



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 227 of 2012**

**ANTHONY WAHOME.....PLAINTIFF**

**VERSUS**

- 1. PARMINDER SAIMBI - CHAIRMAN**
- 2. AMOS WERU – SECRETARY**
- 3. RIAZ ABDULGANI – TREASURER**

**Sued as officials and the Management Committee of KENYA REGIMENT RIFLE CLUB.....DEFENDANTS**

**RULING**

By his Motion on Notice dated 16<sup>th</sup> May 2012 expressed to be brought under the provisions of section 1A, 1B/3A and 63(c) of the Civil Procedure Act, Order 40 Rule 2, 3 Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law, the applicant herein seeks the following orders:

- 1. That service of this application be dispensed with in the first instance.**
- 2. That an order of temporary injunction do issue against the Management Committee of the Defendants restraining them from holding the Disciplinary Meeting scheduled for 20<sup>th</sup> May 2012 pending the hearing and determination of this Application inter partes and/or further orders of this Honourable Court.**
- 3. That an order of temporary injunction be issued against the management Committee of the defendants restraining it from conducting any business of the defendant pending the hearing and determination of this Application inter partes.**
- 4. That an order of mandatory injunction be issued against the Defendants to hold its Annual General Meeting within twenty one (21 days of this order or within any such period that the court may find reasonable, just and fair.**
- 5. That the costs of this Application be awarded to the Plaintiff.**

The application is based on the grounds that the Management Committee has been in office for five (5) years contrary to the Defendants Constitution which requires elections to be held every year and that the Management Committee has presided over the mismanagement of the Club causing loss of funds and members to leave the Club.

The application is supported by an affidavit sworn by the plaintiff herein on 16<sup>th</sup> May 2012. According to the applicant, he is a fully registered Platinum Member of the Defendant Club having joined the Club Year 2000-2001. According to him the Club was formed in 1952 with the objective of encouraging and improving all forms of target shooting and offering different forms of membership and hosts a number of disciplined forces in the shooting field drawn from civilians, and other disciplined forces hence offers a rare but very sensitive service to members and civilians. On 27<sup>th</sup> March 2012, the plaintiff wrote an email to the Chairman of the Club raising management and governance concerns of the plaintiff and other members with respect to compliance with certain Articles of the Club Constitution. The issues raised were with respect to the failure to hold an Annual

General Election for five (5) years, failure to keep proper accounts, selling of ammunition to Club Members at higher rates and failure to accord privileges to members entitled to such privileges. Instead of responding to the said issues, the Pistol Sub Committee on 15<sup>th</sup> April 2012 held a meeting and suspended the applicant as a member for six (6) months. The applicant protested the said move on the ground that the defendant's Management Committee had not met and validated the same as required by the Constitution, that he had not been afforded an opportunity of being heard and that the said Subcommittee was illegally constituted as no election had been held for the said five (5) years. On 20<sup>th</sup> April 2012 he was summoned before a disciplinary meeting of the Management Committee on 20<sup>th</sup> May 2012 to discuss his conduct which meeting he contends is likely to lead to his illegal suspension since the said Management Committee is illegally in the office, the Pistol Sub Committee has earlier purported to suspend him without a hearing, the Club's Management Committee has no powers to summon or discipline him being illegally in the office and has presided over colossal loss of the Club's funds hence the prayers sought in this Motion.

