REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 317 OF 2014

BETWEEN

AL YUSRA RESTAURANT LIMITED…....……PETITIONER/RESPONDENT

AND

KENYA CONFERENCE OF

CATHOLIC BISHOPS……...……...1ST RESPONDENT/APPLICANT

KNIGHT FRANK KENYA LIMITED……..2ND RESPONDENT

RULING

Introduction

1. The 1st Respondent, **Kenya Conference of Catholic Bishops**, has filed the Notice of Motion Application dated 1st August 2014 seeking the following orders;

> ***(a) That the Application be heard in priority to the Petitioner's Application dated 9th July 2014.***
>
> ***(b) That paragraphs 25, 26, 27, 28, 29, 30 and 31 of the Petition be struck out, as well as paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of the Supporting Affidavit of Bakai Maalim Kulmia sworn on 9th July 2014 and annextures BMK4, BMK 5, BMK 6, BMK 7 and BMK 8 thereof.***
>
> ***(c) That the 2nd Respondent be struck out from the Petition.***
>
> ***(d) That in the alternative, the Petition be struck out as a whole.***
>
> ***(e) That an interim conservatory order be issued to restrain the Petitioner, by themselves or through their agents or representatives, or otherwise howsoever, from interfering with the 1st Respondent's quiet possession or use of its premises on the Ground Floor of Waumini House L.R. No. 1870/IX/42,Westlands, Nairobi, pending the hearing and determination of this Application inter-partes and the Petition.***

(f) That an interim conservatory order be issued to compel the Petitioner under the supervision of the 1st Respondent to remove its fixtures and fittings from the 1st Respondent's premises on the Ground Floor of Waumini House L.R. No.1870/IX/42, Westlands, Nairobi, pending the hearing and determination of this Application inter-partes and the Petition herein.

(g) That in the alternative to Prayer 6 above, the 1st Respondent be hereby authorized to remove the Petitioner's fixtures and fittings from its premises on the Ground Floor of Waumini House, L.R No. 1870/IX/42, Westlands, Nairobi.

(h) That the Court do give any other or further Orders that will favour the cause of justice.

(i) That the 1st Respondent's costs be provided for.

2. The Application is premised on grounds *inter-alia* that the Petition seeks to address a commercial tenancy dispute as a claim for violation of fundamental rights and freedoms. That in doing so, the Petitioner has relied on privileged correspondence and documents which were obtained without prejudice. Further, that the Petitioner's fixtures and fittings remain on the 1st Respondent's premises and are thus interfering with the 1st Respondent's right to use the said premises.

3. The Application is supported by an Affidavit sworn by Father Vincent Wambugu on 1st August 2014.

4. To put the matters into perspective, the Petitioner, Al Yusra Restaurant Limited, a limited liability company carrying on the business of a restaurant and catering within Nairobi, filed the Petition dated 9th July 2014 alleging that the 1st Respondent has denied it access and the right to carry on its business at Waumini House and has therefore been discriminated against on grounds of religion and also that its rights to property under **Article 40** have been violated. In its Petition, it has sought the following orders;

"(a) A declaration that the Respondents are in breach of the Agreement for Lease to let 2132 square feet at Waumini House L.R. No.1870/IX/42 to the Petitioner for a term of Six years with effect from 1st December 2013.

(b) A declaration that the Respondents' refusal to allow the Petitioner to carry on with its restaurant business and give access to the demised premises is unlawful and discriminatory and a violation of Articles 27(5), 32(3) and 40(1) of the Constitution.

(c) A permanent injunction restraining the Respondents, whether by themselves, their agents and or servants from interfering, trespassing, constructing, alienating, charging, selling, disposing off, dealing or in any way interfering with the Petitioner's quiet possession of the restaurant on Ground Floor of Waumini House, L.R. No.1870/IX/4 Westlands, Nairobi.

(d) A mandatory injunction compelling the 1st and 2nd Respondents to allow the Petitioner access to its restaurant on the Ground Floor of Waumini House on, L.R. No.1870/IX/4 Westlands, Nairobi and sign a Lease in favour of the Petitioner in terms of the Head of Terms signed on 3rd December 2013.

(e) In the Alternative to prayers (c) and (d), the Petitioner be awarded compensation for discrimination, loss of right to use the demised property and loss of business in the sum of Kshs.88,472,782.22/-

(f) Aggravated and punitive damages for subjecting the Petitioner to discrimination of grounds of religion and ethnicity contrary to the Constitution.

(g) Costs of this Petition.

(h) Any other or further relief as this honourable Court may deem just and expedient."

Case for the 1st Respondent/Applicant

5. Mr. Kanjama presented the 1st Respondent's Case which is summarized herebelow.

6. It was his submission that a substantial portion of the alleged evidence in support of the Petitioner's case contains documents and correspondences whose content has been marked, **"without prejudice".** In that regard, he urged the point that such documents are inadmissible and should be struck out pursuant to the provisions of **Section 23 (1)** of the **Evidence Act**. He relied on the decision of ***Kawamambajo Limited vs Chase Bank (Kenya) Limited and Another 2014 eKLR*** in support of that proposition.

