



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL SUIT NO. 9 OF 2015

SOLOMON M. CHOTI.....PLAINTIFF

VERSUS

JOSEPH NYAGAKA BWANA1ST DEFENDANT

NYAMACHE TEA FACTORY LIMITED..... 2ND DEFENDANT

KENYA TEA DEVELOPMENT AGENCY (MS) LTD.....3RD DEFENDANT

JUDGEMENT

Introduction

1. On 6th January 2015, the 2nd Defendant herein, Nyamache Tea Factory Company Limited carried out an election exercise in which shareholders elected directors to represent them in the Board of Directors of different electoral areas. The plaintiff herein contested in the said elections for the directorship of Bassi Bogetaorio electoral area in which the 1st defendant was declared the winner.

The Plaintiff

2. In his plaint dated 16th April, 2016, the plaintiff herein, SOLOMON M. CHOTI, sued the 3 defendants seeking the following orders.

a) An order nullifying the elections of the 1st defendant carried out on 6th January 2015 in which the 1st defendant was declared the winner.

b) An order directing the 2nd and 3rd defendants to carry out fresh elections for the said zone of Bassi Bogetaorio.

c) A declaration be and is hereby made that the election held on the 6th January 2015 by the 2nd defendant for purposes of electing a director to represent Bassi Bogetaorio electoral area in the 2nd defendant's Board of directors breached the express provisions of the 2nd defendant's memorandum and articles of association and therefore null and void.

d) A declaration be and is hereby made that the election results in respect of the said electoral area published in the print media by the company secretary of the 2nd defendant in respect of Nyamache tea factory company limited declaring Joseph Nyagaka Bwana is in contravention of the company's articles of association and thus null and void.

e) Costs and interest.

3. The plaintiff's claim is captured at paragraph 7 of the plaint in which he avers that the election of directors of the 2nd defendant's company for Bassi Bogetaorio electoral area was marred with irregularities and bribery. He further avers that through connivance, the defendants encouraged and allowed the said irregularities to take place in a bid to assist the 1st defendant win the said elections thereby robbing the plaintiff of his victory in the said elections. The plaintiff enumerated the particulars of the election irregularities to include voter bribery, bias against the plaintiff, voter intimidation and allowing unqualified persons to vote.

4. The plaintiff further contends that the 2nd and 3rd defendants illegally declared the 1st defendant the duly elected director in the said elections despite being aware of the complaints of irregularities raised by the plaintiff thereby necessitating the filing of the instant suit.

5. The plaintiff further accuses the defendants of failing to hold the Annual General Meeting that was scheduled for 8th January 2015 contrary to the law and the Company's Memorandum and Articles of Association.

Defendants' Defence

6. In their separate, but identical statements of defence filed on 21st May 2015, the defendants confirm that elections for directors were conducted on 6th January 2015 in which the 1st defendant was declared the winner and that the said elections were free, fair and open to all the qualified nominated shareholders.

7. The defendants' reiterate that the elections were conducted as scheduled and ended without any hitches to the satisfaction of all the parties involved. It is the defendant's case that no irregularities were reported or pointed out by the plaintiff, agents or participants in the said elections as alleged by the plaintiff.

8. The defendants' case was that a notice convening the 37th Annual General Meeting (AGM) of the 2nd Defendant that was scheduled for 8th January 2015 was duly advertised to all and sundry through print media and that the said AGM had already taken place as at the time of filing the defence and further, that at the said AGM, all items on the agenda were passed including the confirmation of directors after which the 1st defendant took over office of director. The defendants added that the 1st defendant has been discharging the functions of the office of director from the date of the said AGM to the date of filing the defence. The defendants therefore contended that the orders sought by the plaintiff had already been overtaken by events as the 1st defendant had already taken over office and he cannot therefore be stopped from discharging the functions of his office at the behest of the plaintiff. It is the defendants' contention that the elections were conducted peacefully and democratically and therefore, the plaintiff's case was an afterthought, an exercise in futility, without merit and an attempt to sabotage the operations of the 2nd Defendant.

9. When the case came up for hearing before me on 16th February 2016, Mr. Ochwangi for the plaintiff informed the court that he was ready to proceed with the case, the absence of the defendant's counsel notwithstanding because the hearing date was taken by consent.

10. This court, upon noting that indeed the hearing date had been taken by consent, ordered that the case proceeds for hearing whereupon the plaintiff presented his evidence and that of his two witnesses as follows.

