



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CONSTITUTIONAL PETITION NO. 31 OF 2016

IN THE MATTER OF CONSTITUTION OF KENYA, 2010

AND,

IN THE MATTER OF THE COMPANIES ACT (CAP 486), LAWS OF KENYA

AND

MOSES NYANDUSI NYAKERAMBA PETITIONER

-VERSUS-

KIAMOKAMA TEA FACTORY CO. LTD.....RESPONDENT

RULING

1. Article 27 of the Constitution of Kenya, 2010, provides for equality and freedom from discrimination in that every person is equal before the Law and has the right to equal protection and equal benefit of the law while Article 35 provides for access to information held by the State and information held by another person and required for the exercise or protection of any right or fundamental freedom.

2. Under Article 47 of the Constitution, every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

The right to fair hearing is catered for under **Article 50** of the Constitution.

3. The jurisdiction of the High Court to “inter-alia” determine the question whether a right or fundamental freedom in the Bill of Rights has been violated, infringed or threatened is provided for under Article 165 of the Constitution.

Article 177 of the Constitution provides for membership of a county assembly and Article 188, provides for boundaries of counties.

Limitation of rights and fundamental freedoms in provided for under **Article 24** of the Constitution.

Save for Articles 165, 177 and 188, all the other aforementioned Articles fall within the categories of rights and fundamental freedoms set out in the Bill of Rights i.e Chapter Four (4) of the Constitution.

4. The Notice of Motion dated 1st November 2016, and filed herein on 2nd November 2016 by **Moses Nyandusi Nyakeramba** (Applicant/Petitioner), against **Kiamokama Tea Factory Co. Ltd** (Respondent), is premised on all the aforementioned provisions of the Constitution. However, it is difficult to see the relevance of Articles 177 and 188 in the application.

The basic order sought in the application is a temporary or interlocutory injunction pending the hearing and determination of the petition filed by the applicant against the respondent dated 1st November 2016. This is essentially civil law remedy of an equitable nature.

5. The applicant thus seeks temporary injunction orders to restrain the respondent from preventing him attending board meetings (**prayer 3**) and to order the respondent to supply to him minutes of the meeting that led to his suspension (**prayer 5**).

The applicant also seeks orders directed at the respondent lifting his suspension as a board member and director of the respondent (**prayer 7**) and for his reinstatement as a director of the respondent (**prayer 9**). Further, the applicant seeks an order quashing his purported suspension from membership and leadership of the respondent and reinstating him as a board member and director (**prayer 10**).

Prayers 5, 7, 9 and 10 are a request for injunctive orders of a mandatory nature.

6. In the Petition, the applicant is described as a resident of Kiamokama within Kisii County and the respondent as a limited liability company duly registered under the Companies Act (Cap 486 LOK) and engaged in the business of processing of tea with its factories.

The description of the two parties viewed against the prayers sought in both the application and petition clearly indicate that this is purely a dispute between a limited company and its aggrieved shareholder cum director capable of being resolved by ordinary civil litigation.

It is therefore ironic that such a dispute would be brought to court as a constitutional petition within the public law realm rather than a normal civil suit within the private law realm.

7. Be that as it may, the basic issue of determination is whether the applicant is entitled to orders of injunction against the respondent pending the hearing and determination of the petition.

In his supporting grounds as fortified by the supporting affidavit, the applicant avers that he is an elected director of the respondent company having been elected by members and farmers representing the Central Electoral Area but on the 30th October 2016, the respondent convened a special board meeting which resulted in his suspension on baseless and malicious grounds. He contends that the action was unlawful, unconstitutional and contrary to the Directors' Code of Conduct and the Companies Act (S.185) which outlines the procedure for the removal and/or suspension of a director.

8. The applicant further contends that the action was in violation of his rights under Articles 47, 35 and 50 of the Constitution and that there is no provision for the respondent to remove or suspend a director in the manner undertaken against him. Further, that the procedure of suspending him from conducting his administrative duties as an elected director was not transparent and was unfair.

9. The application was opposed by the respondent on grounds enumerated in a replying affidavit dated 10th November 2016 deposed by its Company Secretary, **John Kennedy Omanga**, in which it is conceded that the applicant is indeed a duly elected director to the respondent's board of directors representing the electoral area known as Central Electoral Zone, but that, just like all other directors of tea factories he fell within the purview of the Factory Directors Code of Conduct in discharging his mandate. He appended his signature on the said code of conduct on 17th March 2016.

