



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL CASE NO. 19 OF 2016

WILSON COMMANDER MADASIA.....PLAINTIFF

VERSUS

KTDA MANAGEMENT SERVICE LIMITED.....1ST DEFENDANT

MUDETE TEA FACTORY COMPANY LIMITED.....2ND DEFENDANT

JAVAN MWANZI MUKAVALE.....3RD DEFENDANT

THOMAS NYAGETARI.....4TH DEFENDANT

RULING

1. This ruling is in respect of a preliminary objection herein dated 27th January, 2016. The preliminary objection seeks orders that the entire suit and the plaintiff's application dated 26th January, 2016 be dismissed. The preliminary objection is based on the grounds that:-

“1. That the entire suit as filed and the instant application is *subjudice* and an abuse of the court process.

2. That this court is expressly barred from presiding over this matter by virtue of the provisions of Sections 5 and 6 of the Civil Procedure Act, thus lacking jurisdiction to entertain this suit.”

2. The preliminary objection was argued by way of written submissions which this court has duly considered.

3. I have perused copies of HCCC Kakamega No. 1 of 2016 which forms part of the list and bundle of documents filed by the Defendants herein.

In HCCC Kakamega No. 1 of 2016 the plaintiff is Wilson Commander Madasia. The Defendants are KTDA Management Service Limited, Mudete Tea Factory Company Limited and J. J. Mukavale

4. The subject matter of HCCC Kakamega No. 1 of 2016 was the election of the directors of Shinyalu Electoral area of Mudete Tea Factory which is managed by KTDA. The election was slated for 5th January, 2016. The plaintiff's complaint was in respect of voting by proxy through a special Power of

Attorney. The Plaintiff prayed for judgment against the Defendants jointly and severally as follows:-

“a) That the use of Power of Attorney at the forth coming elections be suspended.

b) The Powers of Attorney obtained by one of the candidates be strictly and openly verified and if proved that any was obtained fraudulently the candidate in breach be disqualified.

c) Costs.”

5. A notice of motion seeking an order of injunction restraining the 1st and 2nd Defendant was contemporaneously filed with the plaint. On 5th January, 2016, the orders of injunction were issued pending the hearing of the application *inter-parties*. Subsequently, the plaintiff filed the application dated 18th January, 2016 and another dated 21st January, 2016 seeking orders that “Leave be granted to institute contempt proceedings.” The applications dated 18th January, 2016 and 21st January, 2016 were struck out.

6. On 26th January, 2016, HCCC Nbi No. 19 of 2016 was filed by the same Plaintiff, Wilson Commander Madasia. The KTDA Management Service Limited, Mudete Tea Factory Company Limited and J. J. Mukavale who were the 1st -3rd Defendants remained the same as in the Kakamega case. The 4th Defendant, Thomas Nyagetari who was the returning officer of the elections conducted by the 1st and 2nd Defendants on 5th January, 2016 in Shinyalu electoral area was added.

7. The Plaintiff’s complaint in the Nairobi case relates to the use of the Powers of Attorney at the said election in relation to the candidacy of the 3rd Defendant, Javan Mwanzi Mukavale. The Plaintiff has also complained about the failure by the factory to obey the court orders of injunction to stop the elections of the 5th January, 2016. The plaint and the notice of motion herein dated 26th January, 2016 sought orders to restrain the Defendants from holding the Annual General Meeting that was scheduled for 27th January, 2016. The plaint also seeks damages/penalties for contempt of court.

8. The subject matter of both suits is the election of 5th January, 2016 and the alleged contempt of court in relation to the orders of injunction issued in the Kakamega case. The Nairobi case is therefore an affront to the *subjudice* rule which is stipulated in Section 6 Civil Procedure Act as follows:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

The filing of the Nairobi case is also a violation of the overriding objective of the Civil Procedure Act which under Section 1B requires that there be an **“efficient use of the available judicial and administrative resources”**.

9. The Plaintiff’s counsel has argued that the Nairobi case and the Kakamega case are complimentary and can be consolidated and heard in one location since both suits are at an interlocutory stage. I do not agree. The orders of injunction the subject of the contempt proceedings were issued in the Kakamega case. The contempt of court proceedings can therefore be pursued within the Kakamega file. The other prayer in the Nairobi case is for an order of injunction to stop the Annual general Meeting of 27th January, 2016. This prayer has been overtaken by events. The transfer of the Nairobi file to Kakamega will therefore serve no useful purpose.

10. For the above stated reasons, I strike out the suit herein with costs to the Defendants.

Dated, signed and delivered at Nairobi this 24th day of Nov., 2016

B.THURANIRA JADEN

JUDGE