7. He further submitted that the documents the Petitioner relied upon arose in the course of an out-of-court attempt to settle the matter, and as such are inferred to be **"without prejudice'**. That in any event, those documents did not give rise to any binding agreement between the Parties and accordingly, the Petitioner cannot rely on them. He referred the Court to the case of ***Baseline Architects Limited and 2 Others vs National Hospital Insurance Fund Board Management {2008}eKLR*** on that point and further claimed that it was against public interest for a party to rely on such documents and evidence.

8. For the above reasons, the Applicant prayers that paragraphs 25, 26, 27, 28, 29, 30 and 31 of the Petition be struck out together with paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of the Affidavit sworn on 9th July 2014 by Bakai Maalim Kulmia as well as annextures BMK 4-BMK8 to the said Affidavit.

9. On whether the 2nd Respondent was properly sued, it was Mr. Kanjama's submission that an agent may not be sued where there is a disclosed principal and he referred the court to the decision of ***Daniel Kariiyu Mungai vs Equity Building Society and 4 Others (2008) eKLR, Victor/Mabachi and Another vs Nurtun Bates Limited 2013 eKLR*** in support of that submission. He further submitted that the Petition arises out of an agreement executed by itself and the 2nd Respondent purportedly as the 1st Respondent's agent and as such there is no value in enjoining the 2nd Respondent to the dispute. In any case, that there was no evidence that the 2nd Respondent has engaged in wrongful discrimination against the Petitioner, a claim the Petitioner was making against the 1st Respondent and accordingly, there was no legal basis upon which the 2nd Respondent had been enjoined.

10. In regard to the whole Petition as filed, it was Mr. Kanjama's submission that the dispute in this Petition does not qualify for a claim of the violation of the Constitution as the Petitioner has a clear remedy in commercial law. He also claimed that the Petitioner has sought loss of right to use the demised property and loss of business in the sum of **Kshs.88, 472,782.22**, arising from an alleged breach of contract, to wit a tenancy agreement. To that end, he pleaded that there is a specific realm of law that exists to govern and resolve such a dispute. He relied on the case of ***Four Farms Limited vs Agricultural Finance Corporation 2014 [eKLR]*** where it was held that if a parallel remedy exists in law, constitutional relief should not be sought unless the circumstances in which the complaint is made include some feature which makes it inappropriate to take that course. That therefore the Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the Applicant's grievance.

11. As to costs, it was Mr. Kanjama's submission that they should be awarded to the Applicant upon the striking out of the Petition. Reliance in that regard was placed on the cases of ***Cannon***

Assurance Limited v Anthony Thuo Kanai and Another 2014 eKLR and ***Suleiman Said Shahbal vs Independent Electoral and Boundaries Commission of Kenya and 3 Others 2013 eKLR***.

12. For the above reasons, the Applicant prays that his Application should be allowed with costs.

Case for the Petitioner/Respondent

13. The Petitioner/Respondent's case is contained in the Replying Affidavit sworn by Bakai Maalim Kulmia on 27th August 2014. Senior Counsel Mr. Ahmednassir presented its case and he submitted as follows;

14. That the 2nd Respondent is a necessary party to the Petition contrary to the 1st Respondent's submission because its role in the dispute is clear and it has therefore been properly sued.

15. Further, that the decision to terminate the Petitioners' tenancy was made by the Applicant's Trustees on 18th February 2014, four months after the Petitioner was given possession and the refurbishment and renovations were almost complete, which is an expression of bad faith on the part of the Applicant.

16. That the meetings convened by the Applicant in March 2014 were not on a "without prejudice" basis and were on the contrary very candid admissions by the Applicant that they did not want Muslims or Somalis in their building. It is the Petitioner's case therefore that the proposal to have the refurbishments and renovations valued as well as a valuation of the loss of business was agreed upon and there can be no issue of privilege or prejudice as claimed by the Applicant and that the facts deponed to and pleaded in the Petition as well as the annextures, are all necessary and material for determination of the fairly obvious discriminatory acts of the Applicant. In any event, that the letter dated 16th April 2014 confirms that the discussions and agreement were open and cordial. And it was Mr. Ahmednassir's submission in that regard that the Applicant has deliberately withheld vital and crucial documents that have now been produced by the 2nd Respondent, and all which go to confirm that the Applicant was actuated by an unlawful and deliberate motive of denying Muslims and Somalis the right to carry on business at Waumini House and so the issue of an unwanted restaurant business is a red herring. In that regard therefore, he claimed that the annexures marked **BMK4, BMK5, BMK6, BMK7** and **BMK8** are admissible and crucial for the determination of the issue of discrimination before the Court.

