



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
HIGH COURT CIVIL SUIT NO. 7 OF 2011

BETWEEN

JOHN NYAKUNDI 1ST PLAINTIFF
WILFRED NYANGAU.....2ND PLAINTIFF
GEORGE MOKUA.....3RD PLAINTIFF
DISMAS KEMOSI.....4TH PLAINTIFF
LAWRENCE ABERI.....5TH PLAINTIFF

-VERSUS-

TIMOTHY MOKUA NYARANG'O 1ST DEFENDANT
OGEMBO TEA FACTORY COMPANY LTD.....2ND DEFENDANT

JUDGMENT

1. By a plaint dated 24/11/2011 the plaintiff herein sued the defendants and pleaded that by a notice in print media dated 13/10/2010 the 2nd defendant through its management Agency M/s. Kenya Tea Development Agency Ltd convened an Annual General Meeting to be held on 2nd February 2011 which notice it was pleaded to have been issued in contravention of the express provisions of Articles 62 and 136 of the 2nd defendant Articles of Association.

2. It was further pleaded that the 2nd defendant had breached its own notice by holding election under agenda 5(a) and (b) of the same notice contrary to provisions of the company's Article of Association in particular Articles 64, 75 and 90 with particulars of the alleged of breach pleaded there in and the plaintiffs therefore sought judgment for :-

(a) A declaration that the notice of the 16th Annual General Meeting of the 2nd defendant scheduled for the 5th February 2011 issued through the print media dated 13th December 2010 is contrary to the express provisions of the Articles of Association of the 2nd defendant and thus null and void.

(b) A declaration that the election held on 11th January 2011 by the 2nd defendant for purposes of

electing a Director to represent Sengera electoral area in the 2nd defendants Board of Directors breached the express provisions of the 2nd defendant. Memorandum and Articles of Association and therefore null and void.

(c) A declaration that the election results for the year 2011 published in the print media by the company secretary of the 2nd defendant in respect of Ogembo Tea Factory Company Ltd declaring Timothy Mokuu Nyarango as elected to represent Sengera Electoral Area as Director of the 2nd defendant is in contravention of the Company's Articles of Association and thus null and void.

(d) An order directing the 2nd defendant to call for its 26th Annual General Meeting in accordance with its Memorandum and Articles of Association.

(e) Cost and interest.

3. This plaint was accompanied with a Notice of Motion under certificate of urgency in which the plaintiffs sought an order of injunction against the defendants from admitting the 1st defendant as a Director representing Sengera Area and holding the scheduled 26th Annual General Meeting of the Ogembo Tea Factory Ltd then scheduled on 5th day of February 2011 pending the hearing and determination of the suit.

4. An order of injunction was subsequently granted pending the hearing and determination of the suit and on 21st May 2013 Justice R. Lagat-Korir ordered that this suit be listed for hearing on priority basis.

5. On 10/3/2015 this matter proceeded for hearing before me wherein the plaintiff called one witness Mr. John Onkundi Kiruchi who testified on oath and stated that he is a tea farmer at Ogembo Tea Factory Buying Center No. 42 and a shareholder of Ogembo Tea Factory Share no. 10551/99.

6. It was the plaintiffs evidence that Timothy Mokuu Nyarango the 1st defendant was the Chairman of the Board of Directors of the 2nd defendant in 2011 and that when his time expired the same wanted to seek re-election and to influence the outcome of the said election the polling stations were placed next to his home area and that the pw1 was required to vote at a polling station which was five (5) KM away.

7. At the strongholds of the opponents of the 1st defendant the number of shares of the shareholders were reduced and that no proper notices of the AGM were given. It was his evidence that despite the court order the 1st defendant continued to perform his duties until July 2013 when he retired to contest the position of Member of County Assembly.

8. I must point out that at the time of the hearing, there was no defence filed by the defendants and neither has the plaintiff applied for interlocutory judgment. There was also no pretrial directions given in this matter and therefore the first issue for determination is whether the suit was ready for trial.

9. Order 5 rule 1 of the Civil Procedure Rules provides that when a suit has been filed a summons shall issue to the defendant ordering him to appear since the time specified therein. In this suit there is no record that summons were ever issued and or served up to the defendant as is in law required. It was upon the plaintiffs to issue summons and serve the same upon the defendants and from a perusal of the records herein as at the time when the suit was fixed for hearing no summons to enter appearance had been issued and or served upon the defendants. The defendant therefore could not had been expected to file a defence under order 7 rule 1 since they have not been served with summons as is required.

10. It is also clear that the plaintiffs had not complied with the provisions of Order 11 and neither was a case conference order issued as required under Order 11 rule 4.

11. Whereas by an order issued on 04/10/2011 by Justice Sitati the court had ordered that the suit be heard on 27/10/2011, on 13/10/2012 she further issued an order for directions on 14/02/2012 and no

direction were ever issued as at the time when this suit was fixed for hearing before me.

12. It therefore follows that at the time when the plaintiff fixed the matter down for hearing, the suit was not ready for hearing as the plaintiffs had not complied with the mandatory provisions of the law.

13. The next issue is whether the court should disregard the procedure set down by the civil procedure rules before a matter is fixed down for hearing for being mere technicality which the constitution under Article 159 (2) requires to be disregarded. Failure by the plaintiffs to follow the rules set down for effective hearing of matters to my mind is not mere technicality. Whereas the objective of Article 159(2) is to dispense justice to parties, the same justice must be dispensed in a manner that is not prejudicial to the parties to a suit.

14. Had the plaintiffs initiated pretrial directions it would have been clear that the same that if the defendant had not been served with summons to enter appearance and neither had any been issued and further the defendant had not entered appearance. It is therefore clear that pleading had not closed and therefore the suit was prematurely fixed for hearing.

15. In the interests of justice and taking into account the fact that the matter proceeded ex parte, I will not dismiss the suit herein but order the plaintiff to issue and serve summons upon the defendant within the next 10 days from the date herein with no order as to costs.

Delivered, signed and dated on this 28th day of May, 2015.

J. WAKIAGA

JUDGE.

In the presence of:

Mr. Kiburu for Mr. Otieno advocate for the plaintiffs

Mr. Soile for Mr. Nyathuru advocate for the defendants