



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO.66 OF 2004**

**1. NELSON ONGWAE AONDO )  
2. JAMES ONYANCHA ARON ) ..... PLAINTIFFS.  
DUKE ELKANA ONYAMBU )**

**VERSUS**

**1. KIRIMI MWONGERA )  
2. JAPHETH ONYARI NYAMEINO )  
3. NYANSIONGO TEA FACTORY LTD ) .....  
DEFENDANTS.  
4. K. T. D.A. HEAD OFFICE. )**

**RULING**

The applicants by their application dated 26th April 2004 seeks five orders namely:

1. Injunction to issue against the 3rd and 4th respondents from confirming and recognizing or implementing the election of the 2nd defendant/Respondent as a duly elected director of the 3rd respondent.
2. An injunction restraining 3rd and 4th respondents from conveying or holding an Annual General Meeting, Special Meeting or Board Meeting for purpose of carrying the 2nd Respondent as a duly elected director of GESIMA MICRO CONSTITUENCY until the final determination of the application.
3. An order restraining 2nd Respondent from assuming the office of the director of Nyansiongo Tea Factory until the final determination of the application.
4. A permanent injunction to issue restraining the 2nd defendant/Respondent from participating as a candidate for office director of Nyansiongo Tea Factory Ltd.
5. Costs of the application.

There is an affidavit sworn by the first applicant supporting the application. In it and the submissions by the counsel it is stated that on 23/3/04 there were elections to be held for a post of a director at GESIMA MICRO CONSTITUENCY. The first Respondent was the Returning Officer. The 2nd Respondent was a candidate and so were the 3 applicants.

The 2nd Respondent was declared by the 1st respondent as elected director of the 3rd defendant – Nyansiongo Tea Factory. It was submitted that the elections did not comply with the laid down procedures and rules and contravened the Articles of Association of the 3rd Respondent which is a limited liability Company. Fact, is has submitted that the 2nd respondent did not qualify to contest the elections as he used to be an employee of Nyankoba Tea Factory.

Secondly it was submitted that the 1st respondent was not impartial as he used to be a trainee at the 3rd Respondent was a chairman. It was said he did not apply the proper voting system as directed by the 4th Respondent. Further the process of Tea Act were not followed as only registered voters are allowed to vote. There were only 29 registered voters in the constituency yet record showing that 117 people voted. Further some of those who voted were not proper members. They were only given payslips for Jan 2004 to enable them to vote. Most of those who voted were from Nyankoba Tea Factory where the 2nd Respondent used to work until 1991. The polling clerks were employees of the 3rd Respondent.

Further the method of voting was not proper as it was not agreed upon. Secret ballot method was used though the applicants wanted queuing (mlolongo) system.

Lastly the applicant submitted that they and their supporters and agents walked away from the election and refused to participate in the elections. There were therefore no agents to verify the votes and they did not sign the results.

The application was opposed and 3 replying affidavits filed.

I have anxiously and carefully considered the applicant's affidavits, annexures and submissions. First I agree with counsel for the Respondent that prayer No.5 cannot be granted at this stage. It prays for a permanent injunction to restrain the 2nd Respondent from participating as a candidate. This is an interlocutory application and a permanent injunction cannot be issued until the full suit is heard and determined. In fact prayer (b) in the main suit is similar to prayer 5 in the application.

It was pointed out by counsel for the respondents that prayers 3 and 4 prays for an injunction until the final determination of this application.

The determination of this application comes with this ruling. Even if the prayers are granted it would mean they will be spent when I finish reading the ruling. I presume the applicants wanted an injunction until the main suit is heard and determined but this is not what is in their prayers. Parties are bound by their own pleadings. In fact counsel for the applicant did not touch on the issue when replying.

The above aside I am not satisfied that the applicants have satisfied all the conditions as set out in the case of GIEALA VS CASSMAN BROWN & CO. LTD (1973) EA 338. First they had to show there have a prima facie case.

Their complaints against the way the elections were conducted are not borne by facts. There is nothing to show that the elections were conducted unprocedurally or there was fraud. The elections were held through secret ballot. Para.75 of the 3rd respondents Articles of Association provide the election will either by show of hands or on a poll. Whereas the applicant says that the preferred method was by queuing the 1st respondent who was the presiding officer in para.9 of his affidavit depones that the voters are the ones who demanded voting by Secret ballot.

It is the members who have a right to determine the manner of voting and not the candidates. There is no member who have sworn an affidavit to state that members wanted to vote by queuing. In any case the applicant have not stated how secret balloting would have affected them.

True 1st respondent could have been an employee and agent of 3rd and 4th respondent but I don't think by that reason alone he can be said to have been impartial. There was nothing shown to indicate that he was biased in favour of the 2nd respondent.

The application stated that they and their agents walked away from the election venue. In essence they never participated in the election. They were not therefore present to verify the results and sign them. They were not refused to be present. They left on their own accord and they cannot therefore cry foul about not verifying and signing the results or inspecting the ballot boxes before the poll was taken. They were simply not there to do these things.

In Para. 9 of the supporting affidavit it is deponed that the registered voter for the center are only 29 but those who voted were 117.

However in Para.17 of the same affidavit it is deponed that there are 500 registered voters in the constituency and 138 voted. The respondents have annexed the master register of the center showing the registered voters. There is no other document to contradict that master register.

Lastly it was alleged that some of the voters were from Nyankoba Tea Factory. There was nothing to prove that. The 2nd respondent was said to have been an employee of that factory up to 1991. That is 13 years ago.

Court was not told which section in the Tea Act or paragraph in the Articles of Association which bars the 2nd respondent from seeking to be elected as a director of the 3rd respondent. There was just a blanket submissions that he should not be a candidate.

All in all I find that the application has no merit and the same is dismissed with costs.

**KABURU BAUNI**

**JUDGE**

**21/5/04**

**Mr. Lebu for Applicants.**

**Mr. Nyauntu for Nyatundo for Respondents.**

**KABURU BAUNI**

**JUDGE**

**21/5/04**