



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE 97 OF 2009

PETER OTIENO.....1ST PLAINTIFF
OMAR MWINYI.....2ND PLAINTIFF
HAFIZ N. MOHAMED.....3RD PLAINTIFF
MOHAMED RAMADHAN.....4TH PLAINTIFF
BEN MURIITHI.....5TH PLAINTIFF
GEORGE KIDENDA.....6TH PLAINTIFF

VERSUS

VALENTINE MWAKAMBA.....1ST DEFENDANT
PETER MAMBEMBE.....2ND DEFENDANT
VINCENT MWACHIRO.....3RD DEFENDANT
JOSPHAT MWACHANYA.....4TH DEFENDANT
JOHN KANYIRI.....5TH DEFENDANT
GEORGE MAINA.....6TH DEFENDANT
PETER KINUTHIA.....7TH DEFENDANT
ALBERT DILALI.....8TH DEFENDANT
JOHN GARDNER.....9TH DEFENDANT
PETER WANGO.....10TH DEFENDANT

RULING

In a plaint filed on 31st March 2009, the plaintiffs, mainly seek a declaration that the elections carried out on 27th January 2009 involving Kenya International Freight & Warehousing Association (hereinafter “KIFWA Mombasa”) were and are a nullity; an order that proper and valid elections be carried out; an injunction restraining the defendants 1 to 10 from interfering with KIFWA Mombasa or holding themselves as officials of KIFWA Mombasa and an order that until proper and valid elections of KIFWA Mombasa are held, the persons elected as officials of KIFWA, Mombasa in the year 2008 remain in office.

The plaintiffs describe themselves as members of KIFWA Mombasa and further that they were duly elected officials of KIFWA Mombasa for the year 2008 in elections carried out in 2007. They describe the defendants 1 to 10 as also being members of KIFWA Mombasa and having been purportedly elected as officials of KIFWA Mombasa for the year 2009 in elections purportedly conducted by the 11th defendant. The foundation of the plaintiff’s complaints is that the said elections were conducted without a valid prior notice being served upon members of KIFWA Mombasa and by busy bodies.

Simultaneously, with the filing of the plaint, the plaintiff lodged a Chamber Summons seeking primarily an order of injunction restraining the defendants 1 to 10 from conducting the affairs of KIFWA Mombasa pending the hearing of the suit and further for an order that pending the hearing of this suit the officials who were elected at the Annual General Meeting of 2007 to wit the 1st, 2nd, 3rd and 4th plaintiffs, Meshack Kipturgo, Peter Kinuthia, Peter Wango, C. H. Matovu and Hezron Awiti do carry out the affairs of KIFWA Mombasa.

The application is based on the same grounds given in the plaint. The application is supported by an affidavit sworn by the 1st plaintiff in which the said grounds are elaborated. Annexed to the affidavit are various exhibits including a copy of the Constitution of KIFWA. The 1st plaintiff also swore a supplementary affidavit which was in response to a replying affidavit sworn in opposition to the application. That affidavit was sworn by the 2nd defendant and he did so on his own behalf and on behalf of the 1st defendant. In the replying affidavit, it is deponed *inter alia* that KIFWA Mombasa is not a registered society and does not have its own constitution and that the organization is governed by the Constitution of the National body. It is also deponed that the plaintiffs are not paid up members of KIFWA Mombasa and are not entitled to seek the reliefs sought in their application. It is further deponed, on advice of counsel, that no leave was sought or obtained to bring this action on behalf of KIFWA members. There is also a replying affidavit sworn by the 4th defendant on his own behalf and on the authority of the respondents 3 to 10. In the affidavit, it is deponed that KIFWA Mombasa is not a registered society. It is also deponed that the 1st plaintiff was aware of the meeting whereat the respondents were elected and which meeting was convened after a prerequisite 21 day notice. It is then deponed that membership to KIFWA is open to mainly corporate entities on payment of a membership fee. It is also deponed that the dispute herein goes beyond the interests of the parties herein. It is further deponed that some of the plaintiffs’ principals were not paid up members of KIFWA and the plaintiffs themselves were not qualified to bring this action and application. It is also deponed, that the nature of the plaintiffs’ action could only have been made under the provisions of Order 1 Rule 8 of the Civil Procedure Rules which the plaintiffs have not complied with. There are many exhibits annexed to the replying affidavit including correspondence, e-mails and minutes of KIFWA meetings.