17. It was also his contention that the dispute herein is not a commercial or tenancy dispute as the Applicant has claimed and in addition, the decision to lock out the Petitioner was a result of the insistence by the Petitioner that it should be allowed to carry on with its business if the 1st Respondent was unable to compensate it fully for the unlawful decision to deny it access and right to carry on with its business. Further, that the Applicant terminated the tenancy agreement on the sole ground that the Petitioner's directors are Muslim Somalis and therefore the Petitioner's claim is for compensation for discrimination on grounds of religion and ethnic origin, among other reliefs. It was therefore his arguement that the Petition herein related to the determination of the question whether a right in the Bill of Rights under the Constitution had been denied, violated and or threatened with a violation. Further, he contended that the submission by the Applicant that its application to evict the Petitioner should be allowed merely because it can pay damages is an invitation to this Court to sanction violations of fundamental rights and freedoms and therefore the Applicant should not be allowed to benefit from its deliberate and wilful violation of the Constitution.

18. Mr. Ahmednassir therefore urged the Court to dismiss the Application with costs and allow the Petition to be determined on its merits.

Case for the 2nd Respondent

19. The 2nd Respondent, Knight Frank Kenya Ltd's case is contained in a Replying Affidavit sworn on 4th August 2014 by Margaret Motiri.

20. Mr. Carnor made submissions on its behalf and they were;

Firstly, that the 2nd Respondent is the sole letting and managing agent for the Applicant's property known as **L.R No. 1870/IX/42** and that the 2nd Respondent ordinarily and in that capacity, markets and lets the property on terms and conditions agreed upon and that also it grants renewal of leases of any part of the suit property at such rent and terms as it would agree with the Applicant.

21. Secondly, that it was not included and was not privy to the meetings between the Petitioner and the Applicant referred to in paragraphs 10, 11, 12 of the Petitioner's Supporting Affidavit and that the decision to terminate the Tenancy Agreement between the Petitioner and the Applicant was unilateral and made by the Applicant resulting from a meeting of its Trustees which meeting the 2nd Respondent was not privy to.

22. Thirdly, that the 2nd Respondent submitted that it was at all times the Agent of the Applicant and acted within the scope of the Agency Agreement and under express instruction from the Applicant. Further, that it discharged its duties with appropriate care and diligence and endeavoured to promote and protect the interests of the Applicant in line with the Agency Agreement, the Constitution of Kenya and all other laws. In that regard therefore, it is indemnified from the Petitioner's claim in terms of the Agency Agreement it executed with the Applicant.

23. Fourthly, that the 2nd Respondent and/or its employees/agents have never supported the alleged decision by the Applicant to deny the Petitioner's right to operate its business on the basis that its directors are of Somali origin. That in fact it was the Applicant who had requested the 2nd Respondent to carry out a profiling of all tenants at Waumini House and provide details of other Muslim Tenants, which instructions the 2nd Respondent did not carry out as it would be tantamount to validating the Applicant's bias towards the Petitioner.

24. It was therefore its case that it had not violated any of the Petitioner's constitutional rights and in particular **Articles 27 (5), 32 (3)** and **40 (1)** of the **Constitution** as alleged.

25. Fifthly, that only the Petitioner and the Applicant are privy to the contents of the alleged "without prejudice" discussions held between the two parties and in that regard, the 2nd Respondent was not included or present in the meetings referred to in the disputed paragraphs and cannot submit on issues not pertinent to it. It relied on the provisions of **Order 19 (3) (1)** of the **Civil Procedure Rules 2010** and also the proposition in **Halsbury's Laws of England Vol 17 paragraph 213** that; **"the contents of a communication made without prejudice are admissible when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached and the fact that such communication have been made (though not their contents) is admissible to show that negotiations have taken place, but they are otherwise not admissible…"** In that regard, it further relied on the decision in ***Lochab Transport Ltd vs Kenya Arab Orient Insurance Ltd (1986) eKLR*** to support its case.

26. Sixthly and with regard to Prayer 3 of the Application, it submitted that **Rule 5 (d)** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (hereinafter "The Rules")** is to the effect that a Petition cannot be defeated by reason of the misjoinder or non-joinder of parties. And in such an instance the Court is mandated to deal with the matter in dispute in accordance with **Rule 5 (b)** of the said Rules. Further, that **Rule 5 (d)** of the Rules allows the Court, at any stage of the proceedings, (either upon or without the application of either party) to order that the name of any party improperly joined be struck out and that the name of any person who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court to adjudicate upon and settle the matter, be added. That therefore, the 2nd Respondent was enjoined herein by virtue of the Agency Agreement and even so, it is trite that a principal is liable for acts entered into by its agent when it gives the agent either actual or apparent authority. Additionally, that if an agent conducts business on behalf of a disclosed principal through the performance of an authorized act the agent is not liable and is not a party to the contract. Consequently, any contract that the agent enters into

is a contract between that third party and the principal and so the agent is not a party to that contract and cannot be held responsible by the third party for any breaches on the part of the principal party.

27. In light of the foregoing, it is its further submission that under **Rule 2** of the Rules above, the term 'Respondent' by implication means that any person can be joined as a Respondent so long as there is an allegation that the person has infringed or threatens to infringe the Petitioner's fundamental rights.

