



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 44 OF 2014

SANTOCK SINGH PLAINTIFF/APPLICANT

V E R S U S

SURJI SINGH SAGOO 1ST DEFENDANT/RESPONDENT

SIRI GURU SINGH SABAHA 2ND DEFENDANT/RESPONDENT

RULING

1. Plaintiff described himself in this action as the duly elected Hon. General Secretary of the Community Siri Guru Singh Sabha (**the 2nd Defendant**), a Sikh Community established to advance the Sikh Religion and to administer “**Khande Di Dhar Amrit**” within Mombasa County.
2. The 1st Defendant is sued in his personal capacity and is described as the Chairman of 2nd Defendant.
3. Plaintiff in his plaint makes various allegations against the 1st Defendant, that he was planning to oust him as a General Secretary by calling an Annual General meeting, which was scheduled for 31st March 2014 for that very purpose. In the final prayer in the plaint Plaintiff seeks following orders-
 - a. **A Declaration that the purported actions and or verbal Notice issued by the 1st Defendant purporting to oust the Plaintiff from his position as Honorary Secretary of the Siri Guru Singh Sabha is against the Constitution of the 2nd Defendant is in breach of the rules of natural justice, unjustified, unlawful, thus illegal, null and void.**
 - b. **An order of Permanent Injunction restraining the 1st Defendant from interfering with the position and person of the Plaintiff and from in any way purporting to issue any notices and from proceedings to illegally oust him from the position of Hon. General Secretary or doing any other act, or thing to the prejudice the Plaintiff’s position in the Community in contravention of the law.**
 - c. **An order of Permanent removal of the 1st Defendant from the office and position of Chairman of the 2nd Defendant’s board for grounds of mismanagement and misleading the Sikh Community Civil Society into disrespect.**

- d. **An order of Nullification of the 1st Defendant's position of Chairman of the Board of the 2nd Defendant with a ban to from occupying any such positions.**
- e. **Damages for Defamation.**

4. Plaintiff filed a Notice of Motion dated 31st March 2014. The prayers of that Notice of Motion are very different from those reproduced by the Defendant's Learned Counsel in the written submissions, dated 16th June 2014, in support of Defendant's Preliminary Objection dated 17th April 2014. According to the Notice of Motion of that date which is on Court record, the prayers Plaintiff sought are as follows-

- **THAT the Application herewith be certified as being of extreme urgency service of the same be dispensed forthwith in the first instance for reasons of urgency.**
- **THAT this Honourable Court be pleased to issue an order of temporary injunction restraining the 1st and 2nd Defendants herein either by themselves or their proxies or agents from in any way interfering with the position and person of the Plaintiff and from in any way purporting to issue any notices and from proceedings to illegally oust him from the position of Hon. General Secretary and/or from denying him free ingress to his proper and appointed place of work/office and/or from doing any other act, or thing to the prejudice the Plaintiff's position in the 2nd Defendant/Respondent's society in contravention of the law pending the hearing and determination of the Application herewith inter-parties and/or pending the hearing and determination of this suit and/or until further orders of this Honourable Court.**
- **THAT this Honourable Court be pleased to issue an order of injunction restraining the 1st and 2nd Defendants either by themselves or their proxies or agents restraining them from holding the Annual General Meeting slated to be held on the 31st day of March 2014 at 7.00pm at the Darbar Hall, Sikh Temple Mombasa where the illegal ousting of the Plaintiff as the Hon. General Secretary is set to be implemented pending the hearing and determination of the Application herewith inter-parties, and/or pending the hearing and determination of this Suit and/or until further orders of this Honourable Court.**
- **THAT this Honourable Court be pleased to issue an order of temporary injunction restraining the 1st Defendant from occupying the position as Chairman of the 2nd Defendant pending the hearing and determination of this suit and/or until further orders of this Honourable Court.**

The difference in those prayers and the ones reproduced by Defendant in the written submissions supposedly being the ones in the Notice of Motion dated 31st March 2014, will become apparent herein below.

