



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, SHAH & BOSIRE JJ.A)
CIVIL APPEAL NO. 276 OF 2000**

**MOSES MBUGUA MWANGI 1ST APPELLANT
PETER MUREITHI KUNGU 2ND APPELLANT
CHARLES KIARIE 3RD APPELLANT
GITWE COFFEE GROWERS CO-OPERATIVE SOCIETY 4TH APPELLANT
KAWEITHEI FARMERS CO-OPERATIVE SOCIETY 5TH APPELLANT

AND
COFFEE BOARD OF KENYA RESPONDENT**

**(An appeal from the ruling and order of the High Court of Kenya at Nairobi
(Justice Aluoch) delivered on the 17th day of January 2000
in
H.C.C.C. No.54 of 2000)

JUDGMENT OF THE COURT

This is an interlocutory appeal. The first three appellants, namely, Moses Mbugua Mwangi, Peter Mureithi Kungu, and Charles Kiarie, are licensed coffee planters and growers, while Gitwe Coffee Co-operative Society, the 4th appellant, and Kaweitheo Farmers Co-operative Society, the 5th appellant, respectively, are Coffee Co-operative Societies. Each appellant markets his or its coffee through the Coffee Board of Kenya, the respondent, which is a body corporate with perpetual succession established under the Coffee Act Cap 333, Laws of Kenya. For convenience we shall hereafter refer to that Act simply as the Coffee Act. It was common ground that the respondent is a state corporation as defined under State Corporations Act, Cap 446 Laws of Kenya.

This appeal is from the order of the superior court made on 17th January, 2000 in its CIVIL SUIT NO. 54 OF 2000 declining to grant an interlocutory injunction to the appellants to stop the holding of a delegates' conference which had been convened by the respondent to be held on 18th January, 2000, on the direction of the Minister for Agriculture. The said conference was to be held for the purpose of selecting names for submission to the Minister for Agriculture for appointment to the Board of Directors of the respondent. The stated ground for the injunction application is that the said conference was convened in contravention of the provisions of the Coffee Act, and the Rules made thereunder. In its ruling the superior court (Aluoch J.) rendered itself, in pertinent part, as follows:-

"From the submissions before us, I can quite rightly say that we are not dealing with a normal situation but a crisis, though this does not entitle any party to act in contravention of the

law. As there has been a notice exhibited calling plants (sic) for a Delegates Conference tomorrow to a meeting to transact business in January 2000 when the life of the present Board expires, I feel that granting an injunction at this stage and in these circumstances before all facts have been litigated would not be (si c) the interest of the parties involved. For this reason I proceed to refuse to grant the injunction order sought and I proceed to dismiss with costs the application for injunction."

Section 12 of the Coffee Act makes provision for annual conferences of delegates of planters for the purposes of selecting names for submission to the Minister for Agriculture (hereinafter referred to as the Minister) for the purpose of appointment to the Board of Directors of the respondent by the Minister, among other business. The Coffee (General) Rules, made pursuant to the provisions of section 38 of the Coffee Act, among other things, make provision for the procedure and manner of appointing delegates to the annual and other delegates conferences for coffee planters from various electoral districts in the country. Each delegate, by dint of rule 10 thereof, holds office for one year. And rule 14 of the said rules confers the power on the secretary of the respondent with the agreement of the Board, to convene the annual planters delegates conference and give notices of the meeting "at least sixty days from the date fixed therefor". As we stated earlier, the meeting scheduled for 18th January, 2000, was convened on the direction of the Minister given by his letter to the General Manager of the respondent dated 6th January, 2000. The letter in pertinent part, reads as follows:-

"In exercise of the powers conferred by sub -section (7) of Section 6 of the Coffee Act, Chapter 333 of the Laws of Kenya, I hereby direct the Board to convene a conference of delegates of planters as set out in sub-section (1) and (2) of section 12 for purposes of selecting names for submission to the Minister for Constitution of the Board as set out under section 3 and 5 of the Act.

In this regard, the conference shall be held at the Kenya Coffee College, Ruiru on 18th January, 2000 starting at 10.00 a.m. In pursuance to the above exercise, the delegates representing all electoral districts should attend the conference. In the event that a delegate is absent for whatever reason a substitute delegate should attend.

..... Signed

C.M. OBURE

MINISTER FOR AGRICULTURE".

In their application for an interlocutory injunction, which was expressed to be brought under Order XXXIX rules 3 and 5 of the Civil Procedure Rules, the appellants averred that the respondent by agreeing to convene the conference as had been directed by the Minister breached the mandatory statutory provisions of the Coffee Act with regard to the convening of annual delegates conference for coffee planters. The appellants contended that unless they were granted an injunction the said conference would be held and thus deny them the right to participate in a lawful and fair election of the Board of Directors of the respondent to represent them in the respondent Board.