28. Seventhly, in regard to Prayer 4, it is submitted that in the alternative, should the Petition be struck out, there is a potential yet seemingly imminent suit by the Applicant against the 2nd Respondent and therefore it would be in the best interest of the Applicant to have the same struck out, only to go after the 2nd Respondent in separate proceedings. In that regard therefore, it would be prudent and in the best interest of justice that the issue of culpability and liability of all parties be determined in this forum so as to lay all issues to rest.

29. For the above reasons, it is its submission that the issues raised in the Petition must be approached more from a practical perspective rather than a purely legalistic manner and in a way that best advances the cause of justice with regard to all parties concerned.

30. In a nutshell, the 2nd Respondent is opposed to the Application and seeks that it should be dismissed with costs.

Determination

31. From the foregoing, following are therefore the issues to be determined;

(1) Whether paragraphs 25, 26, 27, 28, 29, 30 and 31 of the

Petition be struck out, as well as paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of the Supporting Affidavit of Bakai Maalim Kulmia sworn on 9th July 2014 and annextures BMK4, BMK 5, BMK 6, BMK 7 and BMK 8 thereof.

(2) Whether it is proper for the 2nd Respondent to be struck out from the Petition.

(3) Whether in the alternative, it is proper for the Petition to be struck out as a whole.

(4) Whether this Court should grant an interim conservatory order to restrain the Petitioner, by themselves or through their agents or representatives, or otherwise howsoever, from interfering with the 1st Respondent's quiet possession or use of its premises on the Ground Floor of Waumini House L.R. No. 1870/IX/42, Westlands, Nairobi, pending the hearing and determination of this Application inter-parties and the Petition.

(5) Whether this Court should grant an interim conservatory order to compel the Petitioner under the supervision of the 1st Respondent to remove its fixtures and fittings from the 1st Respondent's premises on the Ground Floor of Waumini House L.R. No. 1870/IX/42, Westlands, Nairobi, pending the hearing and determination of this Application inter-parties and the Petition herein.

(6) Whether in the alternative to (5) above, the 1st Respondent should be authorized to remove the Petitioner's fixtures and fittings from its premises on the Ground Floor of Waumini House, L.R No. 1870/IX/42, Westlands, Nairobi.

(7) Whether there are any other or further Orders that will favour the

cause of justice.

(8) Who should bear the cost of this Application.

Whether paragraphs 25, 26, 27, 28, 29, 30 and 31 of the Petition be struck out, as well as paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of the Supporting Affidavit of Bakai Maalim Kulmia sworn on 9th July 2014 and annextures BMK4, BMK 5, BMK 6, BMK 7 and BMK 8 thereof.

32. It was the Applicant's case that the above paragraphs of the Petition be struck out and for clarity of issues, I hereby summarise their contents as follows;

(i) Paragraph 25 - at the request of Kenya Conference of Catholic Bishops, a meeting was convened between the Petitioner and the Respondents in March 2014, which was attended by His Emminence Cardinal John Njue, the Very Reverend Father Vincent Wambugu and the Right Reverend Anthony Muheria where the Bishops expressed reservations in the Petitioner operating a restaurant at its premises.

(ii) Paragraph 26 – the only reason given was that the Bishops were uncomfortable in having Somali Muslims at the headquarters of the Kenya Conference of Catholic Bishops and that the Restaurant would be patronized by Somalis.

(iii) Paragraph 27 – the 1st Respondent proposed that a valuation of the cost of the refurbishment and fittings be undertaken by an independent quantity surveyor together with a valuation of the loss of business that the Petitioners would suffer if the 1st Respondent were to repudiate the six-year lease.

(iv) Paragraph 28 – the 1st Respondent proposed that QS Alex Kamau of the firm of M/s. Obra International, Quantity Surveyors and Project Managers to undertake the valuation while the firm of M/s. Pacific Advisory was to advise the Respondents on the quantum payable if the lease was to be repudiated.

(v) Paragraph 29 – by an email sent on 12th May at 13:17 hours, the Quantity Surveyor priced the Bills of Quantities for the refurbishment works, equipment and furniture by the Petitioner at the Waumini House restaurant at **Kshs.17, 953, 325.00**

(vi) Paragraph 30 – the Petitioner on its part engaged the services of a financial consultant who computed the projected loss of business and profits for the six years that the restaurant would have been operating at the sum of **Kshs.68,464,000.00**

(vii) Paragraph 31 – the 1st Respondent failed to honour its undertaking to make a reasonable offer for compensation for the intended repudiation of the lease to the demised premises and in breach of the Agreement for lease, wrote a letter dated 28th May 2014, through the firm of M/s Muma and Kanjama Advocates, purporting to claim vacant possession of the property and alleging that the 2nd Respondent did not have any consent or authority to let out the premises to the Petitioner.

