



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 77 OF 2017

EKUAM LOMONGIN LEONARD PLAINTIFF

VERSUS

PROF JULIA A. OJIAMBO 1ST DEFENDANT

KENYA NUTRITIONIST & .

DIETICIANS INSTITUTE 2ND DEFENDANT

RULING

INTRODUCTION

1. The 1st Defendant's Chamber Summons application dated 14th May 2018 and filed on 15th January 2018 was brought pursuant to the provisions of Order 40 Rule 2(1), 4(1), and 4(2) of the Civil Procedure Rules, Section 4, and Paragraph 1(5) of the First Schedule of the Nutritionists and Dieticians Act, 2007 and all other enabling provisions of the law. Prayer No 1 was spent. It sought the following remaining prayers:-

1. Spent

2. A temporary injunction be and is hereby issued restraining the second Defendant, her agents, servants or employees or any other persons acting on its behalf from planning, organising and or holding the special general meeting of second Respondent pending final determination of this suit.

3. THAT costs of this application be awarded to the first Defendant.

THE 1ST DEFENDANT'S CASE

2. The 1st Defendant supported her application with what she referred to as a Verifying Affidavit that was sworn on 14th May 2018 and a Supporting Affidavit that was sworn on the same date.

3. She pointed out that the 2nd Respondent had planned a Special General meeting on 24th May 2018 for purposes of electing an "acting chairperson" but that it did not have a Council in place. It was her contention that its CEO could not perform its functions without a Council. Her position was that she was its bona fide Chair in a holding capacity pending legal and proper procedures for appointing its successor.

4. She therefore urged this court the aforesaid orders.

THE PLAINTIFF'S CASE

5. On 22nd May 2018, the Plaintiff filed Grounds of Opposition of even date in response to the said application.

6. The essence of their Grounds of Opposition as that the 1st Defendant's application was misconceived in law, vexatious, scandalous, an abuse of the court process and was directed to the 2nd Defendant yet it was not the genesis of the suit. It added that her application had no relation to the order that had been sought in his Plaintiff.

THE 2ND DEFENDANT'S CASE

7. In opposition to the said application, David Okeyo, the 2nd Defendant's Chief Executive Officer (CEO) swore a Replying Affidavit on 21st May 2018. The same was filed on 22nd May 2018.

8. The 2nd Defendant's case was that the 1st Defendant resigned as its Chairperson on 31st March 2017 with a view to her pursuing other professional opportunities. As a result, the Principal Secretary of Ministry of Health informed the Bank Manager of Co-operative Bank of Kenya that she and the 2nd Defendant's Council members were no longer signatories to the bank as the term of its Council and by extension, Council committees had expired.

9. On 11th July 2017, the Cabinet Secretary Ministry of Health appointed an Interim Council of the 2nd Defendant. However, in a Ruling by Aburili J that was delivered on 2nd March 2018, the said appointments were quashed. Thereafter, the 1st Defendant purported to rescind her resignation as its Chairperson on 21st December 2017.

10. On 16th March 2018, the 1st Defendant sought a legal opinion from the Attorney General on her status as its Chair but that she concealed the fact that she had resigned as its chair. It disclosed the fact of her resignation when it sought an opinion from the Attorney General who informed it that according to the First Schedule of the Nutritionists and Dieticians Act, the position of a past chair holding acting as a chairperson until a new chairperson was elected was not applicable where a chair had vacated office.

11. It contended that it would be greatly prejudiced if the orders she had sought were granted. It added that the prayers to the Plaint herein did not relate to an injunction of the Special General Meeting that was scheduled to be held on 24th May 2018 and that she had not filed a Defence herein rendering her application highly irregular.

12. It termed her application an abuse of the court process as she had filed **Petition No 174 of 2015** and **JR No 170 of 2018** seeking similar orders to stop the said Special General Meeting.

LEGAL ANALYSIS

13. Counsels for the parties herein submitted orally in court due to the urgency of the matter which was first placed before it on 21st May 2018. They did not therefore furnish this court with any case law in support of their respective positions.

