



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO 1 OF 2014
SAMUEL G. KABIRU.....PLAINTIFF
VERSUS
1. KENYA TEA DEVELOPMENT AGENCY LIMITED
2. KIMUNYE TEA FACTORY CO. LIMITED.....DEFENDANTS

R U L I N G

1. The Plaintiff has applied by **chamber summons dated 6th January 2014** under **Order 40, rules 1, 2, 2A, and 3** of the **Civil Procedure Rules, 2010** (the **Rules**) seeking temporary injunction to restrain the Defendants from proceeding with elections of a director of the 2nd Defendant (for the Kianjogu Electoral Area) pending hearing and determination of the suit. In the alternative, and if the court permits the elections to proceed, he seeks an order for his reinstatement to the ballot and to be allowed to participate in the election process, pending hearing and determination of the suit.

2. The grounds for the application appearing on the face thereof include –

(i) That the Plaintiff was on 31st December 2013 illegally and unlawfully barred by the 1st Defendant from participating as a candidate for the election notwithstanding that he had complied with all requirements as per the Defendants’ memoranda and articles of association and their electoral regulations.

(ii) That no board resolutions to bar the Plaintiff were availed to him.

(iii) That the “alleged” power of attorney by a deceased shareholder which formed the basis for his disqualification from participation in the election was not part of the documents presented by the Plaintiff and must have been exchanged or planted by the Defendants

(iv) That in any event the alleged forged power of attorney should have been treated only as a spoilt vote and not an electoral offence sufficient to bar the Plaintiff from participating in the election.

There is a supporting affidavit sworn by the Plaintiff. It sets out the Plaintiff’s case in the application (and indeed in the suit). Various documents are annexed to the supporting affidavit.

3. The Defendants opposed the application by **grounds of opposition dated 13th January 2014** and **replying affidavit sworn on 21st January 2014** sworn by one **John Kennedy Omanga**, the Company Secretary of the 1st Defendant. Various documents are annexed to the replying affidavit. Grounds of opposition emerging from both documents include -

(i) That as Elections Coordinator he issued a notice and election manual to candidates in the election which included a requirement that every candidate in the election had to be of good standing in society and a holder of founder shares; that according to the manual a shareholder unable to attend the election could do so by proxy through a power of attorney donated to another shareholder; and that the list of proxies was then to be submitted to the factory manager for onward transmission to the 1st Defendant's headquarters for scrutiny and verification.

(iii) That out of the 64 proxies submitted by the Plaintiff one of them, **Paul Kabindu Gitonyi - entry 166**, turned out to be long deceased. This was construed as a bid by the Plaintiff to fraudulently obtain an unfair advantage in the electoral process.

(iv) That the Plaintiff was then disqualified from the electoral exercise as he had engaged in electoral malpractice by forging a special power of attorney, and he was so informed.

(v) That later a letter was received from the Plaintiff's advocates urging him to treat the special power of attorney as a spoilt vote, which he declined to do.

4. On 27th January 2014 the Plaintiff swore a **supplementary affidavit**. By it he in effect joined issue with the Defendants upon the replying affidavit. The Defendants thereafter filed a **further affidavit** on 3rd February 2014, sworn by John Kennedy Omanga essentially reiterating the facts in the replying affidavit.

5. The application was canvassed by way of written submissions. The Plaintiff's submissions were filed on 27th February 2014 while those of the Defendants were filed on 10th March 2014. One case was cited on behalf of the Defendants. I have considered the submissions as well as the case cited.

6. The main reliefs sought by the Plaintiff in his plaint are -

(a) his reinstatement as a candidate in the nomination and election of directors of the 2nd Defendant;

(b) a permanent injunction to restrain the Defendants from conducting the nomination and election of director of the 2nd Defendant for Kianjogu electoral area without the name of the Plaintiff as a candidate in the election; and

(c) general and exemplary damages for the inconvenience caused to him.

7. It is thus apparent that the orders sought in the application are the same as the reliefs sought in the plaint. The court will be reluctant, except in clear and obvious cases, to grant orders at interlocutory stage whose effect will be to determine the suit upon untested affidavit evidence. Let us see if this is such clear and obvious case.

8. The main issue in this suit is whether or not the Plaintiff forged a power of attorney allegedly issued by a person who was already deceased in order to fraudulently gain an advantage in the election, and whether he was thereby lawfully disqualified as a candidate. The corollary to the issue is whether in fact that power of attorney was planted by the Defendants amongst the Plaintiff's papers in order unlawfully to disqualify him from the election. All those are weighty issues that cannot be determined at this interlocutory stage upon untested affidavit evidence. They are issues that must be canvassed and determined at the trial of the action upon tested evidence.

9. The question that I must now determine is whether the shareholders of Kianjogu electoral area of the 2nd Defendant should be denied presentation in the 2nd Defendant pending hearing and determination of the suit. I think not. The wider interest of the shareholders of Kianjogu electoral area to have representation in their tea factory (2nd Defendant) at this interlocutory stage far outweighs the private interest of the Plaintiff to participate as a candidate in elections for director of that electoral area. Whatever loss the Plaintiff might suffer by not participating in the election as a candidate this time around may, in my view, be sufficiently compensated by an award of damages if he eventually succeeds in his suit. The democratic and constitutional rights of a large body of people for representation will not be easily defeated by the private democratic and constitutional rights of an individual to participate in an election for such representation.

10. In the event I must refuse the application by chamber summons dated 6th of January 2014. It is dismissed with costs to the Defendants. The interim injunction now in place is hereby vacated. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF AUGUST 2014

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 13TH DAY OF AUGUST 2014