



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**

**Civil Suit 3 of 2006**

**WILFRED TAWAYI**

**SHIBWECHE .....PLAINTIFF**

**VERSUS**

**WEST KENYA OUTGROWERS CO. LTD.....1<sup>ST</sup>**  
**DEFENDANT**

**MAXWEL SHALLO.....2<sup>ND</sup>**  
**DEFENDANT**

**RULING**

The Appellant, Wilfred Tawayi Shibweche, was at the time of the filing of the suit herein alleged to be a member of West Kenya Outgrowers Co. Ltd., the 1<sup>st</sup> Defendant herein. He contended that he was eligible to contest and be elected as a director of the 1<sup>st</sup> Defendant to represent the area delineated as Malava East Zone and that he offered himself for election but the elections were marred by grove irregularities particulars of which he set out in paragraph 8 of the Plaint. In his view, the said elections were “**flawed, unfair, unjust, and against the provisions of the Articles of Association of the 1<sup>st</sup> Defendant**”. His claim in the suit is for injunction to restrain the 2<sup>nd</sup> Defendant, Maxwell Shallo, who also contested the elections and was elected, from being sworn in as a director of the 1<sup>st</sup> Defendant and for an order nullifying the election.

In his Chamber Summons dated 24-1-06, the Applicant sought injunction to restrain the 1<sup>st</sup> Defendant from swearing in the 2<sup>nd</sup> Defendant as its elected director or in any other way according him any other status as an elected director pending the hearing and determination of the suit.

In his affidavit sworn by the Applicant on 24/1/06 in support of the application, the applicant averred amongst other things that although only 104 people were cleared as qualified voters in the said election, the results reflected a total of 228 votes cast.

The Applicant also filed a supplementary affidavit pursuant to the court order made on 20-2-06. That order required the supplemental affidavit to be filed and served within 7 days of 20-2-06. The supplemental affidavit was however sworn and filed on 6-3-06 but, interestingly, the court stamp on the affidavit was shown as 6-2-06 while the receipt issued on payment of the filing fees was dated 6/3/06. It is quite clear that the supplemental affidavit was not filed in compliance with the court order and as no extension of time was sought and obtained to file it on 6/3/06, it must be struck out. I order it struck out.

In the replying affidavit sworn on 8-2-06 by the 2<sup>nd</sup> Defendant, the latter denied the allegations of irregularities. From the affidavit of the Applicant making the allegations of irregularities and the replying affidavit of the 2<sup>nd</sup> Defendant denying those allegations, it is nigh on impossible to determine the veracity of the allegations. This may have to await the trial when parties and their witnesses shall give evidence and be cross-examined.

Mr. Munyendo, learned counsel for the Applicant urged the court to grant the application to prevent the 2<sup>nd</sup> Defendant from being sworn in because the Applicant will suffer irreparable damage if that happens.

On his part, Mr. Anziya, learned counsel for the Respondents opposed the application and contended that the only thing the applicant shall miss if the 2<sup>nd</sup> Defendant is sworn in is director's allowance which can be quantified. It was Mr. Anziya's submission that the balance of convenience was not in favour of granting the injunction sought. At any rate, he said, if the Applicant succeeds in the suit eventually, the 2<sup>nd</sup> Defendant shall vacate office as a director and the 1<sup>st</sup> Defendant shall pay the allowances due to the applicant.

Injunctions are discretionary remedies issued by courts to protect legal and equitable rights. For the applicant to succeed in the application, he must satisfy the court that he has a prima facie case against the Defendants which has probability of success and that he will suffer irreparable loss or damage unless injunction is granted and that damages will not be an adequate remedy. Where the court is in doubt, the grant of injunction should be dictated by the balance of convenience.

In the present application, it has not been shown that damages would not be an adequate remedy should it turn out that it was the applicant and not the 2<sup>nd</sup> Defendant who had been duly elected as director of the 1<sup>st</sup> Defendant. Nor can it be said that the Applicant has satisfied the court that he has a prima facie case with a probability of success. It is my finding that the conditions for the grant of injunction have not been met. In any case, the balance of convenience appears to me to be in maintaining the present status quo. In the circumstances, I dismiss the application and order that the costs shall abide the result of the suit.

It is so ordered.

*Dated, signed and delivered in this 5<sup>th</sup> day of May, 2006.*

**G. B. M. KARIUKI**

**J U D G E**