



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 14 OF 2015

MAURICE MITIOS NYEYWAPLAINTIFF

VERSUS

KAPSARA TEA FACTORY COMPANY1ST DEFENDANT

KENYA TEA DEVELOPMENT AGENCY 2ND DEFENDANT

RULING

1. The application dated 21/12/2015 seeks orders that:

1. That the application be heard *ex parte* in the first instance and the same be certified urgent.
2. That pending the hearing of this application *inter-partes*, the Defendants/Respondents herein, either by themselves, agents servants and/or anybody claiming through them be and are hereby restrained by an order of interim injunction restraining the same from short listing, publishing, nominating casual directors, clearing or declaring candidates/applicants seeking to contest and/or vie for the position of directorship of the 1st Defendant , in respect of Aruba Electoral Area in the forthcoming directors elections scheduled for the 5th of January , 2016 or any other date in exclusion of the plaintiff as well as holding the Annual General Meeting scheduled for 25th January, 2016 to present elected officials to the shareholders.
3. That pending the hearing and determination of this application the defendants/respondents herein, either by themselves, agents, servants and/or anybody claiming through them be and are restrained by an order of interim injunction restraining the same from short listing, publishing, nominating casual directors, clearing or declaring candidates/applicants seeking to contest and/or vie for the position of directorship of the 1st defendant, in respect of Aruba Electoral Area, in the forthcoming directors election scheduled for the 5th of January, 2016 or any other date in exclusion of the plaintiff as well as holding the Annual General Meeting scheduled for 25th January, 2016 to present elected officials to the shareholders.
4. That pending the hearing and determination of this suit, the defendants/respondents herein, either by themselves, agents, servants and/or anybody claiming through them be and are hereby restrained by an order of temporary injunction restraining the same from short listing, publishing, nominating casual directors, clearing or declaring candidates/applicants seeking to contest and/or vie for the position of directorship of the 1st defendant, in respect of Aruba Electoral Area, in the forthcoming Directors elections scheduled for the 5th of January, 2016 or any other date, in exclusion of the plaintiff as well as holding the Annual General Meeting scheduled fro 25th January, 2016 to present elected officials to the shareholders.
5. That the court be pleased to issue an order of mandatory injunction directing and/or compelling the Defendants/Respondents to permit, shortlist, clear and/or allow the Plaintiff/Applicant to contest

the 1st Defendant's directorship in respect of Aruba Electoral Area, for the elections scheduled for 5th of January, 2016 or any other date.

6. That costs of this application be provided for, in any event be borne by the Defendants.
2. On 23/12/2015, this court (HON. S. GITHINJI J) certified the application urgent and allowed the application in terms of prayer No. 1-5. The application was fixed for hearing *interpartes* on 26/1/2016. Before the said hearing date, the application dated 7/1/2016 was filed under the High Court Vacation Rules.
3. The application dated 7/1/2016 seeks ordered that:-
 1. That the application be certified as urgent, fit to be heard ex-parte and service be dispensed with in the first instance.
 2. That pending the hearing and determination of this application, there be a stay of the orders as granted by this court on 23rd December 2015.
 3. That the orders as granted by this court on 23rd December 2015 be and are hereby discharged and or vacated
 4. That in the alternative and without prejudice to the aforesaid, the orders as granted by this court on 23rd December 2015 be and are hereby varied to exclude the 1st defendant's right of nomination of casual director(s) and holding of the Annual General Meeting.
 5. That the costs of this application be borne by the plaintiff.
4. On 13/1/2016, this court (HON S.N. RIECH, J) certified the application urgent and directed that the same be served for hearing *interpartes*.
5. On 26/1/2016, the parties by consent agreed to have the two applications heard contemporaneously by way of written submissions. The interim orders were extended and varied as follows: **“That the order barring the holding of the Defendants Annual General Meeting be and are hereby lifted save that there will be no confirmation of a casual or nominee director for Aruba Electoral Area during the Annual General Meeting.”**
6. The plaintiff's application is supported by the affidavit in support sworn by the plaintiff on 21/12/2015, a further affidavit sworn by the plaintiff on 8/2/2016 and an affidavit sworn by one Tom Ngeywa on 8/2/2016 . A replying affidavit was sworn by the plaintiff on 8/2/2016 in opposition to the Defendant's application.
7. The background facts are that the plaintiff is a registered tea grower within the Aruba geographical area which is served by Kapsara Tea Factory Co. Ltd (1st Defendant). The Plaintiff is also a registered shareholder of the first Defendant. The 2nd Defendant, Kenya Tea Development Agency (KTDA) is the 1st Defendant's managing agent.
8. The plaintiff's complaint is in respect of the elections that were scheduled for to be held on 5/1/2016 for the directorship of the 1st Defendant in respect of Aruba Electoral Area. It is stated by the plaintiff that he tendered his nomination documents on 4/12/2015 for the said position pursuant to the notice published by the 2nd Defendant inviting applications. On 10/12/2015, the plaintiff received a written communication from the chairman, verification Committee, informing him that his application was unsuccessful due to failure to meet the required conditions. The conditions not met were reflected as:-

