



**Rono v Kenya Hospital Association Ltd (Petition E011 of 2022)
[2022] KEHC 15730 (KLR) (Commercial and Tax) (25 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15730 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
PETITION E011 OF 2022
DO CHEPKWONY, J
NOVEMBER 25, 2022
IN THE MATTER OF: SECTION 30(1) OF THE COMPANIES ACT, ACT
NO.17 OF 2015
AND
IN THE MATTER OF: THE CONTRAVENTION OF THE MEMORANDUM
AND ARTICLES OF ASSOCIATION OF KENYA
HOSPITAL ASSOCIATION LIMITED.**

BETWEEN

EDWIN KIPNG'ENO RONO PETITIONER

AND

KENYA HOSPITAL ASSOCIATION LTD RESPONDENT

RULING

1. There are three (3) applications pending in this matter and are subject of this ruling. Two of the applications are filed by the Petitioner while the third application is filed by the Respondent.
2. The Petitioner's applications are the Notice of Motion dated September 27, 2022 and another dated October 12, 2022. In the application dated September 27, 2022, the Petitioner substantially seeks a conservatory order suspending and staying the discussion and implementation of any resolution with respect to election of the Respondent's Directors, pending the hearing and determination of the Petition. The Application dated October 12, 2022 is a contempt application in which the Petitioner seeks to hold the Respondents in contempt of orders issued by this court on September 28, 2022, and accordingly direct them to purge the said contempt.



3. The Respondents applications are the Notice of Motion application dated September 29, 2022. In this application, the Respondent is seeking the setting aside of orders issued by this court on September 28, 2022 which in this court's view is a disguised response to the Petitioner's application dated September 27, 2022.
4. Having found that the two application are related in material facts and there being an overlap in the prayers sought therein, directions issued that the two be consolidated for determination.
5. However, I wish to address the contempt application dated October 12, 2022 first for the obvious reasons that it is an unqualified obligation of every person to obey court orders as this court cannot condone, deliberate disobedience of its orders because such disobedience strikes at the very root of rule of law. In any event, it must be satisfactorily proved that the contemnor had been served with clear terms of the order, and had knowledge of the terms of the order but wilfully and deliberately disobeyed the same.

Determination of the Application dated 12th October, 2022

6. The application dated October 12, 2022, seeks;-
 - a. That the court holds the 1st to 5th Respondents in contempt of the court order as issued by this court on the September 28, 2022.
 - b. That upon grant of order (c)above, the 1st to 5th Respondents be punished for contempt of the court order as issued on the September 28, 2022.
 - c. That upon grant of order (d) hereinabove, the 1st to 5th Respondents do purge the contempt of the court order issued on the September 28, 2022 by restoring the status quo as at September 29, 2022 where the 2nd to 4th Respondents terms as Director had lapsed.
 - d. That the costs of the application be borne by the Respondents.
7. In support of his application dated October 12, 2022, the Petitioner has averred that on 2September 8, 2022, this court granted interim orders restraining the Respondent from discussing, passing, implementing or in any other way engaging with Agenda No.7 on the election of directors which was slated for discussion on the Respondent's Annual General Meeting held on September 29, 2022. The Petitioner has added that vide a letter dated October 5, 2022, the Respondent expressed the intent to discuss the agenda, and indeed actualized the same in a board meeting held on October 7, 2022 whereby some of the 1st Respondent's officers including, Dr. W. Irungu Ndirangu, Hon. DR. Chris M. N. Bichange and Robert F. Shaw were elected as Directors in breach of the orders of the court. In his further affidavit, the Petitioner has averred that Agenda No.7 in the Notice of Annual General Meeting was changed to read as Agenda No. 5/6 so as to circumvent the court's ruling and proceed with the election of the Directors.
8. In response to Petitioners application dated October 12, 2022, the 1st Respondent filed an affidavit sworn by its Company Secretary Gilbert Nyamweya Omoke on October 21, 2022. He averred that Agenda No.7 of the meeting held on September 29, 2022 was merely informing the Respondents of the retirement by rotation of three Directors namely Maj (Rtd) Hon. Dr. W. Irungu Ndirangu, Dr. Chris M.N Bichange and Mr. Robert F. Shaw although they were also eligible for re-election. He stated that in the meeting, the issue of re-election was adjourned on basis of the orders issued by this court. In his view, an act of contempt ought to be pleaded with specificity stating the nature of the alleged contempt, the date and terms of the breach as well as service of the order as stipulated under Part 81.4(1) of *United Kingdom Civil Procedure*. The deponent views the present case as one which has not met



