



**REPUBLIC OF KENYA**

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

**Civil Suit 187 of 2012**

**MILDRED BARASA.....PLAINTIFF**

**VERSUS**

**SYLVIA MACHINI.....1<sup>ST</sup> DEFENDANT**

**JANE WAMBUI THUO.....2<sup>ND</sup> DEFENDANT**

**DORA NESOBA.....3<sup>RD</sup> DEFENDANT**

**ALL SUED IN THEIR CAPACITY AS CHAIRPERSON, SECRETARY AND TRESURER  
RESPECTIVELY OF THE ASSOCIATION OF MEDIA WOMEN IN KENYA**

**RULING**

By her Motion dated on Notice dated 25<sup>th</sup> April 2012 expressed to be brought under the provisions of Order 40 rules 1 and 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Cap 21 and all enabling provisions of the law, the applicant herein seeks the following orders:

- 1. That this application be certified urgent and heard ex parte at first instance.**
- 2. That a temporary injunction do issue restraining the Defendants by themselves, their agents, associates, servants and/or employees from holding, conducting, implementing or effectuating any elections for the Board of The Association of Media Women in Kenya scheduled to be conducted or held the 28<sup>th</sup> of April 2012, or any other date, at Meridian Hotel, or at any other place or venue pending the hearing and determination of this application.**
- 3. That a temporary injunction do issue restraining the Defendants by themselves, their agents, associates, servants and/or employees from holding, conducting, implementing or effectuating any elections for the Board of The Association of Media Women in Kenya scheduled to be conducted or held the 28<sup>th</sup> of April 2012, or any other date, at Meridian Hotel, or at any other place or venue pending the hearing and determination of this suit.**
- 4. That the costs of this application be paid by the defendants.**

The application is based on the grounds that the defendants intend to hold an annual General Meeting in which they intend to carry out elections of the Board of The Association of the Media Women in Kenya to the exclusion of the plaintiff who is a valid member of the Defendant’s association. It is the plaintiff’s case that if the intended action is proceeded with she will be locked from participating as a member and

candidate for the position of chairperson of the Board which will cause the her and other interested parties irreparable loss and harm. It is contended that the defendant's actions are unlawful, contrary to the Defendant Association's constitution, arbitrary, oppressive, malicious and without any legal or factual basis.

The application is supported by an affidavit sworn by **Mildred Barasa**, the plaintiff herein in which she deposes that she is a founder member of the Defendant, a society registered under the Societies Act, having served in its Board as Chair till 2010. Sometimes in June 2011 she inadvertently received a short text message from the 2<sup>nd</sup> defendant asking a private investigator to investigate her on the ground that she was misusing the name of the organisation for personal work. Based on information that there was an intention to put her name in the media that she was not a member of staff or holder of office of the organisation she instructed her advocates to clarify the issue to which the defendants denied any basis for the said fears. Following a decision to increase membership fees on 3<sup>rd</sup> December 2011, she on 12<sup>th</sup> January 2012 transmitted her membership subscription for the year 2012 by *mpesa* which money was however returned to her pending resolution of the way forward arising from her advocate's said letter. Despite depositing the membership fees in the organisation's account she has not received any receipt but on 25<sup>th</sup> January 2012 she was informed by the Secretary to the Board they would not issue her with a receipt until the issue was discussed by the Board and her name was removed from the members' list. After an exchange of correspondences she on 15<sup>th</sup> February 2012 received a letter from the Board's chair that her membership had been put on hold and that she had conducted herself either contrary to journalism code of conduct or to the ethics of the profession or was guilty of breaching the constitution and intimating that a face to face meeting would be held on a date to be communicated. The information withholding her membership was communicated to the members followed by information of an intention to hold the Annual General Meeting at which the elections would be held. On registering her concerns and apprehensions the Chair of the Board invited the plaintiff and members of the Board to a meeting on 20<sup>th</sup> April 2012 which most members expressed unwillingness to attend and according to her no meeting took place regarding her membership. In her opinion the Board is divided on whether she should participate as a member in the said Annual General Meeting. Despite that the Defendants intend to proceed with their unlawful actions to her exclusion an action which in her view is illegal and unprocedural. It is therefore her contention that the application ought to be allowed in the interests of justice to preserve and protect her rights and uphold the Association's Constitution while protecting the interests of members and the rule of law. She stands to suffer irreparable harm should the purported meeting be conducted which harm cannot be compensated by an award of damages yet she has a reasonable case and the balance of convenience tilts in her favour.

