



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT NO. 314 OF 2010

**PETER JUMA (t/a OKILANDERS FREIGHT).....PLAINTIFF/APPLICANT
-VERSUS-**

PETER MAMBEMBE.....DEFENDANT/RESPONDENT

RULING

The plaintiff filed his plaint of **3rd September, 2010** (seeking permanent injunctive relief) together with a Notice of Motion brought under ss.1A, 1B, 3 and 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya) and Order XXXIX, Rules 1, 2 and 3 of the earlier edition of the Civil Procedure Rules. The application has one outstanding prayer at this stage:

“THAT pending the inter partes hearing and determination of this suit, there be a temporary injunction restraining the respondent whether personally or through his agents from interfering with the smooth-running of the secretariat offices of K.I.F.W.A. Mombasa Branch.”

The supporting grounds are thus set out:

- (i) *the respondent together with three others sought and procured various ex parte Orders of this Court in another cause, HCCC No.298 of 2010 against specific members of K.I.F.W.A.;*
- (ii) *purporting to be enforcing the said Court Order, the respondent proceeded to the offices of K.I.F.W.A. and put locks on the doors to the offices, thereby paralyzing the operations of K.I.F.W.A. and its members;*
- (iii) *contrary to the interpretation given by the respondent, none of the Orders so made by the Court allows the respondent to shut down the offices and activities of K.I.F.W.A.;*
- (iv) *the act of the respondent in shutting down the offices of K.I.F.W.A. is “illegal, illogical, mischievous and absurd”;*
- (v) *the applicant has suffered and will continue to suffer unless the Orders sought herein are granted;*
- (vi) *it is in the interest of justice, equity and good conscience that the Orders sought are granted.*

In his supporting affidavit, the applicant avers that he is a registered member of K.I.F.W.A. and that, in another case, **HCCC No. 298 of 2010**, the respondent obtained certain *ex parte* Orders prejudicial to K.I.F.W.A. Owing to the actions of the respondent against the interests of K.I.F.W.A., the deponent avers that he is affected, as he cannot obtain certain services from K.I.F.W.A. The deponent believes that the respondent misinterpreted the terms of the *ex parte* Orders in question.

The respondent swore a replying affidavit on **28th September, 2010** deposing that he is the National

Chairman of K.I.F.W.A., and that the applicant is a member.

Learned counsel, **Mr. Ruwa** submitted that if the Court did not grant the prayers sought, the respondent would continue “*frustrating and paralyzing the activities of [K.I.F.W.A.] to the peril and detriment of its members, including the applicant.*”

Contesting the respondent’s evidence in the replying affidavit, counsel urged that the suit had to be against the respondent, and not the K.I.F.W.A. officials in general, because “*it is the respondent..who personally went and put padlocks at the secretariat offices...*” Counsel submitted: “*the respondent should be held personally accountable for his rogue acts and....he cannot allege that other parties [should] also be brought on board in this suit.*”

Counsel submitted that, from the evidence, the defendant is not denying that “*he has been interfering with the running of the [K.I.F.W.A.].....to the detriment of the plaintiff.*”

Learned counsel, **Mr. Kenga** for the defendant, urged that since the application was aimed at K.I.F.W.A., the plaintiff has no cause of action against the defendant, suing him as an individual.

Counsel submitted that since the plaintiff acknowledges that the defendant is the National Chairman of the association (K.I.F.W.A.), issuing a temporary injunction to stop the National Chairman from interfering with the association’s affairs would “*in essence mean stopping the National Chairman from running the affairs of the Association.*”

Counsel contested the form of the application, having been brought by Notice of Motion rather than by Chamber Summons as provided for under Order XXXIX, Rules 1 and 2 of the earlier edition of the Civil Procedure Rules.

On the foregoing point the Court will be concerned with merits only, on the basis of the principle stated in **Article 159(2) (d) of the Constitution of Kenya, 2010**:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

.....

(d) justice shall be administered without undue regard to procedural technicalities....”

On that basis I do entertain the instant matter, so that its real gravamen may be the basis for determining the question.

From the affidavit evidence in this matter, there is no doubt that there are serious misunderstandings in the conduct of business at the Kenya International Freight & Warehousing Association (K.I.F.W.A.). Already, the defendant herein, as *Chairman of K.I.F.W.A.*, together with other officials of that Association have *sued some 17 members* [in **Mombasa HCCC No.298 of 2010**] and have obtained temporary injunctive Orders *against those members*. The plaintiff who is not one of the defendants in that case, now moves this Court by his plaint and application of **3rd September, 2010** to *restrain the defendant from continuing with K.I.F.W.A.’s management functions*. It is relevant that in the Orders made on **1st September, 2010** in Mombasa HCCC No. 298 of 2010 the *defendant was accorded temporary relief enabling him and his team to continue managing K.I.F.W.A.’s affairs*.

It follows that if, in the instant matter, this Court were to *restrain the defendant in the management of K.I.F.W.A.’s affairs*, the Orders made would clearly stand in contradiction to the Orders of **1st September, 2010** in **Mombasa HCCC No.298 of 2010**. Thus, one lot of K.I.F.W.A. members would have been *restrained from disrupting* the conduct of affairs of K.I.F.W.A., while another lot (specifically, *the plaintiff, who is a member too*) would have been *empowered to disrupt* the current conduct of K.I.F.W.A.’s affairs.

Such a clear *conflict of Court Orders* cannot be allowed, as it would have the effect of nullifying the design and purpose of Court decisions; it would have the effect that the Court has made a certain set of Orders *in vain*. If such is the object sought by the applicant herein, it will be an *abuse of the process of the Court*.

I will make Orders as follows:

(1)The plaintiff's Notice of Motion of 3rd September, 2010 is dismissed.

(2)The plaintiff's suit by plaint dated 3rd September, 2010 shall proceed as part of the defence and counter-claim in Mombasa HCCC No. 298 of 2010, and the two suits shall be consolidated and disposed of on that basis.

(3)The plaintiff herein shall be joined as a defendant in Mombasa HCCC No. 298 of 2010.

(4)The applicant shall bear the costs of the instant application.

(5)This matter shall be listed for mention and directions within 14 days of the date hereof.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 12th day of March, 2012.

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**M.A. ODERO
JUDGE**