



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

Civil Suit 1292 of 2004

GIDEON ASIRIGWA MBAGAYAPLAINTIFF

VERSUS

TEA BOARD OF KENYA.....DEFENDANT

J U D G M E N T

The plaintiff in this suit is dated 23rd November, 2004 and was filed on 25th November, 2004.

The plaintiff pleads that he had, by virtue of the Tea Act (Cap. 343), been appointed to serve for a period of three years as a Director of the Tea Board of Kenya. His appointment had the authority of the Minister for Agriculture, and was conveyed in a letter by the Permanent Secretary of that Ministry, dated 21st August, 2003. The appointment, which was to take effect from 25th July, 2003 was duly published in the Kenya Gazette, as required by s. 3A (2) of the said Act, on 25th July, 2003.

Following the said appointment, the plaintiff duly attended meetings of the Tea Board of Kenya as a director, and continued doing so until 23rd April, 2004. But on that date, the Managing Director of the Board advised the plaintiff verbally that he should no longer attend Board meetings on the basis that "he was not qualified to be a member of the Tea Board of Kenya". The said Managing Director then proceeded to exclude and prevent the plaintiff from attending Board meetings.

It was the plaintiff's case that his exclusion as aforesaid from discharging his functions as a member of the Tea Board of Kenya, was illegal and unlawful. This assertion is founded on the following grounds:

- (i) Only the Minister for Agriculture who had appointed the plaintiff as a director of the Board and duly gazetted his name, had the competence to revoke or terminate the appointment.*
- (ii) The Managing Director of the Tea Board of Kenya or the Board of Directors, had no powers in law to terminate, revoke or suspend the plaintiff as a Board member.*
- (iii) The Managing Director of the Board or the Board itself had no power to prevent the plaintiff from attending meetings of the Board or of pertinent-committees of the Board, in his capacity as a Board member.*

The plaintiff pleaded that, by virtue of being a Board member, he was entitled to attend all meetings of the Board, as well as meetings of the committees of the Board, and in that behalf he had an entitlement

to certain allowances, benefits and emoluments; but as a consequence of the unlawful termination of his membership of the Board, the plaintiff had not been receiving the said allowances, benefits or emoluments.

The plaintiff was claiming, as against the defendant, a declaration that his termination, revocation and/or suspension as a director of the Tea Board of Kenya was illegal and unlawful. He was seeking an injunction to stop the defendant from continuing the termination of his membership of and participation in the Board. The plaintiff was also seeking damages for loss of allowances and other benefits attached to membership of the Board of Directors.

It is pleaded that the defendant had declined to restore the plaintiff's membership of the Board, despite demand and notice of intention to sue being issued and served appropriately. The plaintiffs' prayers were for

a) an order that the defendant's revocation or suspension of the plaintiff's appointment as a director of the Tea Board of Kenya, was illegal and unlawful;

b) an order of injunction to stop and prevent the defendant, its servants and agents from preventing and/or interfering with the plaintiff's attendance at

the Tea Board of Kenya and its committees, up to the time his appointment

as a Board member will have elapsed, or been lawfully terminated;

c) damages for loss of allowances and other benefits as a Board member;

d) interest on the said damages at Court rates, till payment in full;

e) costs of this suit.

The plaint and the summons to enter appearance were served by Enock Bulemi Mulindi, an authorized process server, who swore an affidavit of service on 16th December, 2004 filing the same on 12th January, 2005. The process server received summons to enter appearance annexed to a copy of the plaint issued by the Principal Deputy Registrar of the High Court on 26th November, 2004 from M/s S. M. Keyonzo Advocates, with instructions to serve a copy upon the defendant. When, on 9th December, 2004 the deponent went to effect service upon the defendant, the Director of the Tea Board of Kenya, rather than receive service, instructed his secretary, one Ms. Muthoni, to ask him to go and effect service upon the Ministry of Agriculture. The process server thereupon informed Ms. Muthoni that the summons to enter appearance was addressed not to the Ministry of Agriculture but to the Tea Board of Kenya. Ms. Muthoni, who returned to the Director to brief him appropriately, did not come back, and when reached through another officer of the defendant, returned only to refuse the deponent's attempts to effect service upon the director. She herself, Ms. Muthoni, received summons, and said she was doing so on behalf of the Director. Although she accepted service, she refused to sign on the original summons.

