REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO 47 OF 2005

MAXWELL NYAANGA MAGOMA …...…… PLAINTIFF

VERSUS

1. SAMSON OKARI ANCHINGA

2. NYAMACHE TEA FACTORY CO. LTD……..…… DEFENDANTS

3. KENYA TEA DEVELOPMENT AGENCY

RULING:

The applicant seeks orders restraining the 1st Respondent SAMSON OKARI ANCHINGA from holding himself out, occupying the office and/or discharging the duties of a director of the 2nd defendant NYAMACHE TEA FACTORY CO. LTD. He also seeks the second respondent and the 3rd respondent KENYA TEA DEVELOPMENT AGENCY restrained from recognizing or confirming the 1st respondent as a director. Court was told that on 26th April 2005 there were elections for directorship of Nyamache Tea Factory.

There were four candidates. The applicant; 1st respondent, WILSON O. OMBONGI and STEPHEN A. NYAMARI. The elections were for BASSI BORABU. The presiding officer was one DANIEL GITHU KANJA. The candidates agreed voting to be by queuing. Respondent submitted that the presiding officer after counting the queue of the 1st respondent he declared him as the winner. He told the security personnel to disperse the crowd. The applicant took cover in a nearby house and when he returned he found a certificate of results on the table. He and the other candidates did not sign the certificate.

It was submitted that no proper elections were held and that the applicant stands to suffer irreparable damages as he will be denied an opportunity to present himself as a candidate. The 2nd and 3rd defendants did not file replying affidavit or grounds of opposition. The 1st respondent however opposed the application and submitted that the elections were properly conducted. The vetted voters were 1,738 as shown by the copy of election results annexed to the application. 936 people voted for the respondent. The applicant refused his queue to be counted on sensing defeat. The other two candidates had withdrawn. Thus even if all the other voters voted for the applicant 1st respondent would still be the winner.

Court was told that the prayers in the application are the same in the plaint and if allowed it would effectly deal with the main suit. Secondly court was told that the applicant did not show that he has a prima facie case. In par.6 of plaint the allegations were that the presiding officer did not conduct the voting properly. Yet the said presiding officer is not a party to the suit. Court was also referred to the Tea Act (Election Regulations) which defines a presiding officer as a person appointed by the Returning officer and a returning officer as a person appointed by the Minister. The two are not joined as parties.

I have carefully evaluated the application and the submissions. I too have gone through the plaint filed. It is clear that the biggest quarrel the applicant has is with the presiding officer, who conducted the elections. He says that he did so irregularly allowing himself to be compromised and not vetting the voters and also declaring the 1st respondent a winner without counting the votes for the other candidates. Despite all that the presiding officer was not made a party to this suit.

The applicant knows his names well and names him as Daniel Githu KANJA. If indeed he did not conduct the elections properly he is the person to be blamed and not Nyamache Tea Co. or Kenya Tea Development Agency. Even the 1st respondent cannot be blamed for he was not the one conducting the elections. For this application to succeed the applicant should have made the said Daniel Githu Kanja a party. He is the only person who could possibly respond to the allegations of irregularities raised by the applicant. Failure to enjoin him as a party is fatal to the application.

The above aisle court has to consider from facts presented on whose side the scale tilts in favour of. The applicants have annexed a copy of certificate of results. His only quarrel with it is that he and the other candidates did not sign it. The 1st respondent did sign it. The only other person who signed it was the presiding officer. However the certificate clearly shows that Wilson Ombongi and Stephen Nyamari withdrew from queuing. None of the two have sworn an affidavit to deny that. The applicant is shown to have refused to have his queue counted. If this was so one would not have expected him to sign.

Though he had the certificate when filing the application and swearing the supporting affidavit there is nowhere he specifically denies refusing his line to be counted. The 1st respondent in par.14 of his replying affidavit clearly stated that the applicant refused to have his queue counted. There was no further affidavit filed to controvert that averment. Lastly the certificate annexed by the applicant shows that the 1st respondent got 936 votes. In par.5 of supporting affidavit the applicant states that the presiding officer counted the queue of the 1st respondent before declaring him a winner. In his affidavit he did not dispute that 1st respondent's line had 936 voters as shown in the certificate.

One has therefore to believe that this was the votes he got. The same copy of certificate of election shows the vetted voters were 1738. The applicant has not raised any quarrel about that number. If this was so then, simple calculation will show that after 936 voters voted for 1st respondent the remaining were 802. This even if one assumes that they all would have voted for applicant he would still have lost to the 1st respondent with a total of 134 votes. It is clear therefore in whose favour the scale tilts. It will be more injurious to stop a person who on the face of it seems to have won the election from assuming the office into which he was elected. The applicant has filed a suit and if after evidence is given he succeeds he can be compensated by way of damages.

From the above therefore I find application has no merit and the same is dismissed with costs.

Dated 18th May 2005.

KABURU BAUNI

JUDGE

Cc – Mobisa

Mr. Nyakundi for Minda for applicant

Mr. Ombachi for respondent

KABURU BAUNI

JUDGE