



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL CASE NO.1 OF 2014

SYMON PHILIP KOECH.....PLAINTIFF

VERSUS

LITEIN TEA FACTORY.....1ST DEFENDANT

KENYA TEA DEVELOPMENT AGENCY.....2ND DEFENDANT

SAMWEL KIPLANGAT MUTAI.....3RD DEFENDANT

WILLIAM K. BII.....4TH DEFENDANT

JOHN NJAGI.....5TH DEFENDANT

KENNEDY MOKAYA.....6TH DEFENDANT

RULING

This ruling is the outcome of the Motion dated 13th January, 2014 taken out by **Symon Philip Koech**, the Plaintiff/Applicant herein, in which he sought for the following orders:

- a. **THAT** this Application be certified as urgent and be dispensed within the first instance.
- b. **THAT** pending the hearing and determination of the present Application this Honourable court be pleased to issue an order of Temporary Injunction restraining the Defendants either by themselves, agents, employees, servants or otherwise from confirming the 3rd Defendant/Respondent as a Director of the 1st Defendant or restraining the 3rd Respondent from taking up or acting in any other capacity of the Directorship.
- c. **THAT** pending the hearing and determination of the suit herein this Honourable Court be pleased to issue an order of injunction restraining the Defendants either by themselves jointly and severally, agents, employees, servants or otherwise from confirming the 3rd Defendant/Respondent as a Director of the 1st Defendant or restraining the 3rd Respondent from taking up or acting in any other capacity of the Directorship.
- d. **THAT** costs of this Application be provided for.

Litein Tea Factory, Kenya Tea Development Agency, Samwel Kiplangat Mutai, William K. Bii, John Njagi and Kennedy Mokaya being the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants/Respondents respectively, opposed the Motion by filing grounds of opposition and the replying affidavit of Geoffrey Chepkwony. On 28th January 2014, learned counsels appearing in the matter recorded a consent order to

have the motion disposed of by written submissions.

I have considered the rival submissions. The substantive matter in this dispute is the Plaintiff dated 13th January 2014 in which the Plaintiff prays for *inter-alia*, an order declaring the elections conducted on 7th January 2014 as null and void hence a fresh election be done. The Plaintiff also sought for an order of injunction restraining the Defendants from confirming the 3rd Defendant as the 1st Defendant's director or from taking up or acting in such capacity. Pending the hearing and determination of this suit the Plaintiff has sought for the orders prayed in the aforementioned motion. It is the argument of the Plaintiff that the 1st Defendant's election conducted on 7th January 2014 was riddled with irregularities. It is alleged that there was rigging. The defendants were accused of failing to ensure that during the voting, the laid down procedures were followed to ensure that free and fair elections takes place. The Plaintiff has alleged that strangers were allowed to vote without being vetted as against the 1st Defendant's register of members and that some members voted by proxy against the laid down procedures. The Plaintiff further argued that candidates were not allowed to nominate their agents to assist in counting and verifying the actual votes in each polling station and that others voted without presenting their payslips for the months of September, October, November and December 2013. The Defendants on the other hand have opposed the Motion claiming the elections were free and fair.

The main order sought is the equitable remedy of injunction. The principles to be considered are well settled. **First**, an applicant must show that he has a *prima facie* case with a probability of success. I have already set out the grounds the Plaintiff has relied to buttress his Motion. He has basically alleged that members were allowed to vote by proxy contrary to the laid down procedures and that others were allowed to vote using letters from provincial administration. The question is whether the above ground establishes a *prima facie* case. The Plaintiff avers that according to the 2013/2014 manual for Kenya Tea Development Agency (K.T.D.A) managed Tea Factory Companies Directors nominees and buying centres committee members, the elections of directors are carried out by shareholders and that only founder shareholders may participate in the election. The Plaintiff has complained that strangers were allowed to vote. The Plaintiff's complaint are clearly expressed in the letters of protest of Richard Mibei and that of the Plaintiff. Both letters are dated 8th January 2014. In the letter of protest by Richard Mibei, it is stated that in Roret Polling Station, the following malpractices were noted:

- i. **Names or numbers of deceased's growers were used to vote.**
- ii. **Numbers of growers who were unable to attend were used to vote.**
- iii. **Growers numbers for institutions were used to vote for certain candidates.**
- iv. **Letters from Provincial administration were relied upon by officers presiding polling stations.**

A recount of votes was requested. What was the Defendant's answer to the above allegations? It is said the aforesaid letters were not received by the 1st Defendant and that the annexures did not bear any stamp acknowledging receipt. The 1st Defendant is of the view that the protest was an afterthought. The 1st Defendant further claimed that the Plaintiff raised general complaints which were unsubstantial hence even if the letters were served it would have been very difficult to address as they were too general. It is also argued that the complaints only related to one polling station whose votes could not have materially affected the final result. I find the 1st Defendant's response to the Plaintiff's allegation to be curious. In my humble view, the response appear to be simplistic contemptuous and not well thought out. It cannot be said that the Plaintiff made a general complaint. The Defendant has stated that since there was nothing showing that the Letter of Protest was received, then it can be assured that none was presented hence the complaint should be treated as an afterthought. I do not believe the 1st Defendant's denial. The deponent of the replying affidavit did not express in his averments any form of surprise or knowledge of existence of the Plaintiff's complaint. He did not even aver that had he received the letter of complaint he would have done any investigation on its veracity. In fact, Geoffrey Chepkwony avers in his replying affidavit that even if the 1st Defendant had been served with the Letters of Protest it would have been difficult to address them because they were too general and unsubstantial as to materially affect the final result. For

sure, the issues raised in the Letters of Protest are very serious and touches on the validity of the election. It cannot be said that the allegation that the number or names of people who are deceased were used to vote in general, this is a serious and specific allegation which needed thorough investigation. It has also been alleged that the complaint relates to one polling station hence even the complaint is found to be with merit, it will not materially affect the outcome of the election. With respect, that argument cannot be taken seriously because a critical look at the tallied votes will reveal that the difference between the two candidates are 82 votes. It cannot therefore be true that the vote outcome would not have been materially affected. In the end, I am convinced the Plaintiff has shown he has a *prima facie* case with high chances of success, therefore he satisfies the first principle.

The second principle is that an applicant must show that if the order for injunction is denied, he would suffer irreparable loss. It is the Respondent's argument that the applicant will not suffer irreparable loss since the remuneration and allowances of directors are ascertainable. The Plaintiff has urged this court to look at the matter beyond his individual benefit and find that irreparable loss may occur. I am alive of the fact that at the end of the day that the Plaintiff would have wished to serve as a director. Such a position goes with certain benefits as allowances and prestige in society. I have critically examined the Plaintiff and it is clear that the Plaintiff's aim is to have the 1st Defendant's elections held on 7/1/2014 to be declared as null and void on the basis the same were not fairly conducted. In as much as the Plaintiff may gain individually if subsequently elected from payment of allowances, I think the wider picture is to see to it that the process of conducting elections at whatever level is done fairly and according to the rules and regulations. The biggest question here is whether or not the elections were credible and whether they were conducted according to the rules and regulations. If the members or shareholders lose faith in the election process of electing their directors and committee members then such a loss cannot be said to be quantifiable in monetary terms. The Plaintiff here, is not seeking to be declared as the winner of the vote, but he is simply asking for the election of 7/1/2014 to be interrogated to determine its validity.

The third and final principle to be considered is that, where the court is in doubt, the application should be decided on a balance of convenience. The defendants have argued that the court should not intervene in the internal operations and management of a tea factory because it is ill equipped to manage the tea industry. It is said if the order is given, it will render the operations of the 1st Defendant encumbered. I think this test if applied, will obviously favour the Plaintiff. If the order of injunction is denied, it will mean the 3rd Defendant will serve or continue to serve as a duly elected director of the 1st defendant on the basis of disputed and discredited elections. I am convinced it is necessary to hold the ring evenly by granting the orders since the 3rd Defendant can still take up his position if the suit is eventually found to be unmeritorious.

In the end, I find the motion dated 13th January, 2014 to be with merit. It is allowed in terms of prayer c with costs.

Dated, Signed and delivered in open court this 14th day of March, 2014.

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J.K.SERGON

JUDGE

In the presence of:

Mr. Mutai for the Defendant

Mr. Mutai holding brief for Mr. Orina for Plaintiff