

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

Civil Case 27 of 2005

FRANCIS EKUTU WASHIKA.....1ST PLAINTIFF

WASHINGTON KHWALE.....2ND PLAINTIFF

VS

VINCENT SAMBULIA.....1ST DEFENDANT

MUMIAS OUTGROWERS CO. (1998) LTD2ND DEFENDANT

R U L I N G

Francis Ekutu Washika and Washington S.W. Khwale being the 1st and 2nd plaintiffs respectively sought for an interlocutory order of injunction to restrain Vincent O. Sambula, the 1st defendant herein from carrying out the duties of a director in Mumias Outgrowers Co. (1998) Ltd, the 2nd defendant herein. The plaintiffs further sought to have Mumias outgrowers Co. (1998) Ltd; restrained from organizing for elections of the remaining directors scheduled for the month of July 2005 until the dispute over the election of the Directorship of the Central Zone is resolved. The plaintiffs sought for these orders in a chamber summons dated 11th May 2005 filed pursuant to sections 3, 3A and 63 (c) of the Civil Procedure Act and order XXXIX rules 1, 2 and 3 of the Civil Procedure rules. The summons sets out the grounds it is based. The same is also supported by the affidavit of Francis Ekutu Washika sworn on 11th May 2005 and a further supporting affidavit of Washington S.W. Khwale also sworn on 11th May 2005.

The application was strenuously opposed by the two defendants who relied on grounds of opposition dated 17th May 2005 and two replying affidavits, one sworn by Vincent sambula and the other sworn by Justin Rapando. Before considering the merits and demerits of the application, I wish to the state brief background of this matter.

On the 26th day of March 2005, Mumias Outgrowers Co. (1998) Ltd Conducted its director's elections in zones pursuant to Article 88 (a) and (b) of its Articles of Association. It would appear the two plaintiffs and the 1st Defendant offered themselves to be elected in the central Zone which had ten (10) voting centers. It is not disputed that elections took place smoothly in all voting centers save for Muroi Primary School where violence broke out while counting of votes was going on. The counting of votes had to be halted midstream and the already counted votes were inserted in the score card. The disruption of the election in Muroi Primary School voting centre appears to have been noted and a complaint was lodged to the relevant authorities. At the end of the exercise, the 1st defendant was declared the winner to represent the central zone. This act did not impress the plaintiffs who then filed this suit. In the plaint dated 14th April 2005, the plaintiffs are seeking for inter alia an order of a declaration that the election of the 1st defendant to represent the central zone is null and void. They also seek to prevent the 1st defendant from taking office as a director representing the central zone. They further sought to stop the 2nd defendant from conducting further elections in other zones until election dispute in the central zone is resolved.

The subject matter of this ruling is the chamber summons dated 11th May 2005. I am alive of the fact that I have to be cautious when deciding this interlocutory application so as I do not decide the whole case at an interlocutory stage. In an attempt to show that they have a prima facie case with a probability of success each of the plaintiffs filed an affidavit in support of the summons. There is an allegation that the elections were disrupted at Muroi Primary school voting centre hence the election was not complete. The plaintiffs have averred that in view of this defect the 1st defendant was not validly elected hence he

should not have been declared the winner by the 2nd defendant.

The defendants conceded that indeed the elections in Muroni Primary School voting centre were incomplete because violence rocked the voting center. The defendants accused the 1st plaintiff for formenting violence when he sensed defeat. The 1st plaintiff was accused of coming to court with unclean hands. They urged this court to prevent him from enjoying equitable rights.

I have considered these rivaling submissions. I have also perused the material placed before me. It is not denied that the elections in Muroni Primary school voting centre were incomplete because there were violence. It is deponed in the affidavits of Justin Rapando dated 17th May 2005 that the 1st Plaintiff formented the alleged violence while counting of votes was going. The act of violence halted the exercise of counting votes. There are annexures in the aforesaid affidavit which shows that the 1st plaintiff assaulted a polling clerk called james Opetu. It is also deponed a complaint has been lodged at Mumias Police station. It is not denied that the Replying affidavit sworn by Justin Rapando dated 17.May 2004 was served upon both the plaintiffs and their learned advocates. The allegations against the 1st plaintiff have not been countered by a further affidavit. The allegations therefore stand unchallenged. In the absence of contrary assertions by the plaintiffs then I am convinced that the 1st plaintiff formented violence which in effect halted the election exercise at Muroni Primary School voting centre.

A prayer for an order of injunction is an equitable remedy. It is trite that he who comes to equity must come with clean hands. The 1st plaintiff is now complaining that the elections were incomplete in Muroni Primary School voting Centre. He does not deny the allegation that he formented the violence which halted the exercise. I hold the view that he has come to court with soiled hands. Equity cannot allow him to benefit from his own mistakes. On this ground alone the application by the 1st plaintiff must collapse even without considering the other principles of injunction. The 2nd plaintiff has not shown in his affidavit that he has a prima facie case with a probability of success. He has not shown what damage he would suffer if an order of injunction is not granted.

In the circumstances of this case and for the above reasons the summons dated 11th May 2005 must fail. The same is dismissed with costs to the defendants. The interim orders are hereby discharged.

DATED AND DELIVERED THIS 24th DAY OF June 2005

J.K. SERGON

JUDGE