



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NUMBER 415 OF 2015**

**BERNARD NTHULI. .... 1<sup>ST</sup> PLAINTIFF**

**MARTIN MUSYIMI. .... 2<sup>ND</sup> PLAINTIFF**

**LYDIA D. WANJIKU. .... 3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**CHARLOTTE HACKETT. .... 1<sup>ST</sup> RESPONDENT**

**WYCLIFF NANDAMA. .... 2<sup>ND</sup> RESPONDENT**

**STANLEY WAITHAKA. .... 3<sup>RD</sup> RESPONDENT**

**RULING**

The Application before the court is dated the 7<sup>th</sup> December, 2015 brought by way of Notice of Motion. The same was brought under Certificate of Urgency and it is expressed to be brought under Section 3A of the Civil Procedure Act and Order 40 of the Civil Procedure Rules Cap 21 Laws of Kenya.

The Application seeks fourteen (14) orders but Prayer 3 is the subject of this ruling which reads as hereunder: -

- a. That an order do hereby issue directing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to restore and maintain the status quo of the Kenya Christian Industrial Training Institute prior to 11<sup>th</sup> November, 2015 pending the hearing and determination of this Application.

It is premised on the grounds set out on the body of the Application and it's supported by the annexed Affidavit of Lydia D. Wanjiku the 3<sup>rd</sup> Plaintiff herein.

The Application is opposed vide a replying affidavit by the Charlotte Hackett sworn on 15<sup>th</sup> December, 2015.

When the Application came up for hearing on the 14<sup>th</sup> of December, 2015, Counsel for the Plaintiffs/Applicants applied that the status quo of the Kenya Christian Industrial Training Institute prior to the 11<sup>th</sup> November, 2015 be restored pending the hearing and determination of the Application.

The Respondents had not filed a Replying Affidavit and Mrs. Koeh sought leave of the court to do so,

which leave was granted and the same was filed on the 16<sup>th</sup> December, 2015.

On the 17<sup>th</sup> December, 2015 the learned Counsel for the Applicants renewed her Application to have the status quo restored as aforesaid and the court had to hear both parties on this particular issue and, therefore, the ruling herein relates to prayer 3 of the Application.

A short history of this matter is that the Plaintiffs and the Defendants were all members of the Board of Governors of Kenya Christian Industrial Training Institute a Non-Governmental Organization registered under the Non-Governmental Organizations and Co-ordination Act which is managed by a Board of Governors.

The Board of Governors of Kenya Christian Industrial Training Institute has six members with the 1<sup>st</sup> Plaintiff as the Chairman while the 3<sup>rd</sup> Plaintiff is the Secretary to the Board, Director and Principal of the organization.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have since 11<sup>th</sup> November, 2015 allegedly removed the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs as members of the Board of Governors.

It is alleged that since 11<sup>th</sup> November, 2015, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have in contravention of the Constitution of Kenya Christian Industrial Training Institute purported to remove the 1<sup>st</sup> Plaintiff as Chairman of the Board of Governors and have also removed the 3<sup>rd</sup> Plaintiff as Secretary of the Board and the Principal.

The Plaintiffs/Applicants further allege that since 12<sup>th</sup> November, 2015, the Respondents have in contravention of the Constitution of KCITI barred and denied access to the Plaintiffs to the premises, affairs, business and management of the KCITI hence this Application.

The matter came up in court on the 17<sup>th</sup> December, 2015 when the learned counsels for the Plaintiffs and the Defendants made oral submissions before me.

On her part counsel for the Plaintiffs/applicants made the following submissions: -

That according to the Non-Governmental Organizations Co-ordination Act, every Non-Governmental Organization is required to prepare and submit an Annual Report to the Non-Governmental Organization and Co-ordination Board. The latest financial statements by KCITI dated 31<sup>st</sup> March, 2015 were for the year 2014 and as at 31<sup>st</sup> March, 2015, the Board of Governors were the Plaintiffs and the Defendants herein. The Financial Reports are statutory documents and are filed in accordance with the law and in her submissions the names on that list are the bona fide members of the Board.

She referred to Article 8 of the Constitution of KCITI that requires that all members should be notified in writing of all the meetings.

Article 9 (B) provides that every member should have an opportunity to speak in favour of or against any motion and the quorum of any meeting will be 2/3 of the members.

The Respondents should demonstrate notice of a meeting in which they proposed to remove any member of the Board as at 31<sup>st</sup> March, 2015 and minutes of a meeting at which four (4) of those members were present as at 31<sup>st</sup> March, 2015.

She took issue with the meetings held on 7<sup>th</sup> November, 2015 and on 28<sup>th</sup> November, 2015 and submitted that on 7<sup>th</sup> November, 2015 the Plaintiffs were not invited in that meeting and there were no notices issued for the same. She referred to a resolution stating to be for a meeting on 28<sup>th</sup> November, 2015 and told the court that even the minutes of that meeting have not been produced and therefore, the resolution

was carried out after an unlawful meeting.

In support of her case she relied on the case of **M/s Gusii Mwalimu Investment company Limited and 2 others Vs Mwalimu Hotel Kisii Limited (1996) eKLR** where the Judge held and I quote: -

***“I have no hesitation whatsoever in holding that the Landlord did all it could to obtain the possession unlawfully and the learned Judge was entirely right in making the orders he made. If what the Landlord did in this case is allowed to happen we will reach a situation when the landlord will simply walk into the demised premises exercising his right of re-entry and obtaining possession extra-judicially.”***

She urged the court to allow the Application.