The defendants opposed the application through a replying affidavit sworn by **Sylvia Machini**, the 1<sup>st</sup> defendant herein. In the said affidavit it is denied that the plaintiff was a founder member of the Association which is a society registered under the Societies Act. While admitting erroneously sending a short text message the deponent denied that the plaintiff's name was mentioned and that the plaintiff's allegations are based on rumours and unsubstantiated allegations. It is conceded that the applicant sent the membership subscription to the secretariat and the same was resent to her and the matter was placed before the Board which resolved that the plaintiff's membership renewal for 2012 be declined pending the resolution of the matter following the plaintiff's failure to respond to the allegations against her. Despite this the plaintiff proceeded to deposit money in the Association's Account. The Board, according to her, deliberated and resolved that the plaintiff's renewal is rejected. The deponent, however, denies that the plaintiff was removed from the membership list in 2011 but avers that following the failure by the plaintiff to avail herself her membership expired on 31<sup>st</sup> December 2011 and was not renewed. According to her the Board is still deciding the applicant's renewal and that there is still an opportunity to resolve the matter internally if the applicant so wishes. In her opinion the Association acted pursuant to the Constitution in calling for the Annual General Meeting. In her view since the applicant's membership has not been renewed her intentions to contest are not possible and that the Organisation was still giving her the opportunity to resolve the issue pursuant to Arbitration clause 4 in the Constitution. The deponent however denies that the organisation has engaged in any unlawful action and contends that these proceedings were instituted only when the Annual General Meeting was approaching yet the applicant had six months within which to seek legal redress. In her views that applicant has not shown any

infringement of her rights and since she is not a member of the Association she has no locus standi to stop the activities of the Association.

In her submissions the plaintiff citing **Gitao and Others vs. National Chambers of Commerce and Industry [1990] KLR 360**, conceded that the Courts are normally reluctant to interfere in the running of affairs of private bodies more so where there are rules and procedures to deal and handle the same in this regard internally. However, where the said rules and procedures are violated with impunity by officials of the private body the courts have been known to intervene. It is submitted that it is in the interest of justice that the orders sought be granted in order to preserve and protect the Applicant's right to a fair hearing and uphold the Association's Constitution, while protecting the interests of members and the rule of law while awaiting hearing of the case. Citing **John Wanjala Mwasame vs. KSITAIWU [1996] eKLR** it is submitted that the Court noted that there were undemocratic practices adopted by the Union in excluding the applicant to participate in a meeting. In the applicant's view, it is only fair that the elections are called in accordance with the Association's Constitution since the results of the intended elections are likely to cause irreparable harm to the plaintiff and other interested parties which cannot be compensated by an award of damages yet the applicant has a good case with a high probability of success and the balance of convenience tilts in her favour.

On the part of the defendants it is submitted that the applicant's membership for the year 2012 having not been renewed per the Association's Constitution, the applicant lacks the locus standi to sue and the cases of **Savana Jua Kali Association vs Councillor Amos Ngatia [2005] eKLR; Anthony Njoroge Kiarie vs. Mohamed Aga Musa [2006] eKLR ; Maathai vs. Kenya Times Trust Ltd [1989]** are cited for support. Since the applicant is not a member of the Association of Media Women in Kenya and was removed from the list of Membership when her membership expired, it is submitted she lacks the locus standi to hinder the activities of the Association in fulfilling its constitutional obligations. Hence the application should be dismissed to allow the General Election pursuant to the Association's Constitution.

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”.**

As submitted by the plaintiff 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 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”**

The plaintiff’s position is that the defendants intend to conduct elections in a manner that is likely to lock her from participating in the said elections. The defendants, on the other hand, contend that the plaintiff is not a member of the Defendant Association although the decision whether or not to renew her membership is still under consideration and a decision thereon is yet to be arrived at. According to the Constitution, the Membership Committee of the Board is empowered to terminate a member’s membership if a member has been found to conduct him or herself either contrary to the journalism Code of Conduct or to the Ethics of the profession or is found guilty of breaching the provisions of the Constitution. From the replying affidavit, it is clear that no concrete decision has been made with respect to the plaintiff’s membership. On the other hand it is admitted that the plaintiff has not failed to pay her annual membership fee as required. The other conditions relating to termination of membership are clearly inapplicable to the present circumstances. It is my view and I so hold that it is unjust for the defendants to deny the applicant the opportunity to participate in the affairs of the Association when they themselves concede that the applicant’s membership has not been terminated.

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”.**

It follows that to deny the plaintiff the opportunity to participate in the affairs of the Association before her fate is legally determined would amount to depriving her of a property vested in her by virtue of her membership to the Association and she would be properly entitled to an injunction restraining the defendants from doing so.

That, however, is not the order the plaintiff seeks in the present application. What the plaintiff seeks is an order restraining the defendants from proceedings with an Annual General Meeting and holding elections. 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.

Pursuant to the decision cited hereinabove I am unable to grant the orders in the manner sought since the effect would be to paralysing the operations of the Association and this the Court ought not to do. See **Tanui & 4 Others vs. Birech & 11 Others** (supra).

For the foregoing reasons the application dated 25<sup>th</sup> April 2012 fails and is dismissed with costs to the defendants.

Dated at Nairobi this 29<sup>th</sup> day of October 2012

**G V ODUNGA**  
**JUDGE**

Delivered in the presence of

Ms Kamau for Mr Makori for Plaintiff

Mr Marigi for Ms Sang for the Defendants