5. This Ruling is directed at Defendant's Preliminary Objection dated 17th April 2014. I intend to deal with each ground of objection in turn as they appear on Defendant's said Objection.
6. On the first ground Defendant state that Plaintiff's ground is defective, incompetent and misconceived. That ground is further broken into two portions that-
 - i. **The 1st Defendant cannot be sued in his individual capacity and also as the Chairman of the 2nd Defendant;**
 - ii. **No party can institute proceedings against himself.**

The Defendants in submissions in support of these grounds faulted Plaintiff's suit because it did not

have a title in respect of 2nd Defendant, which is a registered society, showing that it is sued through its official. Defendants relied on the case **GEOFFREY NDIRANGU & OTHERS –Vs- CHAIRMAN OF MARIAKANI JUA KALI ASSOCIATION & OTHERS (2005) eKLR** where the Court held-

“The remaining and most important point in this preliminary objection is the first defendant’s argument that this suit is bad in law for failure to name the officials of the first defendant. The law on suits by or against societies is well settled. A society not being a legal person cannot sue or be sued in its name. It has to sue or be sued through its officials – Voi Jua Kali Association –Vs- Sange and Others (2002)2 KLR 474. And the officials have to be named. Titles like Chairman, Secretary and or Treasurer cannot be used as those are not legal persons either.”

7. Further Defendant submitted that Plaintiff had sued himself as General Secretary of 2nd Defendant making the suit incompetent.
8. The Plaintiff was correct to have responded to the submissions in support of the above objection by stating that the Defendant’s objection not being based on a pure point of law and in seeking the exercise of this Court’s discretion, must fail. That indeed was the holding in the case **MUKISA BISCUIT MANUFACTURING CO. LTD –Vs- WEST END DISTRIBUTORS (1969)IEA 696** viz-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

9. Plaintiff sued 1st Defendant in two capacities and I do not see anything wrong with that. Firstly 1st Defendant is sued in his personal capacity for acts he is alleged to have done. Secondly he is sued as the Chairman of 2nd Defendant.
10. Further at the time Plaintiff filed this suit he was still the elected Secretary of the 2nd Defendant. He could not therefore substitute any other person as the Secretary of the 2nd Defendant. That fact cannot therefore be the basis of striking Plaintiff’s suit as Defendants seek. It is for that reason that this limb of Preliminary Objection is rejected.
11. It is the second limb of Objection that is of great concern to me because it reveals prayers of Notice of Motion dated 31st March 2014 which are not the prayers of the Notice of Motion of the same date in this Court file. Does that mean Plaintiff served the Defendants with a different Notice of Motion? It does seem so because of Defendant’s second limb of objection. Defendants in this second limb of Objection stated that the Court could not issue mandatory injunction against 1st Defendant because he was holding an elective position. The prayers reproduced by the Defendants of Notice of Motion dated 31st March 2014 that was served on them are as follows-
 - a. **An Injunction restraining the 1st Respondent from occupying the position as the Chairman of the 2nd Respondent;**
 - b. **An order of permanent removal of the 1st Respondent from office and position of 2nd Respondent’s Chairman;**
 - c. **An order of nullification of the 1st Defendant’s position of Chairman of the Board of the 2nd Defendant with a ban from occupying any such positions.**

d. Damages for defamation.

It does not take much to see that the above orders are diametrically opposed to the ones reproduced before. I will not comment further on this but if the Plaintiff has practiced mischief the Defendant may consider to move the Court for appropriate orders.

12. That as it may be that second limb of Objection since it is seeking the Court's exercise of its discretion is caught by the principle in the MUKISA BISCUIT case (supra) and is rejected.

13. On the third limb of Objection Defendant again seeks the Court to

exercise its discretion. On this limb Defendant seeks striking out of Plaintiff's Notice of Motion on the ground-

"That the application and suit amount to an outright abuse of the process of Court for grossly offending and/or violating the appropriate mandatory provisions of the Civil Procedure Rules invoked in the application."

14. On whether an application can be defeated by citing of the wrong order was discussed in the case DOMINIC MUTUA MAWEU v OCCIDENTAL INSURANCE CO. LIMITED [2014]eKLR; viz-

"On the first ground I respond by stating that an application is not defeated by the citing the wrong Order, Rule or Section. This is so if the opposite party is not prejudiced by such wrong citation. In this regard I refer to the case NAIROBI HCC NO. 1823 OF 2000 PAUL OJIGO OMANGA –Vs- JAPHETH ANGITA where the Court stated-

"The Respondent has not been prejudiced by the failure to refer to XLVI in the application and the order sought cannot be refused solely on that ground that Order XLVI 5(2) (sic) was not cited or that no order or wrong order has been cited."

The only prejudice Plaintiff's Learned Counsel referred to cannot be termed as prejudice. The fact that Plaintiff was very badly injured and is now bound on a wheel chair is not a reason to deny a party to reopen a case to produce a document that is vital for the determination of this case."

Similarly in this matter there is no prejudice that can lead this Court to strike out the application.

15. In view of the above finding the Defendant's Preliminary Objection dated 17th April 2014 is dismissed but the costs thereof shall be in the cause.

DATED and DELIVERED at MOMBASA this 18TH day of SEPTEMBER, 2014.

MARY KASANGO

JUDGE