“ production per bush is excessive way above the Kapsara catchment average”

9. It is the plaintiff's contention that there was no such prequalification condition as no such

condition was contained in the notification or in the election manual. That the only requirement was that the candidate must have delivered not less than 3000 kg of green leaves in the preceding year. That the plaintiff had delivered 3241.70 kg of green leaves for the relevant year 2014 -2015. That on 6/12/2015 before the candidates were cleared, the plaintiff wrote to the 1st Defendant's manager informing him that he had bought an additional 1300 tea bushes from one Tom Ngeywa in the year 2014, bringing the total number of his tea bushes to 2860. That a letter was written by the officials of the plaintiff's Tea Buying Centre confirming that the plaintiff's tea bushes were 2860 in number but the Defendants failed to rectify their records.

10. The plaintiff further deposed that there was no physical count of his tea bushes and neither was he invited to participate in the verification exercise nor served with any verification certificate duly countersigned by the farmer and the Tea Buying Centre officials. That the plaintiff was also not issued with a **“Tea extension Growers visit card”** duly signed by both parties. The plaintiff further contended that a farmer buys fertilizer depending on usage and that depends on the farmer's industry. That production cannot therefore be based on the number of fertilizer bags allocated to a farmer.
11. The plaintiff also posed the query why his competitor was not investigated. The plaintiff urged the court to allow the application and stated that the same had not been overtaken by events as no elections were carried out in respect of Aruba geographical area and no candidate for the said area was gazetted as unopposed.
12. The Defendants response to the plaintiff's application is as per the replying affidavit sworn on 14/1/16 by one **Kenneth Mavale** the Factory Unit Manager of the 1st Defendant. The Defendant's application dated 7/1/2016 is supported by the affidavit sworn by the aforesaid factory unit manager. The Defendant's position is that the prequalifications for vying for the position of the directors were in black and white. That the plaintiff failed to meet the condition No 6 which stated that a candidate must have delivered 3000 kg of green leaves to the 1st Defendant during the preceding year and the same verified by the factory manager.
13. That in regard to the plaintiff's candidature, an issue arose as to whether his green leaf production would meet the required threshold of not less than 3,000 kg per year. That the plaintiff was a registered tea grower with 1,560 registered tea bushes yet he had stated in his application that he had delivered 3,241 kg. This triggered an investigation which included a physical visit and verification of the plaintiff's tea bushes in the plaintiff's presence on 10/12/2015. That the investigation findings were that the plaintiff's tea bush population could not match the alleged deliveries and neither could the plaintiff explain the said production margins taking into account that there had been no expansion of the plaintiff's tea bushes nor any leasing of land during the period under investigation. Consequently, the plaintiff's candidature was found unsuccessful and he was informed accordingly. That the only other nominee who was qualified for the position, DAVID WANYONYI SIFUNA was declared unopposed.
14. That on 10/12/2015 past the nominations deadline of 8/12/2015, the plaintiff submitted a letter dated 6/12/2015 stating that he had purchased a plot with 1,300 tea bushes from one TOM K. NGEYWA and also availed a sale agreement dated 19/5/2015. The Defendant's position is that the said transfer of the tea bushes did not meet the requirement that any transfer of tea bushes must be registered with the 1st Defendant in the prescribed form duly signed by the transferor, the transferee and an officer of the 1st Defendant. That the said requirement assists in curbing the making of false entries and in planning for the number of fertilizer bags that the grower will be allocated.
15. On the orders sought in respect of the election for the Aruba Electoral area, the Defendants position is that the same has been overtaken by events as there is no election due to be held as to only qualified candidate was unopposed. That the mandatory injunction orders are therefore incapable of being complied with.

16. The Defendants also accuse the plaintiff of failure to disclose material facts to the court at the *ex parte* hearing stage when orders were obtained stopping the 1st Defendant's Annual General Meeting when it is a mandatory requirement on the part of the company under the Law and under the company's own Articles and Memorandum of Association. That only one agenda of the Meeting related to the election of the directors. That no leave of the court was sought when the proceedings herein were conducted during the High court vacation and that the plaintiff was not entitled to *ex parte* orders which basically disposed off the application without the Defendants being afforded a hearing.

