



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

Civil Suit 102 of 2009

ROBERT K. BETT.....1ST APPLICANT

DAVID KIMUTAI BETT.....2ND APPLICANT

VERSUS

UNIT MANAGER MOGOGOSIEK TEA

FACTORY LTD.....1ST RESPONDENT

COMPANY SECRETARY, KENYA TEA

DEVELOPMENT AGENCIES LTD.....2ND RESPONDENT

MOGOGOSIEK TEA FACTORY

COMPANY LTD.....3RD RESPONDENT

RULING

The plaintiffs' claim in their plaint that on 30th November 2009 Mogogosiek Tea Factory Company Ltd, (the Company) the 3rd defendant called for applications from suitable tea growers in Boito and Koiwa Electoral areas for nomination and later election as directors of the Company. Despite meeting all the requisite conditions for qualification and submitting their applications, they aver that the Unit Manager of the Company omitted their names from the list of the pre-qualified candidates without assigning therefor any or any reasonable excuse. They have therefore filed this suit and sought an injunction to restrain the defendants from going ahead with the nomination and elections until the pre-qualification exercise is carried out properly.

Contemporaneous with the filing of the suit they have applied under **Order 39 Rules 2, 3 and 5** of the **Civil Procedure Rules** and **Sections 3A and 63(e)** of the **Civil Procedure Act** for a temporary injunction to restrain the defendants by themselves, their agents and/or servants or any other persons acting on their behalf from proceeding with the nomination of the directors tomorrow, the 12th January 2010, until this suit is heard and determined.

The application is supported by the affidavit of the 1st plaintiff in which he has expounded on the above grievances and annexed copies of documents in support thereof.

The application is strongly opposed. In his replying affidavit Mr. Christopher Maina Kirui, the 1st defendant, has besides attacking the propriety of the application and the supporting affidavit, stated that the plaintiffs did not annex to their applications documents in support to prove that they are qualified for nomination.

Citing the High Court decision in **Atieno Vs Omoro [1985] KLR 677**, Mr. Nyachiro for the defendants submitted that the suit against the 3rd defendant is incompetent because the amendment joining it was made under **Order 6A Rule 1** of the **Civil Procedure Rules** instead of seeking leave of the court to join it under **Order 1 Rule 10** of the **Civil Procedure Rules**. On the merits of the application itself he submitted that the plaintiffs were required by the circular letter entitled “Nomination of Directors Election Manual Candidates Copy” annexed to Mr. Kirui’s affidavit and marked as “**CMK2**” to annex to their applications copies of their academic qualifications and documents to prove that they are holders of founder shares.

In his rejoinder Mr. Onsongo for the plaintiffs, while conceding that the plaintiffs did not annex to their applications those documents, submitted that they are nonetheless holders of founder shares and that on 14th December 2009, at the request of the said Unit Manager, they presented the originals and copies of their academic qualification certificates which he scrutinized and returned to them.

I have considered these rival submissions and read the affidavits in support of and in opposition to the application as well as the annexures thereto. On the issue of the competency of the suit, I disagree with Mr. Nyachiro that the plaintiffs required to join the 3rd defendant as a party to this suit with leave of court under **Order 1 Rule 10**. As Mr. Onsongo submitted that provision deals with substitution of parties where wrong parties have been sued or where others require to be joined. I understand that provision to deal with a situation where the pleadings have been closed as was the position in the said case of **Atieno Vs Omoro** cited by Mr. Nyachiro and a party seeks substitution or an addition of other parties and not where a party is joined by an amendment under **Order 6A Rule 1** before the close of the pleadings. In the circumstances I overrule Mr. Nyachiro’s preliminary point on the competence of the suit.

On the merits of the application itself I think Mr. Nyachiro is on firm ground. The circular letter entitled “Nomination of Directors Election Manual Candidates Copy” annexed to Mr. Kirui’s affidavit and marked as “**CMK2**” stated that “Where the conditions in the Articles refer to ‘O’ Level or other Professional qualifications, the original certificate must be seen and a copy retained.” That clearly implies that candidates had to annex to their applications copies of their academic certificates. There is nothing in the plaintiffs’ applications to prove that they annexed thereto copies of their academic qualifications. I cannot therefore accept Mr. Onsongo’s statement from the bar, which is not in any of the plaintiffs’ pleadings, that upon receipt of the plaintiffs’ applications the Unit Manager rang them and they took to him the originals of their academic qualification certificates for verification. In the circumstances, I find that the Unit Manager of the 3rd defendant was right in rejecting the plaintiffs’ applications as not meeting the set out requirements. Consequently I dismiss this application with costs.

DATED and delivered at Nakuru this 11th day of January 2010.

D. K. MARAGA
JUDGE.