33. The following paragraphs in **Bakai Maalim Kulmia's** Supporting Affidavit are also sought to be struck out;

(i) Paragraph 10 – at the request of the Kenya Conference of Catholic Bishops, a meeting was convened between the Petitioner and Respondents in March 2014, which was attended by His Eminence Cardinal John Njue, the Very Reverend Father Vincent Wambugu and the Right Reverend Anthony Muheria where the Bishops expressed

reservations in the Petitioner operating a restaurant at its premises.

(ii) Paragraph11 – on enquiring about the sudden change of heart, the only reason given was that the Bishops were uncomfortable in having Somali Muslims at the headquarters of the Kenya Conference of Catholic Bishops and that there was concern that the restaurant would be patronized by Somalis.

(iii) Paragraph 12 – at a meeting held on 11th and 15th April 2014, the 1st Respondent also proposed that a valuation or projection be made of the loss of business that the Petitioner would suffer if the 1st Respondent were to repudiate the six-year lease. The Petitioner has proposed to avail copies of video recordings of the meeting when the proposals were made.

(iv) Paragraph 13 – by a letter dated 16th April 2014, whose terms were accepted by the Petitioner, the 1st Respondent proposed that an independent quantity surveyor should undertake a valuation of the cost of the refurbishment and fittings. Annexture '**BMK-4'** is a copy of that letter.

(v) Paragraph 14 – the 1st Respondent proposed QS Alex Kamau of the firm of M/s. Obra International Quantity Surveyors and Project Managers to undertake the valuation while the firm of M/s. Pacific Advisory was to advise the Respondent on the quantum payable if the lease were to be repudiated. Annexture **'BMK-5'** are copies of emails exchanged on the appointment of consultants and their terms of reference.

(vi) Paragraph 15 – by an email sent on 12th May 2014, the Quantity Surveyor priced the Bills of Quantities for the refurbishment works, equipment and furniture by the Petitioner at **Kshs.17,953,325.00**. Annexture '**BMK-6'** is a copy of the email and Bills of Quantities.

(vii) Paragraph 16 - Mr John Kiruthu of M/s.Pacific Advisory was to prepare and submit a valuation to the Petitioner, but despite several promises made, the report was not submitted to the Petitioner. Annexture '**BMK-7'** are copies of the emails confirming the same.

(viii) Paragraph 17 – the Petitioner on its part engaged the services of a financial consultant who computed the projected loss of business and profits for the six years that the restaurant would have been operating, at the sum of **Kshs.86,000,000.00.** Annexture '**BMK-8'** are copies of the audited accounts for 2013 and the Financial Projection prepared at the Petitioner's request.

(ix) Paragraph 18 – By a letter dated 28th May 2014, through the firm of M/s. Muma and Kanjama Advocates, the Applicant sought vacant possession of the property and alleged that the 2nd Respondent did not have any consent or authority to let out the premises as a restaurant. Annexture '**BMK-9'** is a copy of that letter.

(x) Paragraph 19 – the Petitioner claims that the claim for vacant possession by the Applicant is spurious and an attempt to validate the alleged unlawful decision to deny the Petitioner the right to operate its business only on the basis that its directors are Muslim Somalis and that it would reflect badly for the Kenya Conference of Catholic Bishops to have Muslim Somali tenants at its headquarters.

34. From the foregoing, the single thread running through all the cited paragraphs of the Petition and Affidavit is that the claim by the Petitioner at a prima facie level is that it was discriminated against on the basis of the fact that its directions are Muslim Somalis. All other matters pleaded therein, go to support that general position.

35. The Applicant however has claimed that the evidence tendered is privileged as it was based largely on "without prejudice" communication between itself and the Petitioner be struck out. What is the law on application for striking out of pleadings?

36. In the case of **Musikari Nazi Kombo vs Moses Masika Wetangula and 2 Others Election Petition No .3 of 2013**, the Court stated partly as follows;

> ***"…such an application [for striking out] should be looked at within the entire petition and the evidence of all the witnesses as filed, and tested in cross examination and re-examination. This approach has been adopted in law due to the fact that striking out a pleading or a part of it is a draconian act which completely forecloses the right of the affected party from seeking legal redress on the affected matter - See the famous case of DT Dobie Coopers and other cases on this subject. This harshness produced by such an action is what dictates upon the court to exercise extreme caution in its discretion to strike out a pleading or a paragraph in a pleading or affidavit. Care should be taken by the court not to engage in an extravagant exercise that would result into an insidious change and harm to the essential core and character of the petition. Thus, I should strictly scrutinise the impugned paragraphs against all possible effects the striking out of those paragraphs will occasion to the proceedings, especially where evidence or a scintilla of it exists in the documents on record…"***

37. I agree with the above reasoning and looking at the Petition, which is predicated on the Bill of Rights, **Article 22(3)** of the **Constitution** provides as follows;

> ***"(1) …***
>
> ***(2) …***
>
> ***(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—***
>
> ***(a) the rights of standing provided for in clause (2) are fully facilitated;***
>
> ***(b) formalities relating to the proceedings, including***
>
> ***commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;***
>
> ***(c) no fee may be charged for commencing the proceedings;***
>
> ***(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and***
>
> ***(e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court."***

38. To my mind, the Constitution intended that as much as possible, all Petitions seeking the enforcement of a right should be heard on their merits and that even informal documentation should be admitted. The expectation of the framers was therefore obvious and the technical rules in for example, commercial litigation, cannot apply. If that is so, how can the Court adopt a stringent approach to pleadings and engage in the draconian measure of striking out in every instance where such an order is sought? The High Court while exercising its jurisdiction as the interpreter of the Constitution ought to be very slow to strike out any pleading and I have shown why. That is the approach I shall take in the matter before me.