17. I have considered the two applications, the responses to the same and the written submissions filed by the counsels on behalf of their respective clients. On 23/12/2015 the plaintiff's application was allowed in respect of prayer No. 1 – 5 pending hearing *inter partes* of the same. Whatever the import of the said orders, the application was still pending and was not disposed of. On 26/1/2016, the parties herein entered into a consent order which gave them the greenlight for the holding of the Annual General Meeting to be held save for the confirmation of the elections in question. The prayers that are already spent are prayer No. 1, 2 and 3 of the said application. The rest of the application is therefore still pending.

18. In relation to the application dated 7/1/2016, prayer No. 1 & 2 are spent. Prayer No. 4 was taken care of by the consent orders recorded herein. What remains of the application dated 7/1/2016 is prayer No. 3 and 5 i.e the prayer that seeks orders to discharge or vacate the orders dated 23/12/2015 and the prayer for costs.

19. The principles of the Law governing the grant of injunctions were set out in the Landmark case of *GIELLIA VS CASSMAN BROWN & CO . LTD (1973) E.A.* as follows:

“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 normally be 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. (E.A. Industries v Trufoods, [1972] E.A. 420.)

20. As restated by the court of appeal in the case of *NGURUMAN LIMITED VS JAN BONDE NIELSEN & 2 OTHERS, CA NO. 77 OF 2012 , together with the mode of their application as follows:-*

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) Establish his case only at a *prima facie* level,

(b) Demonstrate irreparable injury if a temporary injunction is not granted, and

(c) Allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially”

21. On the law relating to the grant of mandatory injunctions, suffice it to quote the Court of Appeal in the case of *Kenya Breweries Ltd & 2 others V Washington Okeyo (2002) Eklr* in which it was stated as follows:

'The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th Edition paragraph 984 which reads:

' A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the defendant attempted to steal a match on the plaintiff a mandatory injunction will be granted on an interlocutory application'.

Also in Locabail International Finance Ltd V Agroexport and others [1968] 1 ALL ER 901 at page 901 it was stated:

' A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in a clear case either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction'.

22.The facts of this case are by and large not in dispute. The point of divergence is on whether there was a **“production per bush”** condition. According to the plaintiff, there was no such condition either in the notification or in the elections manual. That condition No. 6 of the notification only required the candidates to have delivered 3000 kg of green leaf in the preceding year. The plaintiff has exhibited both the notification and the elections manual in his affidavit. Relying on the same notification and the elections manual, the Defendants argument is that under the nomination condition no. 6 the candidate that have delivered not less than 3,000 kg of green leaf the preceding year and the same was to be verified by the factory management.

23.Condition no. 6 in the notification states as follows:-

“ The candidate MUST have delivered to the factory during the preceding year (1st July 2014 to 30th June, 2015) NOT less than 3,000 kilograms of green leaf(To be verified by Factory Management).”

It is therefore clear that the in addition to delivering not less that 3,000 kg of greenleaf a verification exercise was to be conducted.

24.The election manual (Headed Election of TEA FACTORY CO. DIRECTORS NOMINEES AND BUYING CENTRE COMMITTEE MEMBERS PROCEDURES – 2015/2016 states as follows in respect of the verification exercise.

“VERIFICATION COMMITTEE AND VERIFICATION EXERCISE

“The verification Committee will sit at the Regional Office or such other identified location the day after the submission of applications (as specified in the notification for candidatures/applicants). The Committee would be responsible to scrutinize each application and verify whether the candidates/applicants have met the conditions precedent for the nomination elections for the position of director as stipulated.

The Committee will sit between 9.00 AM and 4.00 PM on 9th December 2015 and between 9.00 AM and 12.30 PM on 10th December 2015. The 2nd day of sitting would be to seek and receive any additional information and documents in the committees view is/are required to enable the committee make a determination in respect to an

application.

The Committee members will rely on a checklist of the conditions precedent for each factory, from which they will use in the verification exercise.

The committee would be made up of a Chairman (Regional Manager/Regional Operations Manager) from an external KTDA Region and Factory Unit Managers from within the Region and identified Regional staff (appointment to be by Group Company Secretary).”

The verification committee was therefore provided for.

25. How about the “production per bush” issue?

The election manual on page No. 4 provides as follows:

“LEASEHOLD

Leasing of land of one by another is seen as a commercial venture. The person leasing land of another is ordinarily expected to have his own land where he gets his own yield. The yield that would be applicable in the event of the measurement of greenleaf (kg) as an election condition would be the yield from ones registered farm and not from a farm where one has leased land of another grower or yield procured elsewhere. The verification committee would be guided by the Regional/Zonal/Factory average Kg's yield per bush. In the event of dissatisfaction/dispute of the Regional/Zonal/Factory average yield figures, the Tea Research Institute (or its successor in title) under KARLO would provide the guide. It would be the responsibility of the person disputing the Regional/Zonal/Factory average yield data to pursue the same from KARLO. The election timetable will not be halted or delayed as a result of any inquiry on yield from KARLO.

