

[8]{2003} KLR125

[9] www.mccarthy.ca/.../interlocutory_injunctions_practical_considerations.pdf

[10] Supra

[11] Dole Food Co. Vs Nabisco Ltd {2000}, 8 C.P.R. (4TH) 461, (F.C.T.D.)

[12] {1990} K.L.R 557

[13]**{1991} KLR 401**

[14]Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.

[15] Supra note 3

[16] Robert Sharpe, Injunctions and Specific Performance, looseleaf, (Aura, On: Cananda Law Book, 1992), P 2-27

[17] See Halsbury's Laws of England, Third Edition, Volume 21, paragraph 766, page 366.

[18] Ibid

[19] Supra note 6

[20] Supra note 6