39. The Courts have also on several occasions determined questions dealing with admissibility of 'without prejudice' documents. The following cases are indicative of the law on the subject;

(a) In the case of **Millicent Wambui vs Nairobi Botanica Gardening ltd Cause No 2512 of 2012** the Court stated thus;

"…The Application revolves around "without prejudice" communication. The use of the term 'without prejudice' is used by parties as a means to enable offers and counter offers to be made to settle disputes or claims without fear that the said letters would later be used by the opposite party as an admission of liability in the ensuing lawsuit. The words "without prejudice" impose upon the communication an exclusion of use against the party making the statement in subsequent court proceedings. It is a well-established rule that admissions, concessions or statements made by parties in the process of trying to resolve a dispute cannot be used against that party if the dispute is not resolved thus resulting in litigation. A party making a 'without prejudice' offer does so on the basis that they reserve the right to assert their original position, if the offer is rejected and litigation ensues. [6]For correspondence between parties to be protected it must be made in a genuine attempt to settle a dispute between the parties…"

(b) In **Re Daintrey ex Holt [1893] 2 QB 116**, the Court, per Vaughan Williams J, stated at page 119 that;

"In our opinion the rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation, and it seems to us that the judge must necessarily be entitled to look at the document in order to determine whether the conditions, under which the rule applies, exist. The rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purpose of arriving at terms of peace, and unless there is a dispute or negotiations and an offer, the rule has no application. It seems to us that the judge must be entitled to look at the document to determine whether the document does contain an offer of terms. Moreover we think that the rule has no application to a document which, in its nature, may prejudice the person to whom it is addressed. It may be that the words "without prejudice" are intended to mean without prejudice to the writer if the offer is rejected; but, in our opinion, the writer is not entitled to make this reservation in respect of a document which, from its character, may prejudice the person to whom it is addressed if he should reject the offer, and for this reason also we think the judge is entitled to look at the document to determine its character."

(c) In **Kawamambanjo Ltd vs Chase Bank and Another Civil Case No 344 of 2013** the Court held that;

"…The above notwithstanding, in Halsbury's Laws of England Vol 17 paragraph 213, it had been stated that:- "the contents of a communication made "without prejudice" are admissible when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are otherwise not admissible… Similarly as was held in the case of Lochab Transport Ltd vs Kenya Arab Orient Insurance Ltd [1986] eKLR:- "… if an offer is made "without prejudice", evidence cannot be given on this offer. If this offer is accepted, a contract is concluded and one can give evidence of the contract and give evidence of the terms of that "without prejudice" letter". As has therefore been seen hereinabove, contents of a communication made "without prejudice" are admissible when there has been a binding agreement between the parties and that once a contract is concluded; one can give

evidence of the terms of that "without prejudice" letter…"

(d) In the case of **D. Light Design Incorporated vs Powerpoint Systems East Africa ltd Civil Case No 93 of 2013** the Court stated thus;

"…As was correctly submitted by the Plaintiff's counsel, negotiations that are done out of court must be guarded jealously to allow parties to be free to explore all possibilities of an out of court settlement with a view to compromising a suit. However, there was nothing to jealously guard in this matter as regards the correspondence that was attached in the Joint Affidavit. The Plaintiff does not even tell this court how the letters and credit notes by the Defendant to its clients were privileged. This is because as was also correctly stated out by counsel for the Defendant, the documents in the said Joint Affidavit were not privileged for the reason that the Plaintiff and the Defendant did not intend them to be confidential. This was illustrated by the fact that the letter marked "without prejudice" basis was to be acted upon and it was copied to other persons other than to the advocates of both the Plaintiff and the Defendant. Indeed, from the contents therein, the terms therein were acted upon. It is evident that the said documents were not intended to compromise the suit herein and they were acted upon before the suit herein was contemplated… In an adversarial system like the one in this jurisdiction, each party puts its best foot forward. It must be given a fair and reasonable opportunity to present its case in the best way it knows how. The right to fair trial in indeed envisaged in Article 50 of the Constitution of Kenya, 2010. It would be a travesty and miscarriage of justice if a party to a suit could dictate the evidence that its opponent would seek to be relying on. The inadmissibility of the evidence can only be as provided for under Section 23 (1) of the Evidence Act Cap 80 (laws of Kenya)."