those prerequisites since the petitioner misunderstood the import of the order issued on September 28, 2022. He has gone on to explain that the 1st Respondent through its advocate advised the Petitioner vide a letter dated October 5, 2022 that the issue on election of Directors had been held in abeyance to be considered in an adjourned Annual General Meeting and that the Directors in office were to continue running office until such time. That it is on that basis that the existing directors held a meeting on October 7, 2022, and at no point did they indicate or represent that they had been duly re-elected as purported by the Petitioner. Based on those grounds, the deponent describes the application dated October 12, 2022 as a delay tactic which is in contravention of the court's overriding objectives.

Analysis and Determination

9. I have considered the application dated October 12, 2022, the grounds set out in the affidavits sworn in support and rebuttal of the same, the submissions tendered on behalf of the parties as well as the authorities cited. The much I have understood of the Petitioner/Applicant's case is that the Respondent and its officers namely Dr. W. Irungu Ndirangu, Hon. DR. Chris M. N. Bichange, Mr. Robert F. Shaw and CPS Gilbert Nyamweya Omoke acted in deliberate disobedience of the orders issued on September 28, 2022 by changing Agenda No.7 to Agenda No.5/6 in order to deliberate the election of directors, allowing those officers to continue acting as Directors of the Company despite their term having ended, and allowing the same officers to appoint themselves as Directors.
10. It is important to note that on October 14, 2022, this court declined the Petitioner's move to join the above-mentioned officers to this suit on account that leave to do so had not had been sought. Therefore, albeit, I have seen the response and submissions filed by the mentioned officers through the Firm of Triple OK Law. It would be an academic exercise to consider their merits in this issue given that the court has already pronounced itself on joinder of the said officers as parties to this suit.
11. It has also emerged that the said officers, more specifically Dr. W. Irungu Ndirangu, Hon. DR. Chris M. N. Bichange, and Robert F. Shaw were the existing Directors before the September 29, 2022 when the Annual General Meeting happened. It has been submitted that Article 38 of the Respondent's Article of Association of the Respondent allows the directors exiting office to continue running office in the event of postponement of elections.
12. On the same wavelength, and while minded that the Respondent ought to be maintained as a going concern, this court directed that the Directors in office to continue running the affairs of the Company pending further directions of the court.
13. It would be therefore incorrect, if not being ignorant, for the Petitioner to allege that the existing Director re-appointed themselves and continued running the office of Directors despite their term ending. In my view, that claim/allegation does not amount to deliberate or in any way disobedience of the court's orders granted on September 28, 2022 which suspended and stayed the election of the Respondent's Directors.
14. The other ground advanced by the Petitioner to establish contempt by the Respondents in this application dated October 12, 2022, is the allegation that vide a letter dated October 5, 2022, the Respondent confirmed having held the elections despite the orders of the court. I have taken time to read through the said letter and find this allegation is not true. What the said letter expressly indicates is that the elections were held in abeyance to be considered in an adjourned Annual General Meeting in line with Article 38 of the Articles of Association. The best I can say of this is that the Petitioner chose to adopt a false interpretation of the said letter which cannot establish a ground for contempt as is required in law.



15. Since the terms of the order issued on September 28, 2022 have not been contested, it is incumbent upon the Petitioner/Applicant to show that Respondent and its officers did the acts prohibited in the said order, with the correct position being that the said order only precluded the election of new Directors.
16. In conclusion, it is this court's finding that the Applicant has failed to demonstrate to the required standard of proof, which is higher than that of a balance of probability but almost exactly to that of beyond reasonable doubt, that indeed those orders were intentionally and willfully disobeyed and violated, and new Directors elected.
17. In the circumstances, and while considering the material placed before it, the court is not satisfied that the Petitioner/Applicant has proved a case for contempt and there is none to be purged by the Respondents therein. Consequently, the application dated October 12, 2022 is hereby declined, and accordingly dismissed. Each party shall however bear its own costs.

