



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL CASE NO. 8 OF 2012**

**CHARLES MUTHUNGU WAIRAGU.....PLAINTIFF/APPLICANT**

**VERSUS**

**GEOFFREY WAMBUGU KAGUNDU.....1<sup>st</sup> DEFENDANT**

**GATHUTHI TEA FACTORY CO. LTD.....2<sup>ND</sup> DEFENDANT**

**RULING**

**Charles Muthungu Wairagu**, the plaintiff/applicant herein, took out the Motion dated 17<sup>th</sup> January 2012 in which he sought for the following orders:

- (1) That this application be certified as urgent and be heard ex-parte in the first instance due to its urgency.**
- (2) The Honourable court be pleased to grant a temporary injunction barring the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/respondents whether by themselves or through their servants/agents or any other person acting on behalf of the 2<sup>nd</sup> Defendant/respondent from 19<sup>th</sup> January, 2012, jointly or singly giving effect of the paragraph 5 (a) of the Notice of Annual General Meeting as contained in the Gathuthi Tea Factory Company Limited Annual Report and Financial Statements for the Year Ended 30<sup>th</sup> June, 2011, to the extent that it seeks to approve the name of Geoffrey Wambugu Kagundu as the bonafide director of Thegenge B Electoral area, pending the inter-partes hearing of this application.**
- (3) The Honourable court be pleased to grant a temporary injunction barring the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/respondents whether by themselves or through their servants/agents or any other person acting on behalf of the 2<sup>nd</sup> Defendant/respondent from 19<sup>th</sup> January, 2012, jointly or singly giving effect of the paragraph 5 (a) of the Notice of Annual General Meeting as contained in the Gathuthi Tea Factory Company Limited Annual Report and financial Statements for the Year Ended 30<sup>th</sup> June, 2011, to the extent that it seeks to approve the name of Geoffrey Wambugu Kagundu as the bonafide director of Thegenge B Electoral area pending the hearing and determination of this suit.**
- (4) Cost of this application be provided for.**

When the Motion came up for hearing *ex parte*, Mr. Kimunya, learned advocate for the Plaintiff, sought to be given prayers 1 and 2 pending the hearing *inter partes* of the Motion.

It is the submission of Mr. Kimunya that it is necessary to grant prayer 2 to restrain Gathuthi Tea Factory Co. Ltd., the 2<sup>nd</sup> Defendant herein, from holding its Annual General Meeting scheduled for 19<sup>th</sup> January 2012. The aim is to stop the 2<sup>nd</sup> Defendant from approving the re-election of Geoffrey Wambugu Kagundu, the 1<sup>st</sup> Defendant, as a director of Thegenge B. Electoral area while the Plaintiff desires to have the election results nullified on the basis that they were marred by fraud and irregularities. It is argued that unless the order is granted, the Plaintiff's right to challenge the process will be defeated hence he will suffer irreparably.

I have carefully considered the material placed before this Court plus the oral submissions tendered by Mr. Kimunya, learned counsel for the Plaintiff. There is no doubt in my mind that the Motion is extremely urgent hence the same is certified as such. The issue which this Court must grapple with at this *ex parte* stage is whether or not it should grant a temporary order of injunction pending the *inter partes* hearing of the Motion. The principles for granting orders of injunction are well settled. (See **Giella =Vs= Cassman Brown [1973] E.A. 358**.)

First, an applicant must show a *prima facie* case with a probability of success. Secondly, an applicant must show that if the order is denied he would suffer irreparable loss. Thirdly, if the Court is in doubt it would decide the application on a balance of convenience. Let me apply the aforesaid principles to this Motion. The first question is whether the applicant has shown that he has a *prima facie* case with a probability of success? From the material placed before me, the Applicant avers that he will be able to show at the *inter partes* stage that the 1<sup>st</sup> Defendant's election was marred by irregularities which gave him an advantage over the Plaintiff. It is alleged that some bonafide growers were denied a chance to vote and that some voters voted by proxy using the cards of dead tea growers. In my view the aforesaid allegation is a very serious election irregularity which may lead to the nullification of the 1<sup>st</sup> Defendant's election. In sum, I am convinced the Applicant has shown a *prima facie* case with a probability of success hence the first principle is satisfied.

The second principle which must be satisfied is whether the Plaintiff has established that he would suffer irreparable loss if the *ex parte* order is denied. The Plaintiff has stated that his case will be rendered useless in that he will have lost the chance to challenge the 1<sup>st</sup> Defendant's election. The Plaintiff's intention is to challenge the 1<sup>st</sup> Defendant's election as a director of Thegenge B Electoral area so that he can offer himself for election to take his chance. In essence the Plaintiff is saying that he will have lost a chance of being elected as a director. Can that loss be categorized an irreparable loss? In my view I do not think the anticipated damage can be regarded as irreparable. The same is quantifiable in monetary terms. In the case of **Nicholas Mahihu =Vs= Ndima Tea Factory Ltd. & another Civil Application No. 101 of 2009 at page 3, (unreported)** the Court of Appeal held *inter alia*:

***“On the second consideration on whether the intended appeal is likely to be rendered nugatory, we find that even without speculating as when the appeal might be fully determined, or the hearing in the superior court finalized, we find that the intended appeal would not be rendered nugatory as the applicant can still be compensated in damages. Thus the loss if any, could still be quantified in terms of the lost earnings as a director of the 1<sup>st</sup> Respondent company. Our finding on this is that the applicant has not satisfied the second principle, as to trigger the exercise of our jurisdiction.”***

It is obvious that the Plaintiff's suit cannot be rendered useless. The loss the Plaintiff may suffer as a result of the denial of the order for injunction can be calculated in monetary terms. He has therefore failed to establish the second principle. Since I am not in doubt, I do not intend to belabour myself in considering the principle of convenience. In the end I am unable to grant the Applicant the order sought *ex parte*. The same is denied but may be sought during the *inter partes* hearing of the Motion. The Motion to be fixed for *inter partes* hearing by the registry on priority basis.

***Dated and delivered at Nyeri this 18<sup>th</sup> day of January 2012.***

**J. K. SERGON**  
**JUDGE**

In open court in the presence of Mr. Kimunya for the Plaintiff/Applicant.