40. I agree with the exposition of the law above and it is obvious that contrary to the assertions by the Applicant, "without prejudice" communication is not inadmissible in all instances. Whereas in commercial and other such disputes, the place of "without prejudice" communication is largely protected, I take the view that **Re Daintrex (supra)** is a good expression of the law where constitutional violations are claimed. A judge must have all material placed before him to make a fair and just decision in the circumstances. In the present case, if there is communication pointing to evidence of alleged violation of the Bill of Rights, the rule of inadmissibility must be made flexible to avoid further injustice being committed.

41. In answer to the above issue therefore, and to allow fair decision on the merits of the Petition, I decline to strike out any of the paragraphs of the Petition or Supporting Affidavit. I will however allow the Applicant an opportunity at the hearing to object to any document in the usual manner and specific findings will be made at that time.

Whether it is proper for the 2nd Respondent be struck out from the Petition

I propose to spend very little time on this issue because as can be seen above, the 2nd Respondent has not sought to be removed from the proceedings and in fact supports the Petitioner in the present Application to that extent. It is the Applicant that has sought the removal of the 2nd Respondent, a most unusual situation where a Co-Respondent seeks the striking out of another Co-Respondent while the latter insists that it is properly before the Court as a Co-Respondent.

42. I will in that context take the same approach as was taken in **Rose Wangui Mambo and 2 Others vs Limuru County Club and 17 Others Petition No.160 of 2013** where the Court stated thus;

"… [49] Rule 2 of the Constitution (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013 (hereafter "the Rules') defines the term 'respondent' to mean, "a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom." Further, Rule 5(a) of the Rules states that "Where the petitioner is in doubt as to the persons

from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties." It is also worth mentioning that according to the Rules, a petition cannot be defeated by reason of the misjoinder or non-joinder of parties. The Court in such an instance is mandated to deal with the matter in dispute according to Rule 5(b) of the Rules, while Rule 5(d) allows the Court at any stage of the proceedings, (either upon or without the application of either party) to order that the name of any party improperly joined be struck out and that the name of any person who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court adjudicate upon and settle the matter be added."

The Court then went on to state that;

"[52] From the definition of the term 'respondents' set out above, we understand the implication to be that any person can be joined as a respondent so long as there is an allegation that the person has infringed or threatens to infringe the petitioner's fundamental rights. It is perhaps worth noting that at this point, we are not talking of determination of culpability or liability, as that we think is an issue for the Court to eventually determine… We must also draw a distinction between a petitioner's right to sue for breach of her fundamental rights and freedoms and the issue of liability. At the point of suing, the petitioner will need to join to the suit as (a) respondent(s) a party against whom he or she alleges has infringed or threatens infringement of his or her rights. It then becomes the duty of the Court to make a determination as to whether or not such party is properly enjoined and more importantly, whether such party is liable for the alleged violations."

It then added as follows;

"As was observed in <u>Mwangi Stephen Mureithi vs Daniel Toroitich Arap Moi, Nairobi Petition No. 625 of 2009 [2011] eKLR</u> in reference to the then section 84(1) of the repealed Constitution: "Needless to say, it is clear from the above provisions of the Constitution that a person who alleges (<u>not "proves"</u>) that his fundamental rights have been contravened has a Constitutional right to seek redress in the High Court. It would amount to grave injustice to lock out a petitioner from filing his claim purely because the respondent believes that the claim has no merit. The issue of merit is substantive while the filing of the claim is procedural…"

The Court then concluded thus;

"In the matter before us, the 2nd to 9th respondents' contention that they are wrongly joined to this suit is rejected. We find that they are properly before us as parties against whom claims are made regarding infringement of the petitioners' fundamental rights..."

43. I reiterate the above holding as properly applicable in the present circumstances and it is my view that the nature of the dispute between the parties is that the 2nd Respondent is a necessary party and is obvious why; as the letting agent, its role was crucial in bringing the Applicant and the Petitioner into a tenancy agreement. It will also be a helpful party in determining what caused the repudiation of the tenancy agreement and whether in fact the Petitioner's allegations of discrimination on the grounds of religion and/or ethnicity are valid or not.

44. In the event, I decline to strike out the 2nd Respondent from the Petition as is sought by the Applicant.

<u>Whether in the alternative it is proper for the Petition to be struck out as a whole.</u>

45. I have already touched on the draconian power of striking out. In addition, it is my

understanding that striking out of a Petition where breach of fundamental rights is alleged is an act that is deeply frowned upon by the Courts based on the constitutional philosophy that the right to be heard is that much important in human rights litigation. That is why in the case of **Donovan Earl Hamilton vs Ian Hayles Claim No. 2009 HCV 04623**, the Supreme Court of Judicature of Jamaica in the Civil Division stated thus;

> ***"… The inherent power of the Court at first instance to strike out cases is one which should be exercised with great care and due diligence. It should only be done in the simplest cases and those which are clear-cut cases of abuse of process. The exercise of this power is prima facie not encouraged by the Constitution… The Constitution gives the citizen the right to bring a Petition before the Court in any Constitutional matter. It is for the Court to decide whether that citizen should be allowed to go to the Constitutional Court. This right of the citizen to petition the Court for Constitutional Redress has not been summarily aborted or abrogated by any statute."***

46. I am duly guided and the prayer made to strike out the Petition was surprising to me because in fact no strong grounds were made in support of that prayer. Even if the point had been strenuously argued, it is obvious to me that the issues of discrimination raised in the Petition are neither frivolous, idle nor an abuse of Court process. On the contrary, they are pertinent and ought to be addressed on their merits.