Plaintiff's case

11. PW1, the plaintiff herein testified that he was a candidate in the impugned elections for director's position in the Bassi Bogetaorio electoral area which had 30 tea buying centres that were grouped into 4 polling stations. He produced the duly issued election rules and procedures and the candidates nomination

list as P exhibit 1 and 2 respectively. The plaintiff explained that he campaigned before the said elections and recruited 4 polling agents whose names he submitted to the 2nd defendant. The plaintiff's said his polling agents were, Dickson Monari (PW2), Samson Ontori and Nyabuto Nyaemo.

12. The plaintiff added that he voted at Gesabakwa polling centre but that ugly incidents of violence were experienced at Nyasakwa Polling station following claims of alteration/inflation of shares and the admission of unregistered persons to take part in the said elections. He cited one incident of a voter whose shares were inflated from 6 to 36 shares thereby leading to a fracas that almost stopped the voting process.

13. The plaintiff stated that he was denied access to Nyachogochogo polling centre where the vote tallying was being conducted. He produced voters registers from Nyasakia and Nyachogochogo polling centres as P exhibits 3 and 4.

14. The plaintiff sought the nullification of the 1st defendant's election as a director on the basis that the said elections were flawed, marred with irregularities and therefore not free and fair. He produced the Memorandum and Articles of Association of the 2nd defendant as P exhibit 5.

15. He also produced a court order issued on 7th January 2015 restraining the defendants from interfering, altering, chairing, taking oath of office, accessing the factory destroying the votes cast on 6th January 2015 pending the hearing of the application interpartes.

16. PW2, Dickson Ragira Monari, was the plaintiff's polling agent at Nyansakia buying centre. He stated that the elections were flawed and highlighted instances of inflation of shares which he stated was a move calculated to give mileage to the 1st defendant in the said contest. He urged the court to order for a repeat of the said elections.

17. PW3, Nelson Morara Ontweka, was the plaintiff's polling agent at Nyachogochogo polling station. His testimony was that he noted that unregistered persons were allowed to vote. He gave an instance where a person who was alleged to be shareholder No. 76 was allowed to vote yet he was not in the voters register. He was also of the opinion that there should be a repeat of the elections.

18. At the close of the plaintiff's case, Mr. Ochwangi, learned counsel for the plaintiff applied for the closure of the defence case in view of the fact neither the defendants nor their advocate on record had attended court for hearing even though the hearing date had been taken by consent.

19. The court then marked both the plaintiff's and the defence case as closed and directed that the case be mentioned on 27th April 2016 to confirm the filing of the submissions and to fix a date for judgment.

20. On 4th April 2016, the defendant filed an application under certificate of urgency seeking to set aside the proceedings that had culminated in the filing of the plaintiff's written submissions on 22nd March 2016. The defendant did not however prosecute the application to set aside the proceedings or a subsequent application dated 9th March 2016 and when the case came up for hearing on 4th October 2016, Mr. Ochwangi for the plaintiff requested the court to list the main case for judgment in view of the fact that the plaintiff had already filed his submissions and the proceedings of 7th February 2016 had not been set aside. Mr. Ochwangi argued that the defendants were not keen on prosecuting their two applications yet time was of essence in the case. Mr. Ochwangi sought the dismissal of the defendants' two applications. The court however declined to dismiss the defendants' said application but listed the main suit for judgment.

Analysis and determination

21. I have carefully considered the evidence tendered by the plaintiff and his witnesses, the plaintiff's written submissions together with the authorities he relied upon. I do find that this case raises the following issues.

1. Whether there were irregularities and malpractices experienced during the elections that resulted in the 1st defendant being declared the winner.
2. Whether, if there were any irregularities, the same was so fundamental as to make the election not to be free and fair.
3. Whether the 1st defendant was lawfully elected or whether the election should be nullified.
4. Who should bear the costs.

22. Courts have taken the position that the standard of proof in election cases is higher than that applicable in ordinary civil cases. This means that even though the defendants did not attend court on the hearing date, the plaintiff was still duty-bound to prove his case against the defendants to that higher standard. This higher standard of proof can be attributed to the high costs involved in an election process and the fact that an election outcome affects not only the individual contestants in that election but also the organization and electorate or the constituents on whose behalf the elected party would be acting. In the case of **John Kiarie Waweru vs Beth Wambui Mugo & 2 others (2008) eKLR** it was stated:

“As regards the standard of proof which ought to be discharged by the petitioner in establishing allegations of electoral malpractices, there is a consensus by electoral courts that generally the standard of proof in electoral petition cases is higher than that applicable in ordinary civil cases i.e. proof on a balance of probabilities. The standard is higher than proof on a balance of probabilities but lower than standard of proof beyond reasonable doubt required in establishing criminal cases. Allegations of electoral malpractices like for instance bribery require higher proof.”