On her part, the learned counsel for the Respondents opened her submissions by quoting Section 7 of the NGO and Co-ordination Act which gives authority to the NGO and Co-ordination Board among others to conduct a review of the register with respect to NGO's and provide guidelines where the organization is not following procedures.

She submitted that when the financial statement dated 31<sup>st</sup> March, 2015 was submitted to the NGO Co-ordination Board, it prompted it to carry out a review of the register of KCITI. The Board informed KCITI that they were not in compliance with the legal requirements of the NGO Co-ordination Act. She referred to a letter from the NGO and Co-ordination Board outlining some of the aspects of the Register that were not in compliance with the Act. Some of the highlighted issues were that, it seems no elections had been done and properly registered with the Board to reflect the list that was being given in the audit dated 31<sup>st</sup> March, 2015.

Another issue raised by the NGO Co-ordination Board was that employees were acting as members of the Board and if there were changes on officials or Board members the same had not been properly done and filed with the Board.

She submitted that the court is being asked to reinstate the 1<sup>st</sup> Plaintiff, who was removed from the membership of the Board in a meeting held on the 28<sup>th</sup> November, 2015. With regard to the 2<sup>nd</sup> Plaintiff, she told the court that she is not recognized by the NGO Co-ordination Board as a member of the KCITI Board, as per the Constitution.

With regard to the 3<sup>rd</sup> Plaintiff counsel submitted that she is not an original Board Member as per the Constitution and that being the principal of the organization, the Constitution provides that she shall have a seat as a Board member which shall be terminated if his/her employment is terminated.

In her further submission, she told the court that the 3<sup>rd</sup> Plaintiff was sent on compulsory leave following a Board meeting which took place on 7<sup>th</sup> November, 2015. The decision was arrived at following an interim report in which issues of fraud and misappropriation of funds were raised.

I have carefully considered the Application, the Affidavits and the submissions made by the learned counsels. The issues before the court for determination are whether the Defendants should be ordered to restore and maintain the status quo prior to 11<sup>th</sup> November, 2015 pending the hearing and determination of the Application. In doing so, the court should consider whether the changes to the Board of Directors of KCITI were done in accordance with the law or not? The court will also have to consider who the bona fide Board of Directors are.

In establishing the bona fide Board of Directors, the first step should be Constitution of KCITI. According to the Constitution and for purposes of the case before the court there were eight members of the Board as at 10<sup>th</sup> August 1993 who among them are the 1<sup>st</sup> Plaintiff, 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Defendant.

Clause 3(a) of the said Constitution provides: -

- a. Members of the Board of Governors shall be those who originally signed this Constitution.
- b. New members may be added by majority vote of current members.

There is no indication that the organization has held elections since its inception. This came out clearly in the letter dated 3<sup>rd</sup> December, 2015 addressed to the KCITI by the NGO's Co-ordination Board. In the same letter the NGO's Co-ordination Board has noted that the Board Members have not been following the proper procedures in changing officials.

If the contents of that letter are anything to go by, it then follows that 2<sup>nd</sup> Plaintiff and the 2<sup>nd</sup> Defendant have been acting as Board members illegally and in that case the 2<sup>nd</sup> Plaintiff does not have any legal right to bring any action as a Board Member of KCITI. While I appreciate the provision of Clause 3(b) of the Constitution of KCITI, there is no evidence before this court that he was at any point in time added as a Board Member. He cannot therefore, complain that he was removed from membership of a Board in which he illegally was.

As for the 1<sup>st</sup> Plaintiff, he is a bona fide member of the Board.

The 3<sup>rd</sup> Plaintiff held her position as a member of the Board by virtue of Clause 4(d) of the Constitution. Having been sent on compulsory leave she loses her right to sit in the Board until she is recalled to continue with her duties as the principal. In her capacity as the principal of the organization, the Board deals with her, first as an employee and by virtue of that office then as a member of the Board. The Board sent her on compulsory leave as an employee and this court has no jurisdiction to adjudicate on matters between employer/employee as this is within the jurisdiction of Employment and Labour Relations Court.

With regard to the 1<sup>st</sup> Plaintiff/Applicant as a bona fide member of the Board, any attempt to remove him as a Board Member in the circumstances that it was purportedly done was illegal. This is because there was no notice of the meeting convened on the 28<sup>th</sup> November, 2015 when he was removed.

The Constitution of KCITI being very clear on the bona fide members of the Board, the list of the Board Members forwarded to the NGO Co-ordination Board on the 31<sup>st</sup> March, 2015 cannot supersede that which is in the Constitution of KCITI unless it can be shown either that elections were held or that new members were added by majority vote of the current members, which has not been shown in this case.

In the premises foregoing, it is the finding by this court that the orders of the status quo prior to 11<sup>th</sup> November, 2015 sought by the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs/Applicants cannot be granted for the reasons that I have given above.

As for the 1<sup>st</sup> Plaintiff, a prima facie case has been established and it only fair and just that the Defendants are ordered to restore and maintain the status quo of the KCITI prior to the 11<sup>th</sup> November, 2015 with respect to the 1<sup>st</sup> Plaintiff pending the hearing and determination of the Application.

In the upshot and for avoidance of doubts, prayer 3 of the Application dated 7<sup>th</sup> December, 2015 is allowed but only with respect to the 1<sup>st</sup> Plaintiff.

Signed, dated and delivered at Nairobi this 18<sup>th</sup> day of December, 2015.

.....

**L. NJUGUNA**

**JUDGE**

**In the presence of**

..... for the Plaintiffs/Applicants.

..... for the Defendants.