10. The respondent avers that among the provisions of the directors' code of conduct, is that a director should uphold the principle of collective responsibility and not publicly disagree with decisions of the

board or criticize other orders of the company. And that, a director is required to provide and support the principles contained in the code of conduct by leadership and example.

The respondent also avers that in the month of September 2016, there occurred a boycott of tea plucking within its catchment area. It later emerged that the tea growers had been incited not to deliver tea thereby leading to enormous losses to the respondent. It also emerged that contrary to the collective decision of the board of directors, the applicant was involved in the boycott.

11. Consequently, a special board of directors meeting was convened on the 3rd October 2016, to deliberate on issues pertaining to the boycott and the alleged involvement of the applicant.

The respondent avers that necessary notice of the meeting was served upon the applicant. He attended the meeting and heard the representations against himself. He was thereafter given the opportunity to answer to matters as raised. He was however, found to have involved himself in the boycott by not plucking and delivering tea between the 5th to the 13th of September 2016. The board therefore resolved to suspend him from the office of director for a period of six (6) quarter meetings commencing 4th October 2016. A communication to that effect was made to him by a letter dated the same 4th October 2016.

12. The respondent averred further that the applicant was not removed from the office of director but was only suspended from office for the stated period of time.

It is the respondent's contention that the applicant was subjected to due process and as such, his suspension was well grounded, justified and merited both in fact and law and was a clear message to all and sundry that a director's office comes with duties and responsibilities which any person aspiring to hold and holds such an office must be ready to comply with.

The respondent also contends that the applicant's suspension was lawful and within Constitutional parameters.

13. Learned counsels, **Mr. Nyamweya** and **Mr. Ochoki**, appeared for the applicant at the hearing of the application while learned counsel, **Mr. Millimo**, appeared for the respondent.

In their oral arguments, both counsels gave a detailed and substantive reiteration of the contents of their respective supporting and replying affidavits in an attempt to persuade this court to uphold their respective arguments to either allow or dismiss the application.

This court has given due considerations to the rival arguments in the light of the grounds in support of the application and those in opposition thereto.

14. As observed earlier, the petition is anchored on the provisions of the Constitution but the application essentially seeks the equitable remedy of injunction within the context of private law rather than public law.

It may be pointed out that Article 22 of the Constitution provides for the enforcement of the Bill of Rights while Article 23, provides for the authority of the courts to uphold and enforce the Bill of Rights.

Article 23(3) provides for reliefs which a court may grant. Such reliefs include an order of injunction or a conservatory order. These are two different reliefs but the applicant appears to be seeking both an order of injunction and a conservatory order. Most intriguing, is the fact that neither Article 22 nor Article 23 of the Constitution have been invoked in this application. It would therefore, be safe to opine that what the applicant is really seeking are orders of injunction within the private law realm.

15. Indeed, the present dispute relates more to the provisions of the Companies Act, specifically S.177 and S.185 of the Act.

The position of a director in the respondent company is created under S.177 while S.185 outlines in detail the applicable procedure in the removal of directors. The applicant contends that the prescribed procedure was not adhered to by the respondent before the decision to suspend him was made. That is why he wants the decision to be stayed and/or suspended for him to be reinstated to his position of director pending the hearing and disposal of his petition. He therefore moved this court for injunctive orders against the respondent.

16. In that regard, the principles applicable for grant of interlocutory or temporary injunctions in an ordinary civil suit would apply to the application with the court taking into account that its primary duty is to give a full scale impartial hearing of the dispute at hand before arriving at a final decision.

A temporary or interlocutory injunction is essentially a provisional order to restrain the doing of a particular act or to require a certain state of affairs to be altered temporarily either until the trial of the suit or until further orders (see, **Richard Kuloba – “Principles of Injunctions” Oxford University Press, 1987.**)

A court must be very careful in considering an application for a temporary injunction as it is not unusual for such an injunction to finally dispose of the main matter in controversy and settle the rights between the parties.

