



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL DIVISION

CIVIL SUIT NO. 149 of 2010

DANIEL N. KIMANZI..... 1ST PLAINTIFF/APPLICANT
FRANCIS M. KITHAE.....2ND PLAINTIFF/APPLICANT
FLORENCE M. MUNYALO.....3RD PLAINTIFF/APPLICANT
DUNCAN SINGI.....4TH PLAINTIFF/APPLICANT
LENA MUTUNGA.....5TH PLAINTIFF/APPLICANT

*(Suing on own behalf and that of KITUI BRANCH
KENYA NATIONAL CHAMBER OF COMMERCE &
INDUSTRY)*

V E R S U S

STEPHEN MBUGUA 1ST DEFENDANT/RESPONDENT
TITUS RUHIU.....2ND DEFENDANT/RESPONDENT
**KENYA NATIONAL CHAMBER OF
COMMERCE & INDUSTRY.....3RD DEFENDANT/RESPONDENT**

R U L I N G

Before me is an application by way of Chamber Summons dated 11th May, 2010 filed by M/s Malonza & Company advocates for the applicants/plaintiffs. It was filed under section 1A, 1B, and 3A of the Civil Procedure Act (**Cap. 21 Laws of Kenya**) and Order XXXIX Rule 2 of the Civil Procedure Rules, as well as section 112 and 113 of the Companies Act (**Cap. 486 Laws of Kenya**).

The prayers in the application are as follows-

- 1. THAT the application be certified urgent and be heard ex-parte in the first instance.**

2. ***THAT interim injunctions do issue restraining the defendants from conducting and/or proceeding with elections scheduled for 15/5/2010 until the hearing and determination of this application or further orders of the court.***
3. ***THAT in the alternative any such election as may be conducted on 15/5/2010 be nullified by way of an injunction.***
4. ***THAT the Honourable Court does order for fresh and valid elections in conformity with Memorandum and Articles of Association.***
5. ***Any such other reliefs as may serve the interests of justice.***
6. ***Costs.***

The application has grounds on the face of the Chamber Summons. It was filed with a supporting affidavit sworn by **DANIEL NGOIMA KIMANZI** one of the plaintiffs described as Acting Chairman of Kenya National Chamber of Commerce and Industry (**Kitui Branch**), on 11th May, 2010.

This application was filed following the filing of a plaint in this matter, which was initially filed on 12th March, 2010. The grounds of the application are as follows-

- (a) *The purported meeting and elections called by the defendants are unlawful and contrary to the Memorandum and Articles of Association.*

(b) Great prejudice and injustice will be occasioned to the Plaintiffs and the bona fide members.

(c) *Great damage will be occasioned if orders sought do not issue as non members will be at liberty to vote.*

(d) *Balance of convenience.*

The applicants/plaintiffs through their counsel M/s Malonza & Company advocates filed written submissions on 8th June, 2010.

It was contended in the said submissions inter alia, that the applicants have a *locus standi* to bring this action as it was not in dispute that they were members of the National Chamber of Commerce and Industry, as well as interim officials of the Kitui Branch. Therefore, it was argued, they can bring this action on their own behalf and on behalf of its members. It was contended further that the Articles of Association and Memorandum of Association did not confer on the respondents the mandate to call elections of the Kitui Branch. Reliance was placed on Article 73 of the Articles of Association which provides that the Branch has the mandate to call elections by giving 30 days notice, and Article 72 which gives the Governing Council the mandate also to call elections by giving 30 days notice. It was also contended that elections could only be held where a membership register existed. In the present situation, it was argued, no membership register had been compiled due to problems arising from politician and their favoured factions. Therefore, it was not possible to hold election as was being pushed by the respondents, as there was no list of paid up members.

The application was opposed. A replying affidavit sworn on 14th May, 2010 by **Titus G. Ruhiu** was filed; which appears to be a supporting affidavit to a Notice of Motion dated the same day, which was an application for discharge of the orders made by the court on 12th May, 2010. It was deponed in the said affidavit, inter alia, that the applicants obtained the temporary injunction through non-disclosure of material facts. That the branch was not a separate legal entity from the defendant company, and could not purport to sue the 3rd defendant. That there were three hundred members, who were capable of participating in elections.

The defendants through their counsel M/s RM. Mutiso & Company

advocates also filed written submissions. It was contended in the written submissions, inter alia, that the applicants' application had been overtaken by events, as following the interim orders from court of 12th May 2010, the elections slated for 15th May, 2010 were called off by the defendants. Also the prayer that such elections as may be conducted on 15th May, 2010 be nullified by injunction had been overtaken by events. It was further submitted that the prayer for the court to order for fresh elections in conformity with the Memorandum and Articles of Association could not be granted by the court because that would amount to the court interfering with the internal affairs of the company. It was also contended that the Kitui Branch was not a legal entity and could not therefore sue in its own name. It was lastly contended that the Kitui Branch did not have branch officials but a caretaker committee as elections had not yet been held.

On the hearing date, Mr. Orege for the applicants/plaintiffs, as well as Mr. Mutiso for the respondents/defendants adopted the written submissions, and asked the court to give a ruling.

Having considered the application, documents filed and written submissions, I agree with Mr. Mutiso that prayers 2 and 3 of the application have been spent. Prayer 1 also, which relates to a request for an ex-parte hearing, has been spent. What remain is prayers 4, 5 and 6.

I have been told that the Kitui Branch does not have legal capacity to sue the Kenya National Chamber of Commerce and Industry. Indeed, the persons who came to court as plaintiffs/applicants stated that they were "suing on their own behalf and that of **KITUI BRANCH KENYA NATIONAL CHAMBER OF COMMERCE & INDUSTRY**. They sued **STEPHEN MBUGUA, TITUS RUHIU** and **KENYA NATIONAL**

CHAMBER OF COMMERCE & INDUSTRY.

In my view, since Article 84 of the Articles of Association recognizes branches and their powers to hold general elections and meetings, they can as branches, sue or contest an action of the National Chamber of Commerce and Industry if they interfere with their operations. I find and hold that the Kitui Branch can sue the National Chamber of Commerce and Industry, if there is interference from the National Chamber.

In prayer 4, the court is requested to order fresh or valid elections in conformity with the Articles of Association. That appears to be an order in the nature of a mandatory injunction. It is being requested in an interlocutory application and will have the effect of determining the whole case which was filed by way of plaint. Prayer (c) of the plaint asks for the same order. In my view, it will not be proper for the court to give such a final order through an interlocutory application. At this stage, I have not even been told what specific Articles of Association will apply and how. I think the prayer is premature and can only be considered appropriately, after the case is heard and evidence, if any is tendered by the parties. I will not grant that prayer, as I find no merits in the same at interlocutory stage, and I dismiss the same.

Prayer 5 asking for such relief as may serve the interests of justice is too amorphous. I have not been told by the parties, which reliefs those that are anticipated are. I will dismiss the prayer.

Prayer 6 is for costs. Because of the nature of the matter, I will order that costs be in the cause, as the main case is still pending.

Consequently, and for the above reasons, the application is dismissed. Any interim orders granted, are hereby vacated.

Dated and delivered at Nairobi this 22nd day of September, 2010.

George Dulu
Judge.

In the presence of-_____

Mr. Ngare holding brief for Mr. Orange for plaintiff/applicants

Ms. Waweru holding brief for Mr. Mutiso for defendants/respondents

Catherine Muendo – Court Clerk.