23. In determining whether or not the plaintiff met this higher standard of proof, I will need to evaluate the evidence tendered on the subject of irregularities in order to make my own conclusion on whether the election was free and fair. Chitembwe J. had the following to say on subject of free and fair elections in the case of **Anthony Luyundi Isayi vs Independent Electoral Boundaries Commission & Another [2013] eKLR**:

“An election court is empowered to evaluate whether an election was conducted freely and fairly, whether the election was free from violence, intimidation, improper influence or corruption, whether it was transparent and whether it was administered in an impartial, neutral, efficient, accurate and accountable manner. For the court to do so, it will have to interrogate the evidence adduced and may order scrutiny and recount of the votes. By doing so, the court will be able to come to an informed conclusion as to whether there was compliance with the law..... Free and fair elections is both subjective and objective provision of the law which should be interpreted according to the facts of each case, the court has to analyze the entire election process and make up its mind as to whether the election was free and fair. It is subjective because any election has to comply with certain minimum requirements. It is objective in the sense that where there is non-compliance with the law the court has to evaluate the degree of non-compliance and make its own conclusion as to whether the non-compliance had an effect on the election process and the results.”

24. In the instant case the plaintiff testified that unregistered persons were allowed to vote. He cited one instance where a person who had only 6 shares had his shares inflated to 36 shares, and that this inflation of shares led to a fracas that nearly stopped the voting process. The plaintiff also stated that he was denied access to some voting centres. I however find that there was a missing link in the plaintiff’s testimony because he did not explain the magnitude of the alleged irregularities and the degree, if any, to which they affected the election process and their impact on the overall result of the election. It is instructive to note that the plaintiff and his witnesses did not inform the court of the total tally of the votes cast and the margin or difference between the votes cast in his favour and in favour the 1st defendant.

25. In the Nigerian case of **Olusola Adeyeye vs Simeon Oduoye (2010) LPELR – CA –**

1/EPT/NA/67/08, the court stated:

“It is not enough to merely catalogue instances of malpractices and breaches of the Electoral Act without adding up or tallying the number of votes involved or affected and their impact on the overall result of the election... The reason for tying such malpractices to votes affected thereby is because irregularities affecting minority votes would not upset the election of a candidate with majority of lawful votes. An election cannot be cancelled on the mere speculation of the probable effect of uncertain or unlawful votes procured through alleged malpractices.”

26. In the instant case, save for the fact that the 1st defendant was declared the winner in the impugned elections, the court was not told the actual outcome of the elections, the margin of the win and the votes cast in favour of each candidate. This court is therefore handicapped and completely unable to determine the overall impact of the alleged irregularities on the outcome of the election. It is my finding that in a case challenging the outcome of an election, it is not enough for the claimant to state that there were irregularities or non compliance with the law. Courts have held that non-compliance must also be shown to have had a net effect of substantially affecting the outcome of the said elections. As I have already stated hereinabove, the plaintiff merely testified on the instance of the alleged malpractices without stating the number of votes involved.

27. Maraga J. (as he then was) in **Joho vs Nyange (2008) 3 KLR I (EP) 500** had the following to say:

“There is no election which can be perfectly conducted. However, it is only when such errors, which constitute non-compliance with the law, materially affect the outcome of the results that the court will have no option other than to nullify the said results.”

28. The subject of irregularities in elections was also discussed at length in the case of **Dickson Mwenda Githinji vs Gatirau Peter Munya & 2 others [2014] eKLR** in which it was stated:

“Irregularities in elections refer to mistakes and serious administrative errors in the conduct of elections. In determining whether irregularity affects the results of an election, one has to look at the number by which irregular votes exceed the plurality of the winning candidate. The margin between the winning and losing candidate is a factor in determining whether the irregularity affected the results of the election. In deciding whether to annul an election, an important consideration is whether the number of impugned votes is sufficient to cast doubt on the true winner of the election or whether the irregularities are such as to call into question the integrity of the electoral process. If a court is satisfied that, because of irregularities, the winner is in doubt, it would be unreasonable for the court not to annul the election. Before annulling an election based on irregularity, the magic number test has to be considered. This means that the contested or irregular votes cast when set aside, must exceed the margin between the winner and the runner up.”

29. In the same case of **Dickson Mwenda Githinji vs Gatirau Peter Munya & 2 others (supra)** the expression, “Materially affecting the result of election” was interpreted as follows: ***“ the final aggregate figure arising from the tallying process will be affected arithmetically to the extent that the margin between the returned candidate and the runner up is not only narrowed but significantly eliminated to the point that a reasonable doubt is raised as to whether the returned candidate garnered votes that exceed the runner up. If after an arithmetical calculation has been made and the returned candidate still maintains a lead over his nearest rival, the results of the election has not been materially affected.”***

30. In the Tanzanian case of **Mbowe vs Eliufoo (1967) EA 240**, the Election court of Tanzania interpreted the meaning of affected results” as follows.

