



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 224 OF 2010

WILLIAM CHARLES FRYDA.....PLAINTIFF

VERSUS

ASSUMPTION SISTERS OF NAIROBI

REGISTERED TRUSTEES.....1ST DEFENDANT

ST. MARY'S MISSION HOSPITAL.....2ND DEFENDANT

RULING

By an application dated and filed on 29th March 2011 brought by way of a Notice of Motion (*the Application*), the Defendants/Applicants sought the following orders: -

(1) *that this application be certified urgent and the same be heard ex- parte in the 1st instance.*

(2) *that this honourable court be pleased to give further orders and/or directions as it may deem necessary with a view to preventing abuse of the process of the court and for purposes of giving the court order it's proper meaning and effect.*

(3) *that this honourable court be pleased to review the orders given on 4th March 2011.*

(4) *that costs of this application be provided for.*

The application was supported by the Affidavit of Sister Marie Therese Gacambi, and the grounds set out in the face thereof.

The application was opposed by the plaintiff/respondent whose counsel filed Grounds of Opposition on 31st March 2011, but dated 30th March 2011. The grounds were -

(1) *the annexures marked as "SRMTG2" as per paragraph 4(a) of the Supporting Affidavit and the annexures exhibited are not the same as the latter deal with the Nairobi Hospital not Rift Valley Hospital.*

(2) *the individuals for whom the complaint is made are not parties to this suit.*

(3) *the 1st defendant was sued as registered trustees of an amorphous body which would having nothing to do with individuals [or] with their employers.*

(4) *it is not clear from the Notice of Motion aforesaid which of the orders of 4/3/2011 the applicants want reviewed and why.*

(5) *the matters complained of in the Notice of Motion are matters that are for other forums and not for this suit.*

(6) *the pleadings herein relate to property rights not to individual rights.*

When this matter was urged before me 31st March 2011, the Defendants/Applicants were represented by M/s Wanja Wambugu, while the Plaintiff/Respondent was represented by Mr. Mindo.

Ms Wanja Wambugu learned counsel for the Defendants/Applicants relied upon the grounds on the face of the application and the Supporting Affidavit of Sister Marie Therese Gacambi. The Applicants major complaint and ground for seeking a review of the orders of the court is set out in paragraph 4 of the Supporting Affidavit of Sister Gacambi, namely, the Respondent was misusing the orders of injunction granted by the court ***"to terminate the services of the staff of the 1st Defendant/Applicant who were working in various capacities in the 2nd Defendant's hospitals and had even forcibly evicted the sisters from their residences."***

Counsel for the Applicants further submitted that the Respondent was abusing the orders of court, and no where did either the prayers in the injunctive application, or the orders say that the respondents be excluded from the Management of the Hospital and that the spirit of the order did not allow the respondent to terminate the services of personnel from the 1st Applicant.

Counsel also invoked and relied upon the provisions of Section 1A and 1B of the Civil Procedure Act, (*Cap. 21, Laws of Kenya*), the overriding principles to do substantial justice.

Commenting on the Respondent's Grounds of Opposition, counsel agreed that the issues raised in the application are matters for the Industrial Court, but added that the orders of the court had been used to terminate the services of members of staff belonging to the congregation or society of the Assumption Sisters of Nairobi, and the acts of the Respondent are criminal in nature, and the court should therefore review the orders of 4th March 2011.

On his part, Mr. Mindo counsel for the Respondent relied upon the Grounds of Opposition as set out above, and will consider his submissions together with my opinion on the application.

The application is premised upon the provisions of Order 45, rule 1 of the Civil Procedure Rules and Sections 1A, & 1B, and 3A of the Civil Procedure Act. Order 45 rule 1 provides for review of any decree/order on the following grounds -

(a) *the discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge or could not be produced by the applicant at the time when the decree or order was made,*

(b) *a mistake or error apparent on the face of the record, or*

(c) *other sufficient reason,*

(d) *the application be made without unreasonable delay.*

Section 3A of the Act confers upon the court the discretion to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

On the other hand Section 1A of the Act sets out the overriding objective and the rules made thereunder, is to facilitate the just, expeditious, proportionate and affordable resolution of disputes governed by Act. Section 1B casts upon the Court the duty of furthering those overriding objectives for

the purpose of attaining the following objectives -

- (a) *the just determination of the proceedings,*
- (b) *the efficient disposal of the business of the court,*
- (c) *the efficient use of the available judicial and administrative resources,*
- (d) *the timely disposal of the proceedings and all other proceedings in the court at a cost affordable by the respective parties, and*
- (e) *the use of suitable technology.*

In my humble opinion, the overriding objectives of the Act, and the rules and the discretion conferred upon the court to make orders - necessary for the ends of justice, can only be justly met and achieved by reference to the requirements of those objectives and the rules under the Act. In my humble view further where the rules of court set out grounds upon which the orders of court may be or are grounded, the court's discretion is dictated by those ground rules. It would thus be neither just, or in the end expeditious, proportionate, or affordable resolution of a dispute to ignore those ground rules.

The subject matter of this application herein is review of the orders of this court made on 4th March 2011. The application for review was filed 29th March 2011 some 25 days thereafter. I would say the delay was not unreasonable. One condition for review under Order 45, rule 1 was thus fulfilled. I am however unable to say that there was either discovery of new and important matter which, with exercise of due diligence did not come to the knowledge of the Applicants at the time when the orders were made, or that there is any mistake apparent on the face of the record, or that there is some other sufficient cause.

The gist of the Applicants' application and Sister Marie Therese Gacambi's Supporting Affidavit and annexures thereto are references to letters of termination of service of some employees of the hospital, signed by a Doctor Kaya on behalf of the hospital management board.

I would agree with the submission by Mr. Mindo, counsel for the plaintiff/respondent that these letters are not signed the plaintiff, and are directed to employees who ordinarily would have a contract of service with the employer, and do not concern the matters in this suit. Indeed the action here is *in rem*, and so is the counter-claim. Allegations of criminal acts or behavior are matters for reports to the Police, not this court. Ms Wanja learned counsel for the Applicants conceded this point in her submissions.

Finally, I would agree with Mr. Mindo on a purely legal point, that there appears to be a misconception of the position of **Assumption Sisters Nairobi - Registered Trustees, which is a legal and separate entity and individuals who belong to the Assumption Sisters of Nairobi**, who are individuals and may be staff of the hospitals in question. The Assumption Sisters of Nairobi - Registered Trustees, however attractive or logical it may seem to them, cannot agitate in this suit, on behalf individuals in the name of Trustees.

The second Applicant, St. Mary's Hospital is a legal corporation registered and licensed to operate as a hospital, and individual sisters have no *locus standi* in this suit. If any of them feels that her or his rights have been breached, the remedies is elsewhere, and not this suit. Noting that an employer has a right to hire and fire, their remedy is against the employer.

For those reasons, I find no merit whatsoever in the Defendants/Applicants' Notice of Motion dated and filed on 29th March 2011. The same is dismissed with costs to the Plaintiff/Respondent.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 20th day of May 2011

M. J. ANYARA EMUKULE
JUDGE