



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL CASE NO. 4 OF 2014

PETER MWOMBE MWISUKHA

GERALD HANDA SHITSILILI

BARASA SHIRO CAESAR

SAMWEL NANDI WOMONDO

DAVID LUMONJE LUSNAKEPLAINTIFFS/ APPLICANTS

VERSUS

BUTALI SUGAR MILLS LTD.1ST DEFENDANT/ RESPONDENT

BUTALI SUGAR CANE OUTGROWERS

CO. LTD. 2ND DEFENDANT/RESPONDENT

RULING

Before me is a Notice of Motion dated 10th March 2014 filed by the plaintiffs under Order 40 rule 1 and 2 of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act (Cap. 21). The prayers are as follows -

1. That service of the application be dispensed with and the application be certified urgent.
2. That the Honourable court be pleased to issue temporary injunction against the 2nd defendant, his agents, directors, employees and all persons acting under it from convening, conducting, attending, submitting certain or all of the resolutions including membership issues proposed in the Notice of the Annual General meeting, pending hearing of this application inter-parte and thereafter pending determination of this suit.
3. That the O.C.S. Malava Police Station does ensure compliance of this order.
4. That costs of this application be provided for.

The application has grounds on the face of the Notice of Motion. It was filed with a supporting affidavit sworn by Zebedee Kutsishi, the 4th plaintiff, on 10th March, 2014. It was deponed in the said affidavit *inter-alia* that the plaintiffs had brought the suit seeking orders of permanent injunction against levying or deducting of 1% from cane delivered to the 1st defendant and remitting the same to the 2nd defendant. That the plaintiffs were neither shareholders nor members of the 2nd defendant. That the plaintiffs therefore were seeking orders that the 2nd defendant be restrained from convening an Annual General Meeting to deliberate on the issue of membership and to stop the said illegal deductions against non

members. A copy of a Notice of the intended Annual General Meeting was annexed to the affidavit. The said Annual General Meeting (AGM) was slated to be held on 15th March 2014 at 10.00 a.m. at Tande Secondary School hall, Kakamega-Webuye road.

The application is opposed. A replying affidavit sworn by Nyongesa Kisiangani the Chairman of the Board of Directors of the 2nd defendant was filed. It was deponed inter-alia that the notice for holding the AGM was grounded on the Articles and Memorandum of Association of the company. That the 2nd defendant had not instructed the 1st defendant to make deductions of 1% levy on the plaintiff's sugar cane proceeds.

The 2ND defendant also through their counsel, Nandwa & Company advocates filed grounds of opposition to the application. The grounds were that the plaintiffs lacked capacity or *locus standi* to bring this application and obtain the orders sought. Secondly, that the application was fatally defective. Thirdly, that the application amounted to an abuse of court process.

The 1st defendant opposed the application through an affidavit sworn by Morris Lukano on 4th March 2014. He swore that he was its Agriculture Services Manager. He deponed that the 1st defendant had entered into a memorandum of understanding with the 2nd defendant on 16th June 2010 in which one of the resolutions was the levying of 1% from sugarcane deliveries. That since its inception, the 1st defendant had been supporting the 2nd defendant. That recently, the 1st defendant had requested the 2nd defendant to provide them with the list of shareholders or members, which had not been done. That the 1st defendant had been wrongly dragged into these matters in which the dispute was between the farmers and the 2nd defendant. That the issues should be resolved without involving the 1st defendant.

At the hearing of the application, Mr. Ondieki appeared for the plaintiffs. Mr. Nandwa appeared for the 2nd defendant while Mr. Karanja appeared for the 1st defendant. Mr. Karanja submitted that the matter was principally between the plaintiffs and the 2nd defendant. Mr. Ondieki for the plaintiffs and Mr. Nandwa for the 2nd defendant made extensive oral submissions, which I have considered.

This is an application for interlocutory injunctive orders. The parameters to be considered by the court in such an application were clearly stated in the case of *Giella -vs- Cassman Brown & Sons Ltd. [1973] EA 358*. An applicant has to firstly show a prima facie case with a probability of success. Secondly, an injunction will not normally be issued unless the applicant will otherwise suffer irreparable loss or damage which is not capable of compensation in the form of damages if the orders sought are not granted. Thirdly, if the court is in doubt, it will decide the matter or application on the balance of convenience.

The applicants have brought a suit herein. They claim to be sugarcane growers who have been using the services of the two defendants either directly or indirectly in their business of sugarcane growing and selling. This has not been denied. What is for denial is that they have *locus standi* to bring the proceedings as they are not members or shareholders of the 2nd and the 1st defendants. Whether they are members or not in my view, can only be determined when formal evidence is tendered. Whether as non-members they have an interest, or *locus standi* on the levying the 1% charge on their sugarcane deliveries, will also be determined when evidence on both sides is tendered and weighed by the court. A prima facie case is not one that must succeed. It is a case that may or may not succeed. Considering the facts and evidence placed before me at this preliminary stage, I am of the view that the plaintiffs have a prima facie case with probability of success.

Will the plaintiffs suffer irreparable loss or damage, if the orders of injunction sought are not granted? From my understanding of the application, the plaintiffs seek to stop the 2nd defendant from holding an AGM. They have annexed the notice which lists the agenda for the meeting. In my view, only those items to be discussed at the AGM that cover imposition of levies against them will affect the plaintiffs. If an injunction is not granted on those items, in my view, the plaintiffs will suffer irreparable loss as it cannot be determined readily what their financial loss will be and what consequence those decisions will have on their sugarcane growing and selling activities. The fact that those items are not discussed, does not mean that the 2nd defendant cannot hold its AGM. Since the plaintiffs have satisfied the two primary

requirements for the grant of an interlocutory injunction, the application will succeed but to the extent of those items which seek to impose 1% levy on their sugarcane produce.

The balance of convenience is also in favour of the plaintiffs. This is because it is their sugarcane produce that is sought to be taxed for the benefit of either the 1st or 2nd defendants or both. Therefore, in my view, legality of that issue needs to be addressed first before a decision is finally made, on whether the 2nd defendant has powers to decide on imposition of the levies.

To conclude therefore, I allow the application. I grant an injunction only with respect to restraining the 2nd respondent from discussing any items of agenda that will have effect of imposing a levy on the sugarcane produce of the plaintiffs until determination of this case. However, the 2nd defendants can hold an AGM (annual general meeting) if they so wish on any other lawful agenda. Costs of the application will be in the cause.

Dated and delivered at Kakamega this 19th day of June, 2014

George Dulu

J U D G E