14. As a Preliminary issue, counsel for the 1st Defendant averred that the signature that was appended in the 2nd Defendant's Replying Affidavit did not belong to the deponent therein. He showed this court from the bar, previous documents she contended the said deponent had signed to acknowledge receipt.

15. Counsel for the 2nd Defendant admitted that the signature appearing in the Replying Affidavit was different from the signatures that appeared in the documents the counsel for the 1st Defendant had shown the court. He was, however, emphatic that it was not mandatory that a person sign all documents with the same signature and that in any event, the said counsel was not a handwriting expert so as to purport that the signature appearing in the said Replying Affidavit did not belong to the deponent therein.

16. Having considered the said arguments, this court noted that as there were no sample signatures of the deponent of the 2nd Defendant's Replying Affidavit and a report from a handwriting expert, on the court record, indicating whether the said signature belonged to the said deponent or not and the issue was not one that had really been placed before it court for determination, it was not persuaded that it could interrogate the 1st Defendant counsel assertions and make a determination on the competence or otherwise of the said Replying Affidavit. In any event, the documents the 1st Defendant's counsel had purported to rely upon in this regard were of little or no probative value as they had not been filed in court.

17. Turning to the substantive issue, both the 1st and 2nd Defendants were in agreement that the purported action by the Principal Secretary Ministry of Health to appoint an Interim Council was an illegality as Aburili J had correctly found and held in her aforesaid judgment of 2nd March 2018.

18. Where they differed was whether or not the 1st Defendant was acting as a Chair while awaiting the election of a substantive Chair and Council of the 2nd Defendant. Although they both referred this court to Paragraph 1 (5) of the First Schedule of Nutritionists and Dieticians Act, they both differed sharply in the interpretation of the same. The said Paragraph 1(5) of the said First Schedule provides as follows:-

“Unless he earlier vacates the office, a person elected to the office of Chairperson shall hold the office until the other Chairperson is elected.”

19. The 1st Defendant submitted that she wanted the subject matter of the suit herein preserved by way of an injunction so that she could demonstrate, in a full trial, that the resignation letter which she later rescinded was obtained by coercion and under duress.

20. This was a position that the 2nd Defendant vehemently denied and asserted that she had clearly indicated in her resignation letter of 31st March 2017 that she was resigning from being a Chair of the 2nd Defendant so that she could pursue other issues connoting that she was not coerced to write and sign her said resignation letter.

21. There was also the question of whether or not the 2nd Defendant's CEO could issue notices for the holding of the Special General Meeting on 24th May 2018 when there was no duly constituted Council. The 2nd Defendant argued that the CEO could while the 1st Defendant took a diametrically opposite view.

22. Their other point of departure was who would suffer loss if the orders sought by the 1st Defendant were granted. The 1st Defendant opined that the 2nd Defendant would incur no additional costs as the conference was on-going with the Special General Meeting scheduled for 24th May 2018 afternoon.

23. However, on the other hand the 2nd Defendant was emphatic that if the said meeting was stopped, then it would incur expenses in transporting and accommodating its members for another Special General Meeting. It also pointed out that the question to be asked and answered was whether it would be proper to have the 1st Defendant to continue holding herself out as a Chairperson, which they denied she was, because she resigned on 31st March 2017 and she could therefore not purport to re-appoint herself by rescinding her resignation or if elections should be held so that it could have a substantive chair.

24. To determine whether or not the 1st Defendant was entitled to the equitable relief of injunction that she had sought in her present application, this court had due regard to the Plaintiff that was dated 16th April 2018 and filed on 18th April 2018. It noted that the relief the Plaintiff had sought in his Plaintiff was as follows:-

“REASONS WHEREFORE, the Plaintiff's (sic) pray for judgment against the Defendants jointly and severally for:-

a. A permanent injunction restraining the 1st Defendant from carrying and or purporting to be such chairperson...”