“affected results means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if, after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined.

But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any non-compliance of the rules.”

31. Going by the dictum in the above quoted authorities I am of the humble opinion that the failure by the plaintiff give evidence on total number of votes garnered by each candidate in the impugned elections was a fatal omission that dealt a fatal blow to the plaintiff's entire case. The court is, under the above circumstances, unable to determine, not only the number of the votes cast but also the number of the contested votes and if they are sufficient to cast doubt on the true winner of the election.

32. My findings on the issue of the total number of votes cast against the votes garnered by each candidate would have been sufficient to dispose of this matter, but I am still minded to address the other issues raised by the plaintiff with a view to making a determination thereof.

33. The plaintiff also stated that violence erupted at Nyasakia polling centre during the election but that the same stopped after a few minutes. There was however no evidence to support the allegations of violence or fracas apart from the plaintiffs own testimony that the same occurred at some point during the voting process. Courts have held that in order for a court to nullify an election on grounds of violence, it must be proved that the violence was widespread and it led to intimidation of voters. It has to be shown that the voters were prevented from exercising their right to elect the candidate of their choice because of intimidation, coercion or violence.

34. In the case of **Muliro vs Musonye & Another (2008) 2 KLR (EP)** the court stated:

“To the contrary, if any election is characterized and marred by violence of any kind to the extent of disenfranchising the voters this court shall consider whether or not the overall effect was such as to make that election a sham.”

35. In the case of **Joho vs Nyange & Another** (supra) it was stated:

“In the circumstances, I find that though there were incidents of violence, which as I have said involved supporters of both the petitioner and the 2nd respondent, the voting exercise was not affected. The skirmishes were outside the polling stations and there is no evidence that they affected the voters who were queuing in the polling stations.”

36. In the instant case, it was clear, from the plaintiff's testimony, that despite the few minutes of fracas, the voting process went on as scheduled. It is my finding that the voting exercise was not affected by the fracas as the plaintiff did not state that voters were prevented from casting their votes. It is also my finding that the alleged fracas did not affect the outcome of the said elections

37. Turning to the plaintiff's claim that that he was prevented from accessing some of the polling stations during the tallying of the votes. I find that this is also one of the claims that was not proved by the plaintiff who once again did not inform the court how his not accessing the polling stations affected the outcome of the elections considering that the plaintiff had testified that he had polling agents in each of those polling stations. Furthermore, the plaintiff did not clarify to the court, exactly who stopped him from accessing the polling centres. There was no proof that the plaintiff was denied access to some vote tallying centres, no proof of fraudulent tally or returns that cast votes exceeded the registered voters. Mere allegation without proof, to the required standards remains mere speculation which the court cannot accept the truth. The plaintiff did not prove that he reported the alleged irregularities to the 2nd defendant or any other authority for their necessary action.

38. The plaintiff also raised the issue of the defendants' failure to comply with the court order issued on 7th January 2015 restraining the swearing in of the 1st defendant as a director of the 2nd defendant's company pending the hearing of the application for injunction inter partes. On this point of disobedience of a lawful court order, it is my finding that the plaintiff ought to have pursued this issue by way of contempt of court proceedings. The plaintiff did not institute any contempt of court proceedings against

the defendants following their alleged disobedience of a lawful court order. The matter before me is not contempt of court proceedings and I will therefore not give any orders on the defendants' alleged contempt of court.

39. In a nutshell, I find that there was no evidence to show that the election results were compromised or that the voters did not express their will in the ballot papers as a result of which the election was compromised. I further find that the alleged irregularities highlighted by the plaintiff were not proved to have been so massive that they could lead to the nullification of the election results. The plaintiff did not demonstrate, to the satisfaction of this court, that the 2nd and 3rd defendants failed in their obligation to ensure that the elections were by and large conducted in a free and fair manner. I am not satisfied that the plaintiff proved his case to the required standards in a case challenging the outcome of an election. Consequently, the order that commends itself to me is the order to dismiss the plaintiff's case with no orders as to costs considering the reluctance by the defendants to attend court for the hearing or to prosecute the applications that they had filed in this case.

40. It is so ordered.

Dated, signed and delivered at Kisii this 17th day of November, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

- N/A Oguttu Mboya for the plaintiff
- Wafula for the Defendants
- Omwoyo: court clerk