



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO.59 OF 2017**

**LABAN ONDITI RAO.....PLAINTIFF**

**-VERSUS -**

**KIPRONO KITONY.....1<sup>ST</sup> DEFENDANT**

**KENYA NATIONAL CHAMBER OF COMMERCE**

**AND INDUSTRY.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application before the court is for leave to institute a derivative action for and on behalf of Kenya National Chamber of Commerce and Industry.
2. The applicant, LABAN ONDITI RAO, was the National Vice-Chairperson of the Kenya National Chamber of Commerce and Industry (KNCCI), but he had been suspended on 1<sup>st</sup> February 2017.
3. In his considered opinion, the said suspension was unlawful, irregular and malicious.
4. He deemed the suspension to be malicious because, in his view, it was intended to cover-up the fraudulent and illegal activities involving assets and properties of KNCCI.
5. And the applicant considered the suspension to be irregular because it was done by the 1<sup>st</sup> Defendant, KIPRONO KITONY, whilst it was only the National Governing Council of KNCCI which had the mandate to suspend or terminate any member or director from office.
6. The applicant reasoned that the decision to suspend him puts to risk and exposes KNCCI to unnecessary litigation and detriment.
7. The 1<sup>st</sup> defendant is said to have conducted his affairs in a manner which was prejudicial and disadvantageous to KNCCI and its members in general.
8. In the face of the application, the defendants filed a Notice of Preliminary Objection. They asserted that the High Court lacked jurisdiction to hear and determine the suit, as there exists an exclusive and binding Dispute Resolution Mechanism which is spelt out in the Articles of Association of KNCCI.
9. As the defendants insist that the applicant had not exhausted the mechanisms provided for by the

Articles of Association of KNCCI, they described this court action as being premature.

10. When the matter came up for hearing, the applicant submitted that the 1<sup>st</sup> defendant, Kiprono Kittony (*hereinafter* “Kittony?”), jointly with other Directors and Members of KNCCI were conducting the affairs of KNCCI in a manner which contravened the constitution of the company.

11. It was alleged that they were undertaking decisions which were patently fraudulent, and which were ultra vires the constitution of the company.

12. The applicant explained that such decisions were against his interests.

13. In particular, when the defendants sought the removal of the applicant from his position as the National Vice-Chairperson of the company, that was described as not being good for the company.

14. It was for that reason that the applicant asked the court to grant him leave to bring a derivative action on behalf of and for the benefit of the company.

15. The applicant said that Kittony had taken over the company, in order to drive his own agenda. And it was for that reason that the plaintiff said that he ought to be allowed to take action which would protect the company’s interests.

16. In response, the defendants said that the applicant did not intend to safeguard the interests of the company.

17. The position taken by the defendants is that Kittony did not suspend the applicant; the decision to suspend him was allegedly taken by the company’s Board of Directors.

18. Having been removed from his position as the company’s Vice-Chairperson, the applicant was said to be in a position where he could take action as an individual who was affected. The defendants submitted that the applicant did not need to sue on behalf of the company, when he was challenging his removal. He could do so in his own name.

19. But the applicant pointed out that Kittony had not denied the allegations of fraud, which had been labeled against him.

20. A close scrutiny of the applicant’s affidavit reveals that his main complaints are directed against Kittony.

21. For instance, he emphasized that it is Kittony who made the decision to suspend him, because Kittony was working towards barring the applicant from succeeding him as the chair-person of KNCCI.

22. If, as the applicant says, Kittony was taking decisions on his own, without the requisite support of the Board, there should be no difficulty for the applicant marshalling the Board to reverse the alleged unilateral decision.

23. The applicant did make available a Statutory Declaration of BENJAMIN ONKOBA, sworn on 7<sup>th</sup> March 2017. Onkoba said that he did get a Notice of an Ordinary Meeting of the Chamber’s Board of Directors, which was to be held on 1<sup>st</sup> February 2017.

24. During the meeting, Kittony is said to have asked the eleven directors if they supported the stepping aside of the applicant, so as to pave any way for his prosecution.

25. According to Onkoba, that suggestion was only supported by three of the directors.

26. In effect, if the applicant had the support of the majority of the directors, it means that he could get the

said directors to pass the requisite resolution. Therefore, the applicant cannot be deemed to be in the minority, when he has the support of the majority of directors.

27. Pursuant to the provisions of Section 238 (1) of the Companies Act, 2015;

“...derivative claim’ means proceedings by a member of a company –

a. In respect of a cause of action vested in the company; and

b. Seeking relief on behalf of the company?.

28. I have given careful consideration to the claims which the applicant has indicated a desire to lodge. The same appear to be claims for and on behalf of the applicant.

29. He sees himself as being a person who had served the company with “*dedication and undoubted loyalty*?.

30. He says that it is his own initiative and efforts which have helped the company secure fully paid-up training for staff, in China.

31. If he was removed, the applicant believes that the company would suffer, as it is he who was working alongside the Kenya Revenue Authority, with a view to conducting civil education on taxation.

32. And, at the EPZ, the applicant believes that if he was not back in office, the company would be unrepresented.

33. And the setting up of 200 factories in Narok was said to be at stake, if the applicant was not in office, because the investors have confidence only in the applicant.

34. From the foregoing assertions of the applicant, it is evident that he deems himself as being a critical catalyst for the success and growth of the company. Without him, the applicant believes that the company would go nowhere.

35. It is another way of saying that the company needs the applicant, in order to function. That is the applicant’s story.

36. From that story, I have found nothing which can be construed as a cause of action vested in the company.

37. Secondly, the reliefs which the applicant is seeking are not being sought on behalf of the company. The applicant wishes to be reinstated to the position of a director, in the hope that he would thereafter succeed Kittony as the National Chairman of the Kenya National Chamber of Commerce and Industry.

38. The Articles of Association of the Company provides, at Article 175 that if there were disputes between members of the company, the same shall be decided by the Dispute Resolution Committee.

39. The same Article also provides for arbitration.

40. Therefore, the applicant ought to first have utilized the dispute resolution mechanism which was provided for in the Articles of Association.

41. Of course, Article 192 provides that even though there are specified mechanisms for resolving disputes, a party was entitled to seek Preliminary Injunctive Relief or Interim Conservatory Measures from the court.

42. First, such relief as can be sought from the court is of an interlocutory nature. Secondly, Article 192

makes it clear that;

“Recourse to court otherwise than as set out in this Article shall be available to the aggrieved party only after the dispute resolution mechanism herein has been exhausted?.

43. As the applicant has not demonstrated to the court that he did first exhaust the dispute resolution mechanism provided for, I find that he came to court prematurely.

44. Finally, the applicant has not shown the court that he did request the company to institute proceedings, and that the company or the majority of the directors declined to take action.

45. The kind of reliefs that the applicant was seeking can actually be sought by him, as an individual. Therefore, the request for leave to institute a derivative action on behalf of the company is rejected.

46. The applicant will pay to the defendants, the costs of the application dated 7<sup>th</sup> February 2017.

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>th</sup> day of May 2017.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

*Wachira for Miyare for the Plaintiff*

*Juma for the 1<sup>st</sup> Defendant*

*Juma for the 2<sup>nd</sup> Defendant.*