25. It was evident that the 1st Defendant had not filed her Defence and Counter-Claim. This court was not certain whether she had been served with the Summons to Enter Appearance. Be that as it may, it was clear that her application was not related to the aforesaid relief that the Plaintiff had prayed for in his Plaintiff. This court therefore agreed with the 2nd Defendant's submissions that the 1st Defendant's Notice of Motion application seeking injunctive orders was hanging. Indeed, all prayers in an application must be hinged on the main prayers in the substantive suit, a ground that was ably advanced by the Plaintiff herein.

26. In the case of **Shirin Jiwa vs The Ismailia Economic Development Society Limited [2014] eKLR**, this very court dealt with a similar issue and held that prayers in an application must be hinged on the main prayers of a substantive suit failing which such application would be rendered defective and incompetent as it would have no leg to stand on.

27. Indeed, this court agreed with the Plaintiff's assertion that the orders sought in the 1st Defendant's application had no relation to the suit he had filed. On that ground alone, this court found and held that the 1st Defendant's application was defective as it had no legs to stand on.

28. However, taking into consideration the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue regard to procedural technicalities, this court deemed it fit to interrogate whether or not the 1st Defendant had demonstrated that she was entitled to the equitable relief of an injunction purely so that it could determine her application on merit rather than on a technicality.

29. Appreciably, it appeared that the 1st Defendant acted expeditiously when she became seized of information of the holding of the Special General Meeting. Annexure JAO-1, attached to her Supporting Affidavit was a letter dated 10th May 2018 that was addressed to her by the Kenya Nutritionists and Dieticians Institute. It clearly indicated that the said Special General Meeting would take place on 24th May 2018. She filed her present application on 15th April 2018 and after her application was certified as urgent, she was directed to take a hearing date of the same at the Registry. To that extent, she could not be blamed for the rushed manner in which this matter has been heard and determined as had indeed filed her present application timeously.

30. Having said so, this court was not satisfied that the 1st Defendant had demonstrated that she had met the criteria set out in the celebrated case of **Giella vs Cassman Brown [1973] E A 333** to the effect that an applicant seeking an interlocutory injunction must demonstrate that he has a *prima facie* case with a probability of success, that damages would not be adequate compensation if the injunction was not granted or that the balance of convenience tilted in her favour.

31. Although she urged this court not to allow an illegality to continue by not stopping the said Special General Meeting, it could not shut its eyes to the fact that she did not demonstrate the loss she would suffer if the injunctive orders were not granted.

32. Indeed, this case belonged to the Plaintiff. It was not practicable for her to demonstrate that she had a *prima facie* case with probability of success and that she would suffer loss if the order of injunction against the 2nd Defendant herein was not granted because she was not a plaintiff in the suit herein. She was a defendant.

33. As she had not filed a defence and counter-claim in which she could have sought a relief seeking an injunction regarding the said Special General Meeting that is scheduled to be held on 24th May 2018, it was the considered opinion that she had failed to meet the criteria in the case of **Giella vs Cassman Brown Co Ltd** (Supra). To the contrary, as the 2nd Defendant correctly pointed out, it would definitely incur losses in reconvening another Special General Meeting. There was no doubt in the mind of this court that the balance of convenience tilted in favour of the 2nd Defendant by not granting the injunction against it as the 1st Defendant had sought.

34. Accordingly, having considered the Affidavit evidence and the oral submissions by the parties herein, this court found and held that this was not a suitable case to grant an injunction. The 1st Defendant's application was misconceived and bad in law. Going further, without taking a position on the Plaintiff's case, this court noted the submissions by the counsels for the parties herein touched on the merits or otherwise of the Plaintiff's suit. Making a determination on the said issues would have been prejudicial to the Plaintiff who had not been given an opportunity to ventilate its case.

DISPOSITION

35. For the foregoing reasons, the upshot of this court's Ruling was that the 1st Defendant's Chamber Summons application dated 14th May 2018 and filed on 15th May 2018 was not merited and the same is hereby dismissed with costs to the Plaintiff and 2nd Defendant.

36. It is so ordered.

DATED and DELIVERED at NAIROBI this 24th day of May 2018

J. KAMAU

JUDGE