I therefore decline to strike out the Petition as prayed by the Applicant.

Whether this Court should grant an interim conservatory order to restrain the Petitioner, by themselves or through their agents or representatives, or otherwise howsoever, from interfering with the 1st Respondent's quiet possession or use of its premises on the Ground Floor of Waumini House L.R. No. 1870/IX/42, Westlands, Nairobi, pending the hearing and determination of the Application and the Petition.

47. As can be seen above, the Petitioner has submitted that it took possession of the premises based on a lease agreement negotiated with the Applicant through the 2nd Respondent. That subsequently, the Applicant sought to repudiate the agreement and candidly stated that it was uncomfortable with Muslim Somalis operating or frequenting the restaurant.

48. The Applicant on the other hand now seeks repossession of the premises and seeks that the Petitioner should not interfere with its possession and a conservatory order should be directed to the Petitioner in the terms above. What are the principles that a Court should invoke when confronted with such an application?

49. In the case of **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No.11 of 2012**, it was held by a majority as follows;

> ***"In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."***

50. Further, in the case of **Judicial Service Commission vs Speaker of the National Assembly & Another Petition No. 518 of 2013**, the Court expressed itself as follows:

> ***"Conservatory orders in my view are not ordinary civil law remedies but are remedies***

provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."

51. In the Privy Council Case of **Attorney General vs Sumair Bansraj (1985) 38 WIR 286** Braithwaite J.A. expressed himself as follows on the same issue;

"Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the "Conservatory Order" in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, … but on the other hand it would be well within the competence and jurisdiction of the High Court to "give such directions as it may consider appropriate for the purpose of securing the enforcement of … the provisions" of the Constitution…"

He then added as follows;

"In the exercise of its discretion given under Section 14(2) of the Constitution, the High Court would be required to deal expeditiously with the application, inter-partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim Conservatory Order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in Section 14 (2) "subject to subsection (3) and the enactment of Section 14(3) in the 1976 Constitution must have…the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too…The critical factor in cases of this kind is the exercise of the discretion of the judge who must "hold the scales of justice evenly not only between man and man but also between man and state."

52. I agree with and I am guided by the above reasoning. In that context then, it is not denied that the Petitioner has refurbished the premises at a cost. The Applicant, prima facie, seems to have disagreed with its agent, the 2nd Respondent as to whether the Petitioner should have been allowed to enter the premises at all. There is however a pending Application where the Petitioner is seeking conservatory orders against the Applicant and it is best that this particular prayer, taking into account the law as expressed above, should be heard together with the Petitioner's Application dated 9th July 2014.

53. Having so said and in the alternative, it is important that parties should explore the possibility of a mediated agreement under **Article 159(2)(c)** of the **Constitution** as to what to be done with the premises before the Petition herein is heard and determined.

54. Directions in that regard will be given after the delivery of this Ruling.

Whether this Court should grant an interim conservatory order to compel the Petitioner under the supervision of the 1st Respondent to remove its fixtures and fittings from the 1st Respondent's premises on the Ground Floor of Waumini House L.R. No. 1870/IX/42, Westlands, Nairobi, pending the hearing and determination of this Application inter-parties and the Petition herein.

55. The above issue is moot in view of my findings above.

Whether in the alternative to Prayer 5 above, the 1st Respondent should be hereby authorized to remove the Petitioner's fixtures and fittings from its premises on the Ground Floor of Waumini House, L.R No. 1870/IX/42, Westlands, Nairobi.

56. The above issue is similarly moot.

Whether there are any other or further Orders that will favour the cause of justice.

57. I have already directed a mediated agreement as regards the premises and this is a sufficient answer to the above issue.

58. As to costs, it is obvious to me that the Applicant, by bringing the present Application was acting in self-interest and must therefore bear the costs of the present Application.

Disposition

59. There is nothing more to determine and so the Application dated 1st August 2014 is dismissed with costs to the Petitioner and 2nd Respondent.

60. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Kanjama for Applicant

Mr. Lisa holding brief for Mr. Jillo for Petitioner and Miss Ranyizi holding brief for Mr. Mc Court for 2nd Respondent

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

By Court

Application dated 9/7/2014 and prayers 5, 6 and 7 of the 1st Respondent's Application dated 1/8/2014 is stood over for hearing on 18/12/2014 at 2.00 p.m.

Submissions before then.

ISAAC LENAOLA

JUDGE