17. Due to an increase of disputes relating to the provisions of the Constitution of Kenya, 2010, a parallel category of interlocutory measures unassociated with compensation in damages has emerged. It is known as conservatory orders which denote injunctive or stay orders aimed at public bodies or officials who are in the course of discharging their own respective mandates based on the Constitution or Statute Law. Such remedy is available in mostly public law cases.

18. In private law cases, the threshold case on interlocutory injunction in this region is **Giella Vs. Cassman Bracon & Co. Ltd (1973)EA 358.**

This case has stood the test of time despite many attempts to shake or dislodge it. It was therein held by the former East African Court of Appeal that:-

“The conditions for the grant of an interlocutory injunction are now 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”.

19. In this case, the main complaint by the appellant is that he was unfairly, unprocedurally and unlawfully removed and/or suspended as a director of the respondent company yet he was elected to that office by a majority of tea farmers in his central zone. He therefore beseeches this court to allow this application in order to reverse the action taken against him by the respondent pending the final determination of his petition filed herein on 2nd November 2016. A letter dated 27th September 2016, addressed to him notified him of the special meeting of the board to be held on the 3rd October 2016, for purposes of hearing explanations and report respecting the boycott of delivery of tea leaf by a section of farmers within the respondent’s catchment area. The hearing also doubled up as an enquiry of the applicant’s role in the boycott.

20. There was no denial by the applicant that the special board meeting was convened as scheduled and that his conduct was discussed. Most significantly, the applicant did not deny that he attended the meeting and participated in the proceedings. Thereafter, on the 4th October 2016, the board communicated its decision to him. He was thus informed of his suspension from conducting the affairs of the company in his capacity as a director with effect from the date of the letter. It was made clear that the action of the board against him was pursuant to their authority under the Company’s Memorandum and Articles of Association and Company Law and was in line with Good Corporate Governance Practices.

21. Contrary to what the applicant implied, he was not removed as a director of the respondent in accordance with S.139 of the Companies Act 2015 but was only suspended from conducting the affairs of the company in his capacity as such director for a specified period of time. He is said to have been involved and participated as a director of his area in the boycott of supply of green leaf to the respondent factory thereby acting in breach of the Directors' Code of Conduct and Good Governance Practices which exposed him to the resultant sanctions of the respondent's Board of Directors.

22. Under **S.143(1) of the Companies Act, 2015**, a director of a company shall act in the way in which the director considers, in good faith, would promote the success of the company for the benefit of its members as a whole.

The Factory Directors' Code of Conduct, 2015, which is annexed in both the supporting and replying affidavit was undisputedly acknowledged and signed by the applicant on the 17th march 2016. It was binding on him in his conduct as a director of the respondent.

Under **Clause 7.1** of the code, if a director engages in conduct that prima-facie constitutes a breach of the code, good governance practices etc, he would face sanctions of the company through its board of directors and shareholders and existing governance documentation. Such sanction could include suspension from sittings of the board by other directors or removal by shareholders (see, **Clause 3.19** of the Code).

23. The applicant became a victim of the company's sanctions after adverse allegations were made against him in relation to the boycott of tea growers. There is adequate material to show that he was notified of the allegations and was indeed given an opportunity to be heard before any action was taken against him by the respondent's board which was merely exercising its lawful mandate as by law established.

In the circumstances, it is doubtful whether there was indeed violation by the respondent of the applicant's constitutional rights in terms of Articles 27, 47 and 50 of the Constitution.

With regard to Article 35, it was herein conceded that the information sought by the applicant from the respondent was eventually provided. This provision was therefore not violated by the respondent as alleged by the applicant.

24. In light of all the foregoing factors it is difficult for this court to hold that the applicant has demonstrated a 'prima-facie' case with a probability of success. He has also not demonstrated that he is bound to suffer irreparable harm which would not adequately be compensated by an award of damages and since the impugned decision of the board has already been implemented the balance of convenience would tilt in favour of the respondent.

In sum, the present application is without merit not only for the issuance of an injunction order but also a conservatory order if this matter is treatable as a public interest claim. The application is thus dismissed with costs to the respondent.

Ordered accordingly.

[Read and signed this 24th day of November 2016.]

J.R. KARANJAH

JUDGE

In the presence of

Mr. Ochoki for the Applicant

Mr. Bosire Gichana holding brief for Mr. Mullimo for the Respondent

Njoroge CC