Determination of Applications dated September 27, 2022 and September 29, 2022

18. Now turning to the other two applications dated September 27, 2022 and September 29, 2022, as earlier indicated, the two applications will be addressed and determined contemporaneously since the latter is a disguised response to the former. In the application dated September 27, 2022, the Petitioner seeks for the following orders: -
 - (a) Spent;
 - (b) Spent;
 - (c) That pending the hearing and determination of the Petition, a conservatory order be is hereby issued suspending and staying the discussion, passing, implementing any resolution or in any other way engaging with Agenda No. 7 on election of Directors of the Respondent's Notice of Annual General Meeting dated September 1, 2022, scheduling the Respondents Annual General meeting on the September 29, 2022 or any other day;
 - (d) That the costs of this application be borne by the Respondents.
19. The Applicants case as contained in the grounds adduced in support of the application are that the Respondent *vide* an office Memorandum dated September 22, 2022, sought to bar the Applicant from campaigning for the position of directorship in the absence of any laws or company regulations precluding such campaigns. That although there were other persons vying for the positions, the bar to campaign was solely directed against the Applicant thus threatening his Constitutional rights. In particular, the applicant avers that his right to information under Article 35 of *the Constitution* was infringed for he was not informed of the regulations precluding him from campaigning, his right of association under Article 36 of *the Constitution* to participate in events such as vying for Director position, the right under Article 27 of *the Constitution* which protects against discrimination, right of political choice under Article 38 of *the Constitution*, and the right of fair administrative action under Article 47(1) of *the Constitution* of Kenya, 2010. His contention that this is meant to disenfranchise him. He sought this court to intervene and protect the constitutional rights and freedoms.
20. The Respondent opposed the application *vide* the application dated September 29, 2022 and the Replying Affidavit sworn by its Company Secretary Gilbert Nyamweya. He argued that among other Agenda items for the meeting, Agenda No.7 as alleged, addressed the retirement on third of the Board members coupled up with the conduct of election to fill the vacancies.



That eleven (11) candidates including the Petitioner were eligible for the position and accepted as contestants. He added that the notice precluding campaign was directed to all the eleven (11) contestants when the Respondent became aware of the campaigns by some candidates who were eligible for voting hence disruptive of the hospital's operations and in contravention of the order of business of the Annual General Meeting. That the Applicant was merely advised to pull down the campaign materials since the election is meant to be conducted as an agenda and proceed on the floor at the Annual General Meeting. Therefore, the deponent has averred that the allegation of being discriminated are unfounded as the vying of the position of directorship does not accord one any political right under Article 38 of *the Constitution* as the election of Board Directors/Members is regulated by the *Companies Act* and the relevant `.

21. The Respondent added that the Plaintiff's unwarranted campaigns through WhatsApp messages were indeed an infringement to other members privacy and not a denial, violation, or infringement or threat of the Petitioners individual freedoms and rights. It has been stated that the election of Directors is limited to its members and is to be held within limited timelines, which is not more than 15 months after the holding of the last preceding General Meeting, so that if the orders remain in force, there is a threat of the Company being in contravention of this requirement and its ability to perform its duties being undermined since the Company's Directors are members of the Board of Management Committee, which play a crucial role in its management. Finally, according to the Respondent, there is no likelihood of the Petition being rendered nugatory as elections pursuant to Agenda No.7 are not immutable and can be nullified if the same succeeds, and any remedial reliefs arising therefrom compensated. Hence, no prejudice will be suffered by any party. And the Respondent having expended a lot of money in planning for the election, the balance of convenience should tilt in its favour.

