



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 1 OF 2013

WILLIAM KOPIAPPELLANT

V E R S U S

GEORGE MASONI OCHENDARESPONDENT

J U D G M E N T

This is an appeal from a ruling of the Sugar Arbitration Tribunal delivered on the 21.12.2012. The grounds of appeal are that the petition by the respondent before the Tribunal was filed out of time without leave, the petition was bad in law as relevant parties were not enjoined, the respondent was lawfully disqualified from contesting the position of director as he provided fake academic certificates, failure to enjoin the concerned company was fatal to the application and that the petition was not proved before the tribunal. Parties agreed to determine the appeal by way of written submissions but only the appellant complied with that consent.

The appellant contends that he was a candidate for the position of director of Butali Sugarcane Out-growers Limited. He was a candidate for the Silungai/East Chekalini Zone. He was declared the winner and the respondent was barred by the vetting board. The respondent filed Civil Suit No.127 of 2012 before the Webuye Principal Magistrate's Court but the suit was later on withdrawn by consent. The respondent later filed a petition before the Sugar Arbitration Tribunal and the tribunal nullified the appellant's election. The submissions by the appellant mainly expound on the above grounds of appeal.

The record of appeal shows that elections for directorship of Butali Sugarcane Out-growers Company Limited were to be held on the 14.7.2012. The appellant was the chairman of the company and he tendered his resignation so as to enable him to participate in the elections. A notice for the election of directors was issued on the 15.6.2012 for eight zones. The pleadings show that there was a vetting board which barred the respondent from the elections on the allegation that his Form Four certificate was fake. The respondent's petition before the tribunal was based on several grounds including contentions that the vetting board was biased and favoured the appellant, the Articles of Association of the company required that the company secretary was to be the returning officer but that never happened but instead one **MESHACK SHATIMBA** who was a founding director became the returning officer. The elections were premature and were full of irregularities. The elections were not free and fair and the appellant did not resign from the board before the elections were conducted.

The respondent's prayers before the tribunal was for the nullification of the elections and a fresh poll be conducted. He also sought to have candidates who were involved in electoral malpractices be barred from contesting subsequent elections. He requested for all shareholders of the company to be given share certificates and a proper register of shareholders be established.

The tribunal found that the respondent was unlawfully barred from participating in the elections as the document alleging that his form four certificate was fake was not before the vetting board and was only done after the elections. The tribunal found that Article 87 of the Company's Articles of Association provided that a candidate for the position of director was to be a form four leaver and that did not amount to a holder of Kenya Certificate of Secondary Education (KCSE) certificate holder. The tribunal also found that there was no evidence that the respondent did not attend O level education. The tribunal dismissed the appellant's contentions that the petition was filed out of time as the tribunal is not operating under the Elections Act but is guided by the Sugar Act 2001. There is no requirement that the petition had to be filed within 30 days. The appellant attended a board meeting on 9.7.2012 yet he claimed to have resigned on 14.6.2012. The tribunal also faulted the elections as they were not conducted by the Company Secretary as required by Article 89 of the Company's Articles of Association.

I have gone through the record of appeal and the entire pleadings and do find that the respondent offered himself as a candidate of a director for the Silungai/East Chekalini Zone. The respondent was barred as the vetting board found him not to be compliant. The elections were stated for the 14.7.2012 and it appears that the appellant was voted in unopposed. A letter from the Kenya National Examination Council dated 5.10.2012 indicate that there was no such school like Liberty Secondary School which had issued a Form Four certificate to the respondent. The Code number and Index number for the school was not existing. The letter indicates that the respondent did not register or sit for the KCSE exam in 1980 and concluded that the certificates provided by the respondent were a forgery.

It is true as per the decision of the tribunal that the vetting board did not have the letter from the Kenya Examination Council by the time the vetting was being conducted. However, it is a fact that any candidate for the directorship position is expected to be a Form Four leaver. Article 87 of the Articles of Association provided that a person to be elected as a director of the company must be:

1. A sugarcane farmer
2. Aged at least 25 years
3. A form four leaver
4. Can read and write English or Swahili language.

I do find that each of the above qualifications cannot stand in isolation. A candidate was expected to have all the above qualifications. To interpret the requirement of a form four leaver as not necessarily requiring the holder to have obtained a KCSE certificate is to narrow the interpretation. There is no need for somebody to provide a Form Four leaving certificate yet he did not sit for the Form Four exams. Such a leaving certificate cannot qualify the holder to be a director as required by the Articles of Association. Although it was found that the respondent's qualifications were fake after the elections had been conducted, it is clear to me that the respondent did not have the qualifications required of a candidate for the position of a director. The pleadings show that the respondent provided a form four certificate from Liberty Secondary School whereby he obtained Division II. He also provided a leaving certificate from the same school indicating that he was a hardworking boy and showed leadership ability. The truth of the matter is that there was no such school as Liberty Secondary School at Webuye. The vetting board knew the respondent and it is clear that they were aware that the respondent was not a form four leaver. The tribunal erred by concluding that the respondent was unlawfully barred from participating in the elections. Even if the confirmation of the respondent's qualification came late the fact remains that the respondent was not qualified for the position of director.

The tribunal held that the non-joinder of the company and the returning officer was not fatal to the petition. The petition was just against the appellant yet it was an election petition. I do find that the non-joinder of the concerned company as well as the returning officer was fatal to the petition. It is the election that was being contested and therefore the person who conducted it ought to have been a party to the petition. The appellant herein did not conduct the election and was only a contestant. The tribunal did not nullify the election of the other seven directors as there were seven zones that participated in the elections. The tribunal only nullified the election of the appellant. The meaning of such a ruling is that the election of the other directors were properly conducted and that the returning officer was duly authorized to conduct the elections. I do find that the tribunal's holding is bad in law. If it felt that the returning

officer was not authorized to conduct the elections then it ought to have nullified the election of all the directors. I do find that the appellant was discriminated upon by the tribunal He was a mere candidate and there is proof that he resigned on the 14.6.2012.The respondent was lawfully barred from participating in the elections as he does not qualify to be a candidate.

In the end, I do find that the appeal is merited and the same is hereby allowed. The appellant is hereby declared as the duly elected director for the Silungai/East Chekalini Zone until when the next elections shall become due. The decision of the Sugar Arbitration Tribunal is hereby set aside. Each party shall meet his own costs.

Delivered, dated at Kakamega this 18th day of September 2014

SAID J. CHITEMBWE

J U D G E