In opposition to the application the defendants filed a replying affidavit sworn by **Parminder Saimbi**, the Club's Chairman on 4<sup>th</sup> June 2012. According to him, the membership of the club is drawn only from private members and offers services to members only. While admitting the receipt of the email from the plaintiff the deponent states that the club has been complying with all the Articles of the Club's Constitution and where there has been a delay the same has been explained to members. Including delays in holding Annual General Meeting which though ought to be held after the end of the club year provides that the same be held preferably not later than 30<sup>th</sup> April. It is further averred that the applicant has not come to court with clean hands having been a member of the Pistol Committee himself from 2009 to 2011 during which time he actively participated as the Club Coordinator tasked with circulating minutes of the Club's committee's meeting including the Club's Finance Report after which he resigned due to personal commitments. In one such correspondence, it is deposed the applicant informed the members to abide by the decisions of the Pistol Committee and that complaints, grievances be addressed to the said Committee. According to the deponent, the applicant is being mischievous and the members are not bound to buy ammunitions from the club. The applicant it is deposed being a Platinum member is entitled to shoot at range free of charge and has not disclosed which other privileges he has been denied. While denying that the applicant has been suspended the deponent contends that the applicant has only been stopped from entering or taking part in shooting competitions and that the applicant breached the directive he himself was a party to when instead of addressing his grievances to the Pistol Committee he instead copied the same to non-members. By taking the action of making the applicant ineligible to enter any Competition, it is deposed the Committee was acting within its mandate as developed with the help of the applicant. It is further averred that the applicant attended the meeting on 6<sup>th</sup> May 2012 to discuss his conduct wherein he was given opportunity to defend himself and a verdict is pending. In the deponent's view suspension of the applicant from shooting events/competitions is not a policy decision concerning the club as a whole and is therefore not subject to approval by the management committee. It is his view that the applicant, due to his conduct of having been the Chairman of the Pistol Committee is estopped from claiming that the Committee is illegally in office. By circulating his email to non-members with particulars of other members, it is deposed the applicant exposed the members to security risks since the members whose particulars were mentioned would be perceived to be owners of firearms. The applicant, it is deposed, ought not to be allowed to have his cake and eat it by restraining the Club from holding meetings when he participated in some of the Club's meetings. According to the deponent, the Management Committee is not illegally in office but that the nature of the club's activities is that it may not be possible to hold elections every year taking into account the fact that the Club is for licensed firearm holders which necessitate a very high level of discipline in regulation of its affairs. This, it is deposed, requires that the Committees be composed of highly trained professionals and it would be cumbersome to keep changing members of these committees hence the delay in the AGM to ensure that qualified and experienced members offer leadership through committees. According to the deponent, the Pistol Committee has power to stop anyone from shooting without waiting for the decision of the Management Committee depending on the Pistol Committee's perception of the person's frame of mind to avoid any conflict and possibly loss of life. The range, it is deposed is licensed through Kenya Police and any slight indication that something is likely to go wrong may lead to its closure hence the decision it took to avoid any source of conflict between the applicant and other members and avoid confrontations. If the decision amounts to a suspension for a period exceeding 2 months the decision is referred to the Management Committee which takes over the disciplinary proceedings which is what happened in the instant case. It further averred that the applicant has in the past confronted a member who had just come from shooting and later apologised for the said conduct. To the deponent this application is an abuse of the court process since the Club having summoned the applicant is unlikely to hold another disciplinary meeting and further its AGM is slated for 26<sup>th</sup> August 2012 hence the application ought to be dismissed.

There was a supplementary affidavit sworn by the applicant on 5<sup>th</sup> July 2012 in which apart from reiterating the contents of the supporting affidavit, he deposed that there has never been any notification of a delay in holding the AGM and in any case the Constitution clearly states that the AGM be held not beyond 30<sup>th</sup> April of the year the AGM is to be held. While admitting that he served as coordinator of the Club and Pistol Subcommittee from 2008 to 2011, he deposed that he always vouched for elections of officials by members as well as the AGM as provided by the Constitution. According to a communication from the Club's Vice Chair to the applicant the decision to suspend him from the Club's activities had been rescinded though he had not received an official communication to that effect. According to him his frame of mind is unquestionable and beyond reproach and there is no requirement under the Club's Constitution requiring that Committee Members be highly trained professionals. While denying allegation of confronting a shooter the applicant contended that the bottom line is that the Committee is illegally in office and ought not to benefit from that illegality.

Not to be left behind, the defendants similarly filed a further replying affidavit sworn by the Club's said Chairman on 30<sup>th</sup> July

2012 in which while reiterating the contents of his replying affidavit, he deposed that the Club has held AGM's in 1999, 2003 and 2007 in which the members adopted the accounts that were presented and accuses the applicant of coming to court with unclean hands and concealing material facts.

In the applicant's submissions it is contended that prayer 3 which seeks to restrain the Management Committee from conducting any business of the defendant has been overtaken by events since it was rejected by **Waweru, J.** What remains are orders compelling the defendant to hold AGM within 21 days or within any reasonable period. The defendant having admitted the failure to hold AGM for the past 5 years, it is submitted that prayers (a) and (c) of the plaint stand on high chances of success. Since there is no other private members' club in Nairobi offering similar sports it is submitted that damages cannot compensate the plaintiff and the balance of convenience tilts in favour of the applicant. By denying the applicant his shooting rights, it is submitted that amounts to stripping him of his membership. In support of the said submissions, the applicant relies on **Nderu vs. Kenya National Chamber of Commerce and Industry and Another [2003] KLR 160, 167** and **Mbugua vs. Olang and Another [1989] KLR 595 at 605.**

