



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO 29 OF 2015**

**JOSEPH KOBIA NGUTHARI.....PLAINTIFF**

**Versus**

**KIEGOI TEA FACTORY COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**KTDA MANAGEMENT SERVICES LIMITED.....2<sup>ND</sup> DEFENDANT**

**KENYA TEA DEV. AGENCY HOLDINGS LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

**Disqualification of prospective director due to pending suit**

[1] The application dated 29<sup>th</sup> December 2015 seeks for a mandatory and temporary injunction against the Defendants jointly and severally. The temporary injunction is to restrain the defendants and their agents from holding any elections of directors for KANTHARI and or MAUA electoral areas in Kiegoi Tea Factory Limited until this suit is determined. The mandatory injunction is to compel the defendants jointly and severally to declare the plaintiff to be qualified to vie for the position of directorship in respect of KANTHARI Electoral Area and to allow him to so vie. The Applicant also sought these orders to be served upon the Officer Commanding Maua Police Station to ensure compliance. He also sought for costs of the application. The application is expressed to be brought under Section 1, 1A, 3 and 3A of the Civil Procedure Act, Order 40 Rule 1 and 2 of the Civil Procedure Rules, Article 159 (2) of the Constitution and all other enabling provisions of the law. It is also supported by the Affidavit of JOSEPH KOBIA NGUTHARI.

[2] The major reason given for applying is that as a farmer, tea grower and shareholder within KANTHARI and MAUA Electoral area of Kiegoi Tea Factory Limited, the Applicant is qualified to vie for directorship in that area. But, the defendants conspired and colluded to, and disqualified the Applicant from so vying pursuant to notification for nomination of candidates for KANTHARI and MAUA Electoral area dated 12<sup>th</sup> November 2015. The Applicant viewed this disqualification as illegal, unfair and malicious; the reason they gave him was not tenable because Meru HCCC NO 131 of 2007 had been filled by the Applicant in his capacity as the chairman of, and by other committee members of the 1<sup>st</sup> defendant self-help group against one J.K Mubea and not against the defendants as alleged.

[3] The Applicant also filed submissions to amplify their above avowed positions. The Applicant submitted that MERU HCCC NO.131 of 2007 was filed by a duly registered self-help group through its officials who include the Applicant and that it was trite law that a company was a separate legal entity not only from its directors, but also from its employees/or officers. In a swift rejoinder, the Applicant contended that the elections manual was clear and prohibited litigation against “the company” and not

“officials” of the company and that he had further not filed Meru HCCC NO. 131 OF 2007 in his individual capacity but as chairman of the Fair Trade Premium Committee. Consequently, the Applicant asserted that he had satisfied the requirements stated in the case of **GIELLA vs. CASSMAN BROWN** to warrant the issuance of the injunctive orders as prayed.

### **Dismissal on account of pending litigation**

[4] The Application was opposed via a Replying Affidavit sworn by one John Kennedy Omanga the Company Group Secretary of the 3<sup>rd</sup> defendant who deposed inter alia that he was aware that the Applicant had offered himself as a candidate among others for the post of Director, Kanthari Electoral Area and submitted documents in support of his application. But, among others, the Applicant was unsuccessful; his rejection was on the basis that, at the time, the Applicant had an ongoing case namely Meru HCCC NO 131 of 2007 against the Factory Unit Manager Kiegoi Tea Factory namely Mr. J.K Mubea who had been sued in his capacity as the 1<sup>st</sup> defendant's Factory Unit Manager. They cited the Election Manuals of the 1<sup>st</sup> Respondent that, any party with a case pending against the company and by extension against a company official sued in their capacity as such is not qualified to vie for the position of director. They argued that there was no official and duly filed notice of withdrawal of suit which had been served upon the company as at the time of the prequalification.

[5] He further contended that the Applicant being dissatisfied with the decision of the verification committee appealed to the Dispute Resolution Committee vide letter dated 10<sup>th</sup> December 2015 which appeal was considered and found to be without merit. The Respondents also filed submissions to augment their above arguments. Consequently, the Respondent contended that the Applicant was the author of his own misfortune and that he had approached the court with unclean hands and was, thus, not entitled to an equitable relief of injunction.

