



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Civil Case 328 of 2012**

(an application for interlocutory injunction)

**ABISAI WESONGA .....1<sup>ST</sup> PLAINTIFF**

**MARTHA MUKUNGU ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**GERGORY MAKOKHA WERE ..... 1<sup>ST</sup> DEFENDANT**

**MUMIAS OUTGROWERS CO. [1998] LTD..... 2<sup>ND</sup> DEFENDANT**

**RULING**

This is an application dated 24<sup>th</sup> December 2012 brought by way of Notice of Motion filed by the two Plaintiffs. The application was filed following the filing of a Plaint dated the same day. The application was filed under **Order 40 rules 1, 2, 3 and 5** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act (Cap. 21)**. The prayers that are for my decision now are (iii) and (iv) as follows –

(iii) THAT there be an order restraining the 2<sup>nd</sup> respondents, Mumias Outgrowers Company [1998] Ltd. and in particular the 1<sup>st</sup> respondent, **Gregory Makokha Were**, the Chairman of the 2<sup>nd</sup> defendant's Electoral Committee from carrying out nominations for the directors on 28/12/2012, and the elections of 25/1/2013 unless and until the notice of elections dated 19/12/2012 and issued by the said Mumias Outgrowers Company [1998] Ltd. is wholly revoked and revised to delete requirements for directorship to the effect:

- a) That candidates must not be having any current case against the company;
- b) That there should be a non-refundable fee of Kshs.50,000/=;
- c) That candidates must not be members of any other association like MFUSA;
- d) That polling centres be at places other than sub-locations and or there are further orders of the Hon. Court;

(iv) That there be an order on costs.

The application has several grounds on the face of the Notice of Motion. One of the grounds is that there

are pending cases commenced by the plaintiffs and other parties i.e. KAKA. HCCC. No.192 of 2012; KAK. HCCC. No. 53 of 2012 and KAK. Constitutional Reference No. 8 of 2012 which are meritorious and which are still pending such that unless the orders sought are granted as hereby, the said cases will be in vain.

The application was also filed with a supporting affidavit sworn on 24<sup>th</sup> December 2012 by **Abisai Wesonga**, the 1<sup>st</sup> plaintiff. In the affidavit, it is deponed, *inter alia*, that there are pending cases challenging the basis of the purported rules to disqualify candidates for directorships, and that these pending cases were now being used to disqualify people, including the plaintiffs, from contesting for directorships. That recourse to courts of justice cannot be a basis for prejudice against any person. Annexed to the affidavit are a number of documents to support the averments in the affidavit.

The application is opposed. A replying affidavit sworn on 30<sup>th</sup> January, 2013 by **Justin Rapando**, the Legal Officer of the 2<sup>nd</sup> respondent was filed. It was deponed, *inter alia*, that the application had been overtaken by events as nominations for directors were conducted and concluded on 29/12/12 in a fair and transparent manner; that the Elections Committee thereafter issued certificates of nominations to successful candidates; that the plaintiffs did not meet the requirements for elections; and that the elections were ordered by the court. Annexed to the affidavit are some documents, including minutes of a meeting of the Electoral Committee held on 28<sup>th</sup> December, 2012.

On the hearing date, Mr. Ombito for the plaintiffs and Mr. Lutta for the defendants addressed the court at length. I have considered their submissions alongside the documents filed.

This is an application for interlocutory injunction. At this application stage, I cannot give permanent or conclusive orders, as there is a pending case brought by way of Plaint.

The parameters to be considered by the court in an application for temporary injunction are settled. They were stated in the case of ***GIELLA –vs- CASSMAN BROWN LTD. [1973] EA 358***. The same principles have been applied consistently in subsequent cases. They are three. Firstly, an applicant has to demonstrate a prima facie case with probability of success. Secondly, an injunction will not normally be granted unless the applicant will otherwise suffer irreparable loss not capable of being compensated in damages. Thirdly, if the court is in doubt, it will decide the matter (application) on the balance of convenience.

Do the plaintiffs have a prima facie case with a probability of success? From the plaint and documents filed, the plaintiffs appear to have a prima facie case. From the plaint, their main prayers are two, that is requests –

- for declaratory orders that the three conditionalities asset (sic) in the notice of elections are alien to the articles of association of MOCO [1998] Ltd. and are unreasonable.
- That in the alternative, the Hon. Court grant an injunction to restrain the defendant from conducting purported elections for directors unless and until the above notice is withdrawn and or amended.

Both the above prayers are yet to be considered by the court substantively for determination. In my view, depending on evidence to be tendered, the pendulum could either go in favour of the plaintiffs or the defendants. Since a prima facie case is merely a case that may possibly succeed, I find that the plaintiffs have shown a prima facie case with probability of success.

Will the plaintiffs suffer irreparable loss if the injunctive orders sought are not granted? In my view, the answer is yes but only with respect to elections that the plaintiffs say were to be held on 25<sup>th</sup> January 2013. This is because, from the documents filed in the application, temporary restraining orders were only granted by the court on 17<sup>th</sup> January 2013. Therefore, in my view, they could not affect the actions which had already taken place before that date. Otherwise, I find that the plaintiffs will suffer irreparable loss if the said elections for 25/1/2013 were held, as it is not possible to quantify their loss for being excluded

from participating in the directorship elections. Although I am told that the 1<sup>st</sup> plaintiff did not participate in nominations in December 2012, in my view, that is not a basis for saying that he does not have *locus standi*.

The balance of convenience is also in favour of the plaintiffs, as they appear to be sufficiently interested in the activities and directorships of the 2<sup>nd</sup> defendant MUMIAS OUTGROWERS CO. [1998] LTD.

In the result, I allow the application and order as follows:-

1. That an order is hereby issued restraining the respondents Mumias Outgrowers Co. [1998] Ltd. and in particular the 1<sup>st</sup> respondent Gregory Makokha Were as the Chairman of the 2<sup>nd</sup> defendant's electoral committee, from carrying out the elections of 25<sup>th</sup> January 2013 unless and until the notice of elections dated 19<sup>th</sup> December 2012 and issued by the said Mumias Outgrowers Co. [1998] Ltd. is wholly revoked and revised to delete the requirement for directorships complained of. These restraining orders will be effective till the hearing and determination of the case herein, unless otherwise varied by the court.

2. Costs in the cause.

*Dated and delivered at Kakamega this 9<sup>th</sup> day of May, 2013*

**George Dulu**

**JUDGE**