The injunction having been refused the meeting scheduled for 18th January, 2000 was held and names were selected for submission to the Minister for appointment as directors of the respondent Board of directors. Soon thereafter the Minister appointed the directors to serve for a period of six months, which period has from time to time been extended.

In the present appeal, the appellants have raised four grounds for challenging the decision of the Superior Court. They are:

(1) That the learned trial Judge erred in refusing to grant an injunction when the respondent admitted that the Delegates Conference was convened in breach of regulations made under the

Coffee Act.

(2) That the learned Judge failed to appreciate that the failure to follow the laid down regulations as to the convening of a Delegates Conference was as a result of government interference and that it was ironical that the same government had turned around to contend that the election of delegates at the grass-roots level could not be held in time.

(3) Having accepted that the law had been breached the learned Judge erred in declining to grant the injunction prayed for, merely on the ground that "it was a crisis and not a normal situation", a factor unknown to law.

(4) That the learned Judge erred in allowing the Minister through the Attorney-General to be joined as an interested party.

Mr Muite who, with Mr Mureithi, appeared for the appellants submitted before us, inter alia, that the procedure which the respondent adopted excluded the participation of district representatives notwithstanding that the provisions of the Coffee Act mandatorily require their participation. Consequently, he said, the learned Judge of the superior court by not taking cognizance of that fact erred in law and her decision should therefore be interfered with. Besides he urged, it was in evidence that the manager of the respondent Board had been removed and before another one was appointed it was not legally practicable to hold elections as he is the person who, under the Coffee Act, is mandated to organize grassroots elections. In Mr Muite's view, these are matters which should have weighed in the mind of the court below in favour of granting the injunction application.

Mr Adera for the respondent submitted, relying on the provisions of section 6 (7) of the Coffee Act as read with section 7 (3) of the State Corporations Act aforesaid, that the Minister for Agriculture has the power to direct the respondent to convene an annual conference and it was the power he exercised in the matter before us.

In reply, Mr Muite submitted that the State Corporations Act does not apply as the power under that Act to revoke appointments of membership to and to constitute Boards, is vested in the President and to the extent that no evidence of delegation of such power to the Minister was adduced, the Minister could not invoke the provisions of that Act. Besides, he said, the State Corporations Act was cited to support an alternative argument to the main argument based on the provisions of section 6(7) of the Coffee Act upon which the respondent's defence was anchored.

The often cited case of ***GIELLA V. CASSMAN BROWN & COMPANY LTD [1973]*** EA 358 , sets out the principles for the grant of interlocutory injunctions. First, an applicant is obliged to show he has a prima facie case with the probability of succeeding. Second, that unless the injunction prayed for is granted the applicant might otherwise suffer irreparable injury or damage which might not be compensatable in damages. Third, if the court is in doubt in either or both of the above, it may decide the application on the balance of convenience.

We have agonized on the question whether or not to consider the issues raised in this appeal in view of the fact that the conference which the appellants sought to stop has already been held. We posed this question to Mr Muite, but his response was simply that a decision on the matter one way or the other is necessary for purposes of guiding those in the Coffee sector in the future. But it is important to bear in mind that the appellants' suit is still pending in the superior court. As we stated earlier this is merely an interlocutory appeal. The purported mischief the appellants wanted to obviate has been committed, and any resultant damage or injury may have been suffered. We are not here concerned with the nature and extent of such damage as it is not one of the issues we are called upon to determine in the present appeal.

Besides, conferences of the nature as the one the present matter relates to are held annually. For instance another conference was supposed to be held sometime in January or February, 2001. We were informed from the bar that it was not held then because the life of the Board the Minister appointed last year was extended. It is the same Board which was in office when this appeal came for hearing on 11th

June, 2001. So the time has come for another statutory conference to be convened or so we think. If that be so, of what use will an injunction serve if granted in this matter? The parties are free not only to participate in the election of delegates to this year's conference or any other conference that might be convened for that purpose in the future, but also to urge their respective cases at the hearing of their suit pending in the superior court for that court's decision for whatever may be the value of such a decision to the appellants.

In the result, we are of the view that this appeal has been overtaken by events. It is therefore dismissed. We do not know what the position would have been had the appellants chosen to proceed by way of judicial review.

We have given serious thought as to what order should be made on costs, and come to the conclusion that each party should bear their own costs. Those then are the orders we make.

Dated and delivered at Nairobi this 6th day of July, 2001.

R.S.C. OMOLO

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR