



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 198 OF 2013**

**JAMES MWEU MAINGI.....PLAINTIFF**

**-VERSUS-**

**SEIF PATWA.....1<sup>ST</sup> DEFENDANT**

**RICHARD OLAKHI.....2<sup>ND</sup> DEFENDANT**

**MARGARET MUKAMI.....3<sup>RD</sup> DEFENDANT**

**MAISON OLEKILAYO.....4<sup>TH</sup> DEFENDANT**

**KENYA ROWING AND CANOE ASSOCIATION..... 5<sup>TH</sup> DEFENDANT**

**REGISTRAR OF SOCIETIES.....6<sup>TH</sup> DEFENDANT**

**RULING**

1. The application before this Court is a Notice of Motion dated 28.5.13 brought under Section 1A, 1B, 3 & 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya; Order 40 rules 1 & 2 and Order 51 rule 1 of the Civil Procedure Rules 2010.
2. The applicant seeks injunctive orders against the 6<sup>th</sup> defendant from recognizing the 1<sup>st</sup> to 4<sup>th</sup> defendants as officials of the association elected in an Annual General Meeting held on 26<sup>th</sup> April 2013 and restraining the 1<sup>st</sup> to 4<sup>th</sup> defendants from interfering with the running and management of the affairs of the Association.
3. The applicant in his grounds argues that the 1<sup>st</sup> to 4<sup>th</sup> defendants were elected in an unlawfully convened Annual General meeting held on 26<sup>th</sup> April 2013 as the same was contrary to its Constitution and lacked quorum; that unless restrained the said defendants could take up office and hold themselves as officials and participate in proceedings at national and international level and that they have since failed in its mandate to organize programs of the member clubs.
4. The application was supported by the sworn affidavit of James Mweu Maingi dated 28<sup>th</sup> May 2013. He deponed that he was a member of the 5<sup>th</sup> defendant by virtue of his membership at the maritime Club; that elections are held at the Annual General Meeting convened every 4 years. And subsequently confirmed by the Registrar of societies vide letter dated 28<sup>th</sup> may 2010; that on 30<sup>th</sup> July 2011 members sought to have another meeting with persons who were not members of the Association and had only 3 officials instead of 4 as stipulated in the Association's Constitution; that the elected officials were in office unlawfully due to the failure he attributed to the 6<sup>th</sup> defendant for failure in discharging its duties as required ; that the said elected officials

purported to hold the meeting and elections which he depones was illegal and unlawful.

5. The application was opposed. The respondent filed grounds of opposition dated 28<sup>th</sup> May 2013 and a replying affidavit dated 20<sup>th</sup> June 2013. On their grounds of opposition the respondents stated that the plaintiff lacked locus as he was not a member of the 5th defendant, that the matter in issue is also directly and substantially in issue in Mombasa **CMCC 1229 of 2012** and **CMCC 2563 of 2011** and accused the applicant of forum shopping and that he was guilty of material non-disclosure of relevant facts; that the application lacks merit and is an abuse of the process of Court; that there is a temporary injunction in place barring the applicant from interfering with the 5th respondents' affairs;
6. The applicant subsequently filed a supplementary affidavit dated 16<sup>th</sup> December re-affirming the averments in his application and supporting affidavit.
7. The parties proceeded by way of written submissions. The applicant in his submission argued that he had satisfied the requirements as laid down in ***Giella –vs- Cassman brown Co. Ltd (1973) E.A., 358.***
  - a. *An applicant must show prima facie case with a probability of success*
  - b. *An injunction will normally not be granted unless the applicant might otherwise suffer an irreparable injury*
  - c. *When the Court is in doubt it will decide the application on a balance of probability.*
8. On *prima facie* case the applicant submitted that the meeting held on 26<sup>th</sup> April 2013 was convened by officials who had been fraudulently elected, there was no 21 days notice as required by section 8.1 of the Associations Constitution and there was inordinate quorum to constitute membership; the elections were held on 30<sup>th</sup> July 2011 instead of 2013. Counsel relied on the case of ***NAKURU HCCC 335 OF 2004 EDWARD KINGS ONYANCHA –VS- FORD PEOPLE PARTY & OTHERS (2005) eKLR*** where it was held that; *'a Court is entitled to interfere in the affairs of a society if the society's members/officials breach its constitution.'*
9. The applicant submitted that he stands to suffer irreparable loss that cannot be compensated by damages and further argued that the balance of probability tilts in his favour.
10. The respondents submitted that the orders sought by the applicant are not available to him as the said 1<sup>st</sup> to 4<sup>th</sup> defendants had already been registered as bonafide officials and the same can only be adjudicated by a mandatory injunction; the applicant has no locus standi as he was removed as Secretary general by the executive committee and there is an injunction barring the defendant from taking part in the 6<sup>th</sup> defendant's activities; that the Kenya National Sports Council is an amorphous body with no oversight or supervisory rule over the activities of the 5<sup>th</sup> defendant; the respondents refute to having held any AGM on 30<sup>th</sup> July 2011 as argued by the applicant but sought to confirm that that was an executive board meeting where they resolved to remove the applicant as Secretary General.
11. The respondents further submitted that the applicant had concealed material facts in that there were other suits between the parties filed in Mombasa law courts as CMCC 1229 of 2012, CMCC 2563 of 2011 in which the matter in issue in this suit are also directly and substantially in issue those matters. Counsel relied on the case of ***Rex vs Kensington Income Tax Commissioners (1917) 1KB 486 at 504***, where materiality was defined as *material facts that are necessary for the Court to know when dealing with an application.*
12. That a subsisting injunction is a matter that was to be brought to the attention of the Court counsel relied on the decision in ***Lillian S –vs- Caltex Oil K [1989] LLR 1953 CAK*** which sets out the consequences that a Court should attach to any failure by a party make full and frank disclosure. Counsel also relied on the case of ***Gimalu Estates Limited & Anor -vs- International Finance Corporation & Anor. Nairobi HCCC no 65 of 2007, where it was held that;***

*“The central vein that runs through all the suits is that the plaintiffs are bent on frustrating the defendants to certain despair. The whole purpose of filing the present suit when other suits are pending for determination on the same subject matter is merely to get an injunction to stop or postpone the sale of the suit properties and not to have the issues alleged raised in the different suits determined. Prima facie that is a contrived attempt to subvert the cause of justice. In my view the*

*actions of the plaintiffs is a contemptuous game to contaminate the due process of the court with a view a conundrum or contagious disease within the corridors of justice.”*

And also in the case of ***Tende Drive Limited –vs- David Kamau & Others***; where it was held that;

*‘.....an injunction should not be granted where there is material non-disclosure.’*

13. On locus standi the respondent submitted that there is a temporary injunction against the applicant in CMCC 2563 of 2011 restraining the applicant from transacting any business on behalf of the Kenya Rowing and Canoe Association or carrying himself out as an official member of the 5<sup>th</sup> defendant.

14. The present application is unsustainable in law. On jurisdiction he referred the Court to sections 6 and 7. Of the Civil Procedure Act Claiming that the issues raised herein had been raised and determined in the CMCC 2563 of 2011 and if the applicant had any claims he ought to have raised them in the said suit. He referred the Court to the case of ***Abok James Odera –vs- John Patrick Machira Civil application No. 49 of 2001*** where it was held that to rely on Res judicata, there must be;

- i. A previous suit in which the matter was in issue
- ii. The parties were the same and litigating under the same title
- iii. A competent Court heard the matter in issue
- iv. The issue has been raised again in a fresh suit.

15. Also in the case of ***YAT TUNG INVESTMENT CO. LTD -VS- DAO HENG BANK LTD AND ANOTHER 1975 A.C. 581***

*“The plea of res judicata applies except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounced judgment but the very point which properly belonged to the subject of litigation.”*

Though the respondents admit to the jurisdiction of this Court they argue that the matter should have been filed in the Chief magistrates Court in Mombasa.

16. The undisputed facts are as follows; the applicant was ousted from his seat as the secretary General and suspended as a member of the said association on 31/7/2011 and new officials were elected to take office.

17. I have perused the Court record and this is what I have found; there are several other suits before the Chief Magistrate Court touching on the matter substantial before this Court. The defendant and officials of Kenya Rowing and Canoe association filed their suit **CMCC. 2563 of 2011** to bar the applicant from interfering with the management of the association and or carrying himself out as the secretary general after he had been ousted from the Secretary General seat on 31/7/2011. The applicant on the other hand has filed this suit and current application seeking to nullify the officials elected at an AGM held on 26th April 2013 and also seeks an injunction to bar the newly elected officials from taking office. I note however the said officials as per the registration of Societies letter that they have since taken office. In **CMCC 1229 of 2012** claimed for damage for libel as against the applicant while **CMCC No. 2563 of 211** sought to restrain the applicant from interfering with the management of the association and from carrying himself the secretary General of the said association. Why then has the applicant sought to file this matter before this Court instead of the lower Court at Mombasa? What is the status of the other suits?

18. I find that the applicant has failed to show how he stands to suffer irreparable loss if the said order of injunction sought is not granted. Further the applicant has concealed the fact that there are other pending matters until the same was raised by the respondents. I therefore find that the balance of convenience unfortunately does not tilt in the applicant’s favour. I therefore find that the applicant’s application lacks merit and is dismissed with costs.

Orders accordingly.

Dated, signed and delivered this **29<sup>th</sup>** day of **September** 2014.

**R. E. OUGO**

**JUDGE**

In the presence of:-

.....For the Plaintiff/Applicant

..... For the Defendant/Respondent

.....Court Clerk