It is the responsibility of the Factory FUM to provide the verification committee with the record in respect to confirmation of an applicants green leaf record.

Founder shares allotted to the person leasing the land from the land leased will not apply for the election exercise. The shares from his/her own land would however apply.

The field management should be able to identify this occurrence for application of the appropriate shares. Such information should be communicated to the head office in time for the records to be addressed. In any event the Returning officer together with the field management should have such record.

From the foregoing, it is clear the green leaf production must come from the growers own registered farm and not from any leased farm or elsewhere. It is also clear that the verification committee was to be guided by the production per bush in respect of the yield.

26. The plaintiff has stated that he has 2860 tea bushes in his own farm inclusive of an additional 1300 tea bushes he purchased from one TOM NGEYWA in the year 2014. The plaintiff exhibited a sale agreement, a letter from ARUBA BUYING CENTRE and also relied on an affidavit sworn by his brother, TOM NGEYWA relating the sale of the 1300 tea bushes. The said affidavit of TOM NGEYWA also shows that TOM NGEYWA on 22/1/2014 leased 600 tea bushes from one HELLEN CHEROTICH. The plaintiff further averred that despite his visit to the TEA OFFICERS of the 2nd Defendant informing them about the purchase of the tea bushes and of his letter dated 6/12/2015 and his advocates letter reiterating his position regarding the purchased additional tea bushes, the verification committee failed to act on the same. The plaintiff thus admits that the transfer of the said additional tea bushes was not registered with the Defendants.

27. On the other hand, the Defendant's position is that no transfer was registered for any additional 1300 tea bushes. That the plaintiff's letter dated 6/12/2015 referring to the purchase of 1300 tea bushes was received by the factory unit manager on 10/12/15 at 4.58 pm, way past the deadline of the submission of the applications on 8/12/2015.
28. According to the elections manual, the verification committee was to sit between 9.00 am and 4.00 pm on 9/12/2015 and between 9.00 am and 12.30 pm on 10/12/2015. The second day of the sitting was for receiving any additional information on the documents required to enable the committee to make a determination in respect of the application. The Defendants contended that on 10/12/2015 during the verification exercise, the committee visited the plaintiff's tea bushes in the plaintiff's presence and the plaintiff could not explain the production margins of his tea bushes and did not mention any purchase of additional bushes.

The Defendants have exhibited the investigation report (annexture KMN) which shows that the plaintiff's farm was visited on 10/12/2015 between 10.30am and 11.30 am. The plaintiff has denied that there was any such visit.

However, it is apparent from the plaintiff's own evidence that the letter dated 6/12/2015 informing the factory Unit manager about the purchase of the additional tea bushes was received on 10/12/2015 at 4.58 pm. This was way past the nominations deadline. The same applies to the letter dated 11/12/2015 written by the plaintiff's tea buying centre in regard to the tea bushes. There is therefore no evidence of the registration of the transfer of the tea bushes. Indeed the plaintiff's evidence is that the Defendant's failed to register the transfer. There is no document from the plaintiff which reflects the request for transfer was received by the Defendants prior to the nominations deadline. The sale agreements exhibited by the plaintiff reflecting the dates of sale as 19/5/2014 and 14/3/2015 fail to shed light on the exact date of the purchase of the tea bushes.

29. Turning to the issue raised by the Defendants whether the plaintiff failed to disclose material facts to the court during the *ex parte* hearing, it is noted that the parties thereafter on 26/1/2016 recorded a consent which gave the green light for the Annual General Meeting to proceed save for the confirmation of the casual or nominee director for ARUBA Electoral Area. I also find no merits on the issue raised regarding the plaintiff's application having been filed during the High Court Vacation without the leave of the court. This is a matter of technicalities of procedure and not substance. Under article 159 of the constitution of the Republic of Kenya, this court is enjoined to administer justice without undue regard to technicalities.
30. With the foregoing, I find that the applicant did not, *prima facie*, meet condition No. 6 of the notification. Consequently, I hold that the plaintiff's application dated 21/12/2015 did not meet the threshold for the grant of the orders sought therein. In the premises, I dismiss the application dated 21/12/2015 and discharge the orders dated 23/12/2015 .

Costs in cause.

B. THURANIRA JADEN

JUDGE

Dated and delivered at Kitale this 19th day of May, 2016.

B. THURANIRA JADEN

JUDGE