On the part of the respondents it is submitted that there is no evidence of mismanagement of the club while the delay in holding elections within the said 5 years has been explained. In their view no prima facie case has been established by the applicant for the purposes of granting the orders sought. It is further submitted that the applicant has not shown how he will suffer if the Annual General Meeting is held on 26<sup>th</sup> August 2012 as indicated. It is contended that since the applicant is an individual aggrieved by a members' club, the balance tilts massively in favour of the defendant. The applicant suffers zero inconvenience if the AGM is held on 26<sup>th</sup> August 2012 as already planned. Accordingly, it is submitted that the application is premature and the orders sought ought to have been sought after 26<sup>th</sup> August 2012. In support of the submissions the respondents rely on **Kenya Breweries Limited vs. Okeyo [2002] 1 EA 110.**

In **Gitao & 5 Others vs. Kenya National Chamber of Commerce & Industry [1990] KLR 360**, Akiwumi, J (as he then was) expressed himself as follows:

**“In an interlocutory application, such as the present one the court is not prepared to say that the plaintiffs are precluded from challenging the lawfulness of the decision of the Governing Council. The Courts will entertain suits by members claiming to have been irregularly or improperly expelled, and will interfere if the rules providing for expulsion have not been strictly observed, or if the principles of natural justice have been violated. The foundation for this jurisdiction is the right of property vested in the member of which he is unjustly deprived by the unlawful expulsion...An important factor, which will make the courts interfere, is the existence of a right of property vested in the member. The plaintiffs do not seem to have any right of property vested in the non-profit making Chamber since the Memorandum of Association does not seem to allow this...The rules guiding the grant of injunctions are that first, if the plaintiffs have shown on a balance of probabilities that they have a prima facie case with a probability of success and that they will suffer irreparable injury that cannot be compensated for by an award of damages, the injunctions they seek should be granted. The second rule is that if the court has doubts about compliance with the first rule, then it must decide on the balance of convenience. Whilst the court is not too certain whether the plaintiffs have shown that they have a prima facie case with a probability of success, the court is far more uncertain on the affidavit evidence the plaintiffs will suffer injury, which cannot be compensated for by an award of damages...That being so the court must consider the balance of convenience. It is common ground that the termination of membership of the plaintiff's in the Chamber was as required, supported by the majority of the members of the Governing Council. To grant the injunctions sought would, having regard to the fact that the plaintiffs are also members of the Governing Council, be likely to have the effect of undermining the decisions and adversely affect the decision making process of the Governing Council which is charged with the management of the affairs of the Chamber and this could in turn affect the smooth running of the Chamber, the implementation of its activities and the achievement of its objectives. On the other hand the plaintiffs may still seek redress from the Extraordinary General Meeting of the Council without giving rise to the possibility of jeopardising the management and functioning of the Chamber and constituting this court contrary to the Articles, as an appellate forum to hear an appeal from the decision of the Governing Council concerning termination of membership of the Chamber. It would be on a balance of convenience far better in the interests of the Chamber for the injunction applied for to be refused”.**

The law with regard to internal management of social clubs and Associations is that the Courts would be very reluctant to interfere with their internal management unless the Constitution of the Association is breached or there is a contravention of the Rules of natural justice. In **Tanui & 4 Others vs. Birech & 11 Others [1991] KLR 510** the Court of Appeal held:

**“While it is not the business of the High Court or the Court of Appeal to involve itself in the day to day running of institutions such as the Church, colleges, clubs and so on, yet where it is shown that such an organization is conducting its affairs in a manner contrary to its constitution and to the detriment of its members, then the High Court and the Court of Appeal would not only be entitled to but is under a duty to compel it, either, by injunction or otherwise, to obey its constitution”**

In **Patel and Others vs. Dhanji and Others [1975] EA 301** the East African Court of Appeal held inter alia that:

**“With respect to suits between members and clubs, or societies or analogous to clubs, whose objects are mainly social, religious or charitable, the courts will entertain suits by members claiming to have been irregularly or improperly expelled, and will interfere if the rules providing for expulsion have not been strictly observed, or if the principles of natural justice have been violated. The foundation for this jurisdiction is the right of property vested in the member, of which he is unjustly deprived by the unlawful expulsion”.**

In **Teresa Shitakha vs. Mary Mwamodo & 4 Others [1986] KLR 445** the Court of Appeal stated:

**“It would not be right to grant orders which would have the effect of paralysing the National Organisation or bringing it to a halt, both by restraining the holding of meetings and by organisation of elections, pending a decision in the main action, or on the appeal from the learned judge’s order. To do so would be out of proportion to the alleged wrongs suffered by the Applicant, and damages would be an adequate remedy for her if the allegations were proved”.**

In other words what the Court was stating was that in an application of this nature the Court ought to consider the principle of proportionality. This principle is now one of the matters to be considered under the overriding objective of civil dispute resolution provided in section 1A of the Civil Procedure Act. In interpreting the provisions of the Act and the Rules thereunder the Court is enjoined by section 1B thereof to ensure that the aims of the overriding objective are attained.