I have considered the application, all the affidavits filed, together with the annexures. I have also given due consideration to the submissions of counsel. Having done so, I take the following view of the matter. There are preliminary issues that, in my view, have to be determined even before I consider the merits or demerits of the plaintiffs’ application. The 1st such issue is the *locus standi* of the plaintiffs to commence these proceedings and lodge the application. The plaintiffs have instituted these proceedings in their individual capacities. They even describe themselves as members of a duly registered society

known as Kenya International Freight & Warehousing Association. However, in clause 4 of annexure “A”, the Constitution of KIFWA, membership of KIFWA is open to three categories of entities:

- (i) All former members of Kenya Clearing, Forwarding and Warehousing Association,
- (ii) All the former members of Freight Forwarders and
- (iii) Companies, firms, associations, authorities or groups directly or indirectly concerned with the objects outlined in clause 2.

The plaintiff has in fact exhibited annexure “B” which he says is a list of KIFWA Mombasa members. There is no dispute that that list contains names of companies, firms, organizations and other bodies. There are no individuals in the list including the plaintiffs. The plaintiffs have not indicated that they represent the interests of the members of KIFWA indeed they have not exhibited authority of their principals to institute these proceedings. It is therefore probable that the defendants’ challenge of the *locus standi* of the plaintiffs will succeed at the trial. If the *locus standi* of the plaintiffs is in doubt, it is nigh impossible for them to demonstrate a prima facie case with a probability of success at the trial

The second issue which is of preliminary importance is the purported institution of these proceedings by the plaintiffs on behalf of the entire membership of KIFWA Mombasa. In paragraph 5 of the plaint the plaintiffs have pleaded as follows:-

“5. The plaintiffs state that the duly elected officials of the said KIFWA Mombasa for the year 2008 were the 1st plaintiff as Chairman, 2nd plaintiff as the Vice Chairman, 3rd plaintiff as the Treasurer and 4th plaintiff as the Secretary. There are also committee members namely George Kidenda, Meshack Kipturgo, Peter Kinuthia, Peter Wango, C.H. Matovu and Hezron Awiti. The officials were elected in 2007.”

This paragraph gives names of 10 individuals as those officials who were elected in 2007. Yet this suit is instituted by the four senior officials and Ben Muriithi (5th plaintiff) and George Kidenda (6th plaintiff). The interest of Ben Muriithi is not disclosed. The committee members, save for George Kidenda, have not been joined as plaintiffs. Are the plaintiffs also suing on their behalf? The names of Peter Kinuthia and Peter Wango who were elected as members of KIFWA Mombasa committee in 2007, appear as 7th and 10th defendants in these proceedings. If the names belong to the same persons, the plaintiffs’ interests would be compounded because it would suggest that some of the new officials are validly in office.

Prima facie therefore the contention of the defendants that the plaintiffs seem to be urging the interest of the entire membership of KIFWA Mombasa may not be altogether unfounded. In that event, the plaintiffs had to move the court under the provisions of Order 1 Rule 8 of the Civil Procedure Rules. The plaintiffs do not appear to have complied with the provisions of that Order and Rule.

Finally, the defendants have complained that the plaintiffs were guilty of material non-disclosure when they appeared *ex parte* and obtained *ex parte* orders of injunction. On perusal of the material now availed to the court, the defendants’ complaint is not altogether without foundation. A perusal of the 1st plaintiff’s supporting affidavit gives the impression that the plaintiffs knew nothing at all of the meeting of 27th January 2009 where the defendants were elected. The 4th defendant in his replying affidavit sworn on 12th May 2009, exhibits documents which clearly indicate that the 1st plaintiff and indeed members of KIFWA Mombasa were aware of the said meeting. Yet they did not disclose their knowledge to the court when they appeared *ex parte*. The plaintiffs may have been unhappy with the convening of the said meeting and the subsequent decisions made thereat. They were duty bound to disclose that position to the court when they appeared *ex parte*. Prima facie therefore I have come to the conclusion that the plaintiffs were guilty of material non-disclosure.

I think it is now clear where this application is heading. In view of the preliminary issues discussed above, I have come to the conclusion that the plaintiffs have not established a prima facie case with a probability of success at the trial. That being my view of the matter, I do not have to consider the other conditions for the grant of a temporary injunction. The plaintiffs prima facie are also guilty of material non-disclosure and that would disentitle them to an order of injunction even if they had shown a prima facie case.

The upshot is that this application is dismissed with costs.

DATED AND DELIVERED AT MOMBASA THIS 30TH DAY OF JULY 2009.

F. AZANGALALA

JUDGE

Read in the presence of Mr. Gikandi for the Plaintiffs and Mr. Mwakisha holding brief for Mr. Munyithya for the 1st, 2nd and 11th Defendants and Achieng for the 3rd - 10th Defendants.

F. AZANGALALA

JUDGE

30 July 2009