The defendant then failed to enter appearance; and on 12th January, 2005 the plaintiff filed a request for interlocutory judgment, by virtue of Order IXA, rules 3 and 4 of the Civil Procedure Act (Cap. 21). And on 31st January, 2005, the Deputy Registrar entered interlocutory judgment in the following terms:

The defendant herein TEA BOARD OF KENYA having been duly served with summons to enter appearance and having failed to enter appearance and/or file defence within the prescribed period and on the application by the plaintiff's advocates dated 10th January, 2005 I enter interlocutory judgment against the said defendant as prayed.

"The award of costs shall await judgment when the suit shall be set down for formal proof".

Counsel for the plaintiff, on 28th February, 2005 wrote to the Registrar of the High Court seeking

a date for formal proof; and the matter came up before me on 3rd November 2005.

Learned counsel Mr. Keyonzo submitted that since the defendant had neither entered appearance nor filed a defence, the hearing date (3rd November, 2005) which had been set by the Court's Chief Executive Officer on 7th July, 2005 did not now have to be served upon the defendant. He noted that this matter was coming up for formal proof, on the basis of the interlocutory judgment of 31st January, 2005 and in view of the fact that the claim was not a *liquidated claim*

.Learned Counsel introduced the plaintiff's case in terms of the pleadings, and on that basis PW 1, the plaintiff himself, Gideon Asirigwa Mbagaya was sworn and gave his testimony as follows.

The plaintiff is a farmer and an agriculturalist growing tea and keeping dairy cattle in the Vihiga District of Kenya. His tea is delivered to and processed at Mudete Tea Factory. In 2000 the plaintiff became a director of Mudete Tea Factory; and on that footing he was then elected, in the same year, to the Tea Board of Kenya the defendant herein. As a director of Mudete Tea Factory, the plaintiff had been elected by fellow tea growers in the Sabatia area. All the tea factories from the Western Zone which included Nandi, Trans Nzoia, Bungoma, Mt. Elgon, Vihiga and Kakamega formed what was known as Tea Board Zone 6, and this Zone was entitled to elect a section of the membership of the Tea Board of Kenya (the defendant). The plaintiff was one of those elected to the Tea Board of Kenya, representing the Western Zone. He served in that capacity, and was re-elected by the tea factory directors of Zone 6 in 2003; he was to serve for three years, his term ending in 2006.

When the Mudete Tea Factory held elections for its directors in early 2004, the plaintiff was not re-elected, even though his term at the Tea Board of Kenya had already been gazetted to last till 2006. On the strength of that gazette, the plaintiff attended a meeting of the Tea Board of Kenya, on 23rd April, 2004. It was on that occasion that both the Chairman and the Managing Director of the Tea Board of Kenya informed the plaintiff that this would be his last attendance at meetings of the Board. What reason did they give? That the plaintiff had lost in the local elections at the Mudete Factory level; and this reasoning was duly minuted. To the plaintiff's suit papers is attached the "Minutes of the 245th meeting of the Tea Board of Kenya held at the Board's Offices, Tea Board House, Naivasha Road, Nairobi on Friday 23d April, 2004 at 9.30a.m. " Under "Opening Remarks" the following record appears:

"The Chairman called the meeting to order at 9.45 a.m. and commenced by thanking members for keeping time. He informed members that the Board had been notified that following elections for directors at KTDA Ltd., - managed factories, two members of the Gideon Asirigwa Mbagaya v Tea Board of Kenya [2006] eKLR Board, M/s G.A. Mbagaya [the plaintiff herein] ... and D. N. Njoroje

.. were not re-elected in their local factories, respectively. This presented a technical problem on their membership in the Board. The Chairman read the relevant section of the Tea (Amendment) Act of 1999 relating to tenure of office for Board Members. According to Section 3A sub-section 1 and 5 (d), the Act stipulates that a member will lose his seat if he ceases to represent the interests in respect of which he is appointed.

"Deliberating on the matter, the Board noted that the Minister had not yet declared their seats vacant, as the matter had not yet been communicated to the Minister. The Board directed that the matter be reported to the Minister urgently to enable him [to] take the necessary action as provided for under the Tea Act and the Tea Regulations. Meanwhile, the Board approved that the two members could attend this meeting as their seats had not been declared vacant by the Minister. "

The Plaintiff testified that he had not thereafter received invitations to meetings of the Board, and consequently he had not attended any, notwithstanding that he was a duly elected director of the Tea Board of Kenya, with a certificate of directorship dated 26th June, 2003. This certificate had been issued by the returning officer at the relevant elections, and was issued on behalf of the Minister who thereafter appointed him a director and duly gazetted his name as such, on 25th July, 2003 (Gazette Notice No.