From the submissions of both parties it is clear that the only issue for determination in this application is whether the Court should grant mandatory injunction compelling the defendant Club to hold its AGM and within what period.

**In the case of Kenya Breweries Limited & Another vs. Washington O. Okeyo Civil Appeal No. 332 of 2000 [2002] 1 EA 109 the Court of Appeal stated as follows:**

**“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application...A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction”.**

In **Suleiman vs. Amboseli Resort Limited** (supra) it was held on the authority of **Belle Maison Ltd vs. Yaya Towers Ltd Civil Case No. 2225 of 1992** that a mandatory injunction ought and must be invoked to aid law and that it offends public policy to flagrantly disobey the law, if it can be shown that such is the case.

In the present case, there is no dispute that the defendant Club has not held its Annual General Meeting for the last five (5) years contrary to the provisions of its Constitution which mandate it to hold such meetings yearly before the 30<sup>th</sup> April. The excuse given by the defendant for this breach is that the nature of the activities of the Defendant Club require that people who compose the Committees be highly professional persons and this calibre of people cannot be expected to be acquired if the Club adheres to the requirement for yearly holding of AGM’s. I must state clearly that it is not for this Court to dictate to the defendant Club the manner in which it is supposed to manage and regulate its affairs. The defendant being a private members’ club is at liberty to formulate its own rules which rules are meant to guide its activities as long as the said rules are not contrary to the laid down legislation regulating the registration of such bodies. Once the Club sets out its own rules of management, it is duty bound to comply therewith and has no excuse for not complying therewith. If for any reason certain rules become cumbersome or impossible to comply with the Club has the option of following the laid down procedure to appropriately amend the same but is not permitted to ignore its own rules with impunity.

In this case, it is not disputed that the defendant has for half a decade ignored compliance with its own Constitution. The Courts are usually very reluctant to make determinations at interlocutory stage whose effect would be to determine the suit. However that result is invariably the effect of granting mandatory injunctions at interlocutory stage. In this case there is no dispute that the Club’s Constitution has been violated and in my view, without any justifiable cause. Accordingly I have no doubt in my mind that this is a case in which the matter ought to be decided at once and I further feel a high degree of assurance that at the trial it will appear that the injunction has rightly been granted. In **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010** the Court of Appeal dealing with the said Overriding Objective stated *inter alia* as follows:

**“the applicant cannot be allowed to invoke the “O2 principle” and at the same time abuse it at will...All provisions and rules in the relevant Acts must be “O2” compliant because they exist for no other purpose. The “O2 principle” poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of**

**justice. In the court's view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day".**

Similarly, the same Court in **Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others Civil Application No. 327 of 2009** expressed itself thus:

**"Section 3A and 3B of the Appellate Jurisdiction Act gives the Court the freedom in the circumstances of this case to ensure that the matter is handled in accordance with the relevant provisions of the Arbitration Act because it is in doing so that justice will be done to the parties. That is what matters. The overriding objective is so called because depending on the facts of each case, and the circumstances, it overrides provisions and rules which might hinder its operation and therefore prevent the court from acting justly now and not tomorrow".**

Clearly therefore it would be contrary to the spirit of the overriding objective as well as Article 159(2)(b) of the Constitution, which mandates the Courts in exercising judicial authority to be guided by *inter alia* the principle that justice shall not be delayed, for this Court to decline to grant the mandatory injunction sought when the breach of the Defendant's Constitution is clearly admitted and the Defendants are prepared to hold the Annual General Meeting.

Consequently, I hereby direct the Defendants to hold the Annual General Meeting for Kenya Regiment Rifle Club within 30 days from the date hereof in accordance with the Club's Constitution.

The only issue pending is with respect to costs. In my considered view this application would have been wholly rendered unnecessary if good sense had prevailed amongst the parties herein. The application, in my respectful view was driven purely by ego. The consequences are that the AGM which was slated for August 2012 did not take place to the detriment of both parties. In the result there will be no order as to costs.

**Dated at Nairobi this 30<sup>th</sup> day of January 2013**

**G V ODUNGA**

**JUDGE**

In the presence of Mr. Otieno for the Defendants