Analysis and Determination

22. Having considered all the pleadings filed by the parties herein, it is evident that the center of the Petitioner's application is the election of the Respondent's Directors and or Board Members, in which the Petitioner is a nominee and a contestant for the position of directorship. The Applicant alleges that he was denied a fair chance to participate in the contestation upon being ordered to cease the campaigns despite there being no express laws and or regulations by the Respondent which govern the conduct of campaigns. It is his contention that this action by the Petitioner is meant to disenfranchise him for participating in the said elections.
23. Although parties were agreeable in their submissions that Conservatory orders as sought by the Petitioner bear a more decided public law connotation, I wish to add that their effect prevents any action of any kind from being undertaken so as to preserve the subject matter until the suit herein is determined.
24. In the case of *Wilson Kaberia Nkunja -vs.-The Magistrate and Judges Vetting Board & Others*, Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR , the Court, and rightly so, summarized three main principles for consideration on whether or not to grant conservatory orders as follows that: -
 - a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.
 - b. Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and



- c. The public interest must be considered before grant of a conservatory order.
25. Applying those principles to the present case, with regard to a prima facie case, the guiding principles were laid down in the case of *Mrao –vs- First American Bank of Kenya Limited & 2 Others* (2003) KLR 125, wherein, in determining what a prima facie case is, the court had the following to say: -
- In a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.
26. In the case of *Isaiyah Luyara Odando & Another –vs- Kenya Revenue Authority & 6 Others, Nairobi Branch Law Society of Kenya (Interested party)* [2022] eKLR, the court well established thus: -
- “In sum, therefore, in determining whether a matter discloses a prima-facie case, a Court must look at the case as a whole. It must weigh, albeit preliminarily, the pleadings, the factual basis, the respective parties’ positions, the remedies sought and the law. In so doing, a Constitutional Court must be guided by Articles 22 (1) and 258(1) of *the Constitution* which provisions are on the right to institute Court proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or the when *the Constitution* has been contravened, or is threatened with contravention.”
27. In this case, the Petitioners case rests on the Inter-office Memorandum dated September 2, 2022 which directed him to pull down his campaign materials on ground that the election of directors is an Agenda in the Annual General Meeting and is done on that very date on the floor. The Plaintiff incessantly submitted that there are no laws and or regulations with the Respondent Company precluding the conduct of campaigns, pending the election. The Petitioner avers that by the Inter-office Memorandum, his constitutional rights including the right not to be discriminated, the right of association, right to fair administrative action and the right to political opinion were infringed.
28. Having weighed the rivalry submissions and positions taken by the parties, this court is inclined to agree that the Inter-office Memorandum was actually advising on how the conduct of the elections was expected to be done and managed internally. Thus, it would be unfair for the court to delve into the internal management of the Company’s affairs as this would amount to the court usurping the duties assigned to the Company officials. It would only warrant the court’s interference were it to be show that the Company’s decision was so absurd, to the extent of being in contravention of the rights vested in the bill of rights as provided in *the Constitution*, hence lead to injustice being done to the parties involved.
29. In this case, the Respondent has acknowledged that the Petitioner is still a contestant and has not been excluded even after the memo directing him to pull down the campaign materials. Therefore, it cannot be said with certainty that the company’s directive in the Inter-office Memorandum was so irrational as to place the Petitioner in a disadvantaged position as against the other contestants.
30. Consequently, in view of the aforesaid analysis of the material before court, it is not persuaded that the Petitioner has established a *prima facie* case to warrant the consideration on whether he stands to suffer irreparable damage if the intended election takes place.
31. This court has on several occasions pronounced itself that if there is no prima facie case on the point essential to entitle the Plaintiff to complain of the Defendant’s activities, that becomes the end of any



claim for interlocutory relief. Similarly, having found that the Petitioner herein has failed to establish a *prima facie* case, it then follows that the application dated September 27, 2022 is without merit and the same is hereby dismissed on its entirety. Subsequently, the orders issued herein on September 28, 2022 are hereby discharged.

32. Costs of the application shall be in cause of the main Petition.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF NOVEMBER, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Ochieng counsel for Petitioner

Dr. Mutubwa counsel for 1st Respondent in Petition

Mr. John Ohaga (S. C) for 2nd to 5th Respondents in the Contempt proceedings.

Court Assistant - Sakina