4958/03). The plaintiff was invited by the Managing Director to the first meeting of the Board on 16th July, 2003 and thereafter he attended regularly the meetings of the Board and of its committees. He was subsequently appointed the Deputy Chairman of the defendant's Board of Directors. Each year he would attend as many as 21 meetings, for which he was granted benefits in the form of: sitting allowance; lunch allowance; mileage allowance; accommodation allowance, for two nights in Nairobi. The old rates for such allowances were: sitting allowance (KShs.8,000/=); lunch allowance; (KShs.300/=); mileage allowance (KShs.22,800/=); accommodation allowance (at the rate of KShs.8,000/= per day) (KShs.16,000/=); total payable for each Board session (KShs.49,8000/=). In 2004 there were changes to the levels of these allowances: sitting allowance was raised to KShs.10,000/=; lunch allowance was reduced to KShs.2,000/=; mileage now applicable to a person in the position of the plaintiff had been raised to KShs. 32,750/=; accommodation allowance for two nights in Nairobi had been raised to KShs.20,000/=/. Thus the total allowance package for the plaintiff if he had not been prevented from attending Board meetings would have been KShs.64,750/= per meeting. The Plaintiff said that he had used the new rates in calculating his lost benefits, occasioned by his being improperly stopped from attending Board meetings.

The plaintiff testified that he, as well as other members of the Board of Directors of the Tea Board of Kenya had been appointed by the Minister, and their names duly gazetted and it was specified that they would hold office for a period of three years. It was his belief that only the Minister himself could have revoked his position as a member of the Board of Directors. He further averred that up till now, the Minister had not de- gazetted his appointment, and he had not been replaced as a member of the Board representing Vihiga, in the Western Zone.

Learned counsel *Mr. Keyonzo*, in his submissions, noted that the Tea Act (Cap 343) which establishes the Tea Board of Kenya as a body corporate, provides for the composition of its membership; and s. 3 (e) in particular deals with the appointment of directors to the Board who represent the interests of the Tea Growers Association; and s.3A provides for the "tenure of office" of the members appointed to the Board. The Tea (Amendment) Act (Act No.6. of 1999) amended the said s.3A of the Act and repealed subsections (1) and (2) thereof. Before the repeal and amendment, s.3A (1) and (2) had read as follows:

"(1) This section shall apply to the Chairman and other members of the Board who are appointed by the Minister.

(2) Subject as hereinafter provided, the Chairman and other members to whom this section applies shall hold or vacate office as such in accordance with the instruments respectively appointing them. "

Section 3A (3) which was re-numbered S.3A (4) had provided for vacation of office by a member through resignation. The original S.3A (4) had provided for other modes of leaving office as a director. It provided that if the Minister was satisfied that the Chairman or any other member to whom the section applies has been absent from three consecutive meetings of the Board without permission, or has become bankrupt or made an arrangement with his creditors, or is incapacitated by physical or mental illness, or is otherwise unfit to discharge the functions of his office, the Minister may declare the relevant office vacant and give notification as he saw fit. The Tea (Amendment) Act of 1999 added the range of considerations which could lead to the termination of the membership of the Board, for a particular person. Section 3A (5) (d) now Empowered the Minister to terminate such membership where he is satisfied that a member *"has ceased to present the interests in respect of which he was appointed"*.

Mr. Keyonzo submitted, and quite meritoriously, in my opinion, that both the Tea Act and the Tea (Amendment) Act, 1999 contemplate that the appointing authority for a Chairman or other member of the Tea Board of Kenya, is the Minister and the Minister alone; and that cessation of such membership is solely dependent on either the Minister or the member himself who would take the critical decision.

In 2000, the Minister acting by virtue of the Tea (Amendment) Act, 1999 made the Tea (Election) Regulations, 2000 (L.N. 43 of 2000) in exercise of his powers conferred by ss.3, 4 and 25 of the Tea Act (Cap.343). Under Part IV of the said regulations, the Minister provided for elections to small-holder tea

factory companies. It is stated in regulation 14 (1) that elections to the local boards of directors of such small holder companies shall be in accordance with the articles of association of such companies, and the directors of such companies shall be registered tea growers under the umbrella of such local companies.

Regulation 28 (1) provides that every person elected as a director in a tea factory company shall be eligible for election to the Tea Board of Kenya. The plaintiff, a registered tea grower delivering his tea at Mudete Tea Factory, was elected on 25th June, 2003 a board member of Mudete Tea Factory Ltd and it is on this basis he was also elected a member of the Tea Board of Kenya. The Managing Director of the Tea Board of Kenya then informed him that the Minister would formally appoint him to the Board and would duly gazette his name. This took place, and the plaintiffs membership of the Board took effect and was to run for a period of three years.