### **DETERMINATION**

[6] I have carefully considered this application, the rival submissions by the parties and the authority relied upon by the Applicant. Doubtless, this Application is challenging the disqualification of the Applicant from vying for directorship pursuant to a notice of nomination of candidates for directorship in respect of among others Kanthari Electoral Area issued on 12<sup>th</sup> November 2015. The Applicant duly offered himself as a candidate and presented all the relevant documents to the Respondents but vide a letter dated 10<sup>th</sup> December 2015, the Respondents disqualified the Applicant from the said elections solely on account of MERU HCCC NO 131 of 2007 which was filed against one J. K. Mubea. The question for determination is, therefore:-

***(1) Whether MERU HCCC NO.131 OF 2007 instituted by the Applicant among others against one J.K Mubea a factory unit manager of the 1<sup>st</sup> defendant is litigation with the 1<sup>st</sup> Respondent Company envisaged in the Election Manual of the 1<sup>st</sup> Respondent.***

#### **Notion of separate corporate entity**

[7] The notion of separate corporate entity of a company will be the defining point in this matter. But I will examine it within the context of this case. The fundamental instrument is the Election Manual of the 1<sup>st</sup> Respondent which provided *inter alia* that:-

***“.....all candidates in any of the above electoral process must be in good standing in society. This includes having not violated Factory Company by laws, not having ongoing un-concluded litigation with the company.....”***

The Respondents in their replying affidavit interpreted the above provision of the Election Manuals of the 1<sup>st</sup> Respondent to mean that, any person with a case pending against the company and by extension against a company official sued as such is not qualified to vie for the position of director. My

understanding of the said provision in the Election Manual is that the litigation envisaged therein is with the company and not with the shareholders or directors or its officials. This follows after the greatest legal innovation of separate corporate legal entity which was formulated in the case of **SALOMON vs. SALOMON [1897] AC 78**, that:-

***“The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act”.***

This long-standing legal principle is until today true and has been adopted in national legislation and a great number of judicial precedents within the common law tradition including Kenya. I only cite the case of **VICTOR MABACHI & ANOTHER vs. NURTURN BATES LTD, CIVIL APPEAL NO. 247 OF 2005 [2013] eKLR**, where the Court held that a company

***“...as a body corporate, is a persona juridica, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil”.***

[8] Applying this body of knowledge to this case, the Applicant among other members of Tiegoi Fair-Trade Premium Committee had sued one J.K Mubea who was clearly described in the pleadings to be factory unit manager of the 1<sup>st</sup> Respondent. For all purposes, the factory manager is to be taken to be quite separate and deferent from the 1<sup>st</sup> Respondent Company. Therefore, any suit against him is not a suit against or with the company. Accordingly, the above provision in the Election Manual will not apply to or operate as a basis for disqualification of the Applicant from elections for directorship of the 1<sup>st</sup> Respondent. Just in passing I may say this; that article 88 of the Memorandum and Articles of Association of the 1<sup>st</sup> Respondent on qualification of the person who shall be a director of the company, does not have a provision similar to the one in the Election Manual herein on disqualification on the basis of pending suit with the company. And without deciding on that aspect, I am of the opinion that, in view of the widened right of access to justice, a debate on that kind of restriction of right to vie for directorship of a company will be invigorating. Except I find that, in this case, there is a clear violation of the rights of the Applicant as a farmer, tea grower and shareholder within the Electoral Areas of the 1<sup>st</sup> Respondent to participate in the elections for directorship of the 1<sup>st</sup> Respondent. And when I place this case on the scale of law I am satisfied this...

***“...is a case which...the court or a tribunal properly directing itself will conclude that there exists a right which had apparently been infringed by the opposite party hence the need to call for an explanation or rebuttal from the former.”*** See the case of **MRAO LTD vs. FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS**.

As such, where a violation of right of the Applicant has been found, an injunction would issue in terms of **GIELLA vs. CASSMAN BROWN**. Again, a case for mandatory injunction has been made out given the clear nature of this case and the fact that the Defendants intend to steal a match from the Plaintiff; this is indeed a matter that should be determined at once. On this threshold, see a passage in **“Halsbury’s Laws of England,”** Volume 24, at paragraph 948 which has been applied in our courts to the effect that:

***“A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff ... a mandatory injunction will be granted on an interlocutory application.”***

However, as a court of law, we are under a constitutional command to take a wider view of justice in adjudication of cases. I am acutely aware of the contention by the Respondents that the shareholders of the Respondent have legitimate expectations in having an election for and to elect their preferred director for purposes of representation in the Board. I also recognize that indefinite halting of such election would thwart the shareholders' legitimate expectation to representation, hurt and also put the company on a collision path with the law. Therefore, taking into account the totality of the circumstances of this case, in the interest of justice and fairness I will allow only prayer 4 of the application and direct:

***(1) That the Applicant shall participate in the elections for directorship of the 1<sup>st</sup> Respondent which shall be held within 60 days from today's date.***

***(2) Accordingly, the orders issued by this court on 30<sup>th</sup> December 2015 are vacated forthwith.***

***(3) There will be no orders as to costs.***

**Dated, signed and delivered in open court at Meru this 22<sup>nd</sup> day of September, 2016**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Ondari advocate for M/s. Mutinda advocate for defendant/respondent

Mr. Mutegi advocate for Mr. Ngunjiri advocate for plaintiff/applicant

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**F. GIKONYO**

**JUDGE**