Learned counsel submitted that it was illegal for the Tea Board of Kenya to exclude the plaintiff from the meetings of the Board. He contended that even if the Board was of the view that the plaintiff no longer represented *"the interests in respect of which he was appointed"*, because he had lost the 2004 Mudete Tea Factory elections, the Board had no legal authority to exclude him from meetings. Counsel urged that under the proviso to S. 3A of the Tea Act, it was for the Minister exclusively to be satisfied that there existed circumstances under which he could declare vacant a seat on the Board of Directors of the Tea Board of Kenya; and such declaration had to be made in a specified manner. In the words of counsel, *"It was not for the Board to usurp the Minister's powers and decide that the plaintiff's position at the Board had become vacant and exclude him from Board meetings"*. Counsel submitted that there was no provision under the Tea (Election) Regulations, 2000 for a director of the Tea Board of Kenya to automatically cease to be a director once he ceases to be a director of a local tea factory company.

Counsel submitted that the plaintiff was entitled to a declaration that his revocation or suspension as a director of the Tea Board of Kenya is illegal and unlawful; and to an order of injunction stopping the defendant Board from preventing or interfering with his attendance at the Board and its committees.

On the basis of the schedule of meetings which the plaintiff had been stopped from attending, and of the November, 2004 Government of Kenya Guidelines on Terms and Conditions of Service for the State Corporations, counsel submitted that the plaintiff had missed benefits as follows:

(i) allowances from May 2004 to October, 2004 @ KShs.49,800/= per meeting: a total of KShs.398,400/=.

(ii) Allowances from November 2004 to October 2005 @ KShs.64,750 per meeting: a total of KShs.1,295,000/=.

This gave rise to a grand total of KShs. 1,684,400/= which the plaintiff was claiming, apart from the prayers for declaration and injunction.

Why did the defendant, after having been duly served with the suit papers, fail to enter appearance or to file a defence? Whatever the reason, judgment was duly entered for the plaintiff. The evidence given during formal proof has been, in my view, both reliable and cogent; and on that basis learned counsel *Mr. Keyonzo* has made well-directed submissions which have led me to the conclusion that under the Tea Act (Cap. 343), the Tea (Amendment) Act (No. 6 of 1999) and under the Tea (Election) Regulations, L. N. 43 of 2000 only the Minister had the legal authority to terminate the plaintiffs status as a member of the Board of Directors of the Tea Board of Kenya. Indeed this fact, it has become quite clear to me, was well appreciated by the Managing Director and the members of the Board of Directors of the defendant. For they say in their minutes of 23rd April, 2004:

"... the Board noted that the Minister had not yet declared their seats vacant, as the matter had not yet been communicated to the Minister. "

I am in agreement with counsel for the plaintiff that when the Board decided that the plaintiff's attendance at the said meeting of 23rd April, 2004 would be the last, the Board was usurping the functions of the Minister and was acting illegally; and consequently the Board's acts in that behalf must be regarded as having been in violation of the plaintiff's legal rights. The

plaintiff is entitled to redress, which I hereby grant by decreeing as follows:

1. It is hereby declared that the defendant's revocation or suspension of the plaintiff's appointment as a director of the Tea Board of Kenya was illegal, null and void.

2. An order of injunction is hereby issued to stop and prevent the defendant, its servants and agents from preventing and/or interfering with the plaintiff's attendance at meetings of the Tea Board of Kenya and its committees, up to the time his appointment as a Board member will have lapsed, or been lawfully terminated by the Minister.

3. The defendant shall pay damages to the plaintiff as follows:

(a) KShs.398,4001= representing allowances from

May, 2004 to October 2004 @KShs.49,8001=per

meeting.

(b) KShs. 1, 295,0001= representing allowances from November, 2004 to October, 2005 @ KShs. 64,750

per meeting.

(4) The defendant shall pay interests on the damages

specified under item 3 above, at Court rate, with effect from the date hereof until payment in full.

(5) The defendant shall bear the plaintiff's costs in this suit.

DATED and DELIVERED at Nairobi this 3rd day of February, 2006.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court clerk: Mwangi

For the Plaintiff: Mr. Keyonzo, instructed by M/s S. M. Keyonzo Advocates.

Defendant absent and unrepresented.