



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 1392 OF 2005

WILSON KIMANI KANG'ETHE1ST PLAINTIFF
KINGS ONYANCHA MAINA2ND PLAINTIFF
KENNETH BAIKOGI GITOBU3RD PLAINTIFF

VERSUS

DAVID MBURU GITHERE1ST DEFENDANT
TITUS GITHUI RUHIU2ND DEFENDANT
KENYA NATIONAL CHAMBERS OF COMMERCE AND INDUSTRY3RD DEFENDANT

R U L I N G

- (1) Originally, there were three Plaintiffs in this case, but Kenneth Baikogi Gitobu, the Third Plaintiff, withdrew his claim against all the three Defendants leaving only Winston Kimani Kang'ethe and Kings Onyancha Maina, as Plaintiffs.
- (2) According to the Complaint filed on the 17th November 2005, the Plaintiffs and the First and Second Defendants, David Mburu Githere and Titus Githui Ruhui, are members and/or officials of the Kenya National Chamber of Commerce and Industry, the Third Defendant (hereinafter referred to as "**the Chamber**").
- (3) Winston Kang'ethe, the First Plaintiff, also claims to be the Chairman of the Thika Branch of the Chamber and a member of the Chamber's Governing Council. Kings Maina, the Second Plaintiff, claims to be the Vice-Chairman of the Chamber's Finance Committee. David Githere, the First Defendant, is the National Chairman of the Chamber while Titus Ruhui, the Second Defendant, is the Chief Executive Officer of the Chamber. In the Complaint, the Plaintiffs have made a number of allegations and complaints against the Third and Second Defendants.

- (4) The Plaintiffs allege that the said two Defendants have flouted the Chamber's Articles of Association and requirements of the Companies Act [Cap.486] and have engaged in fraudulent, illegal and corrupt activities to the detriment of the Plaintiffs. The two Defendants are accused of interfering in the operations of branches of the Chamber and in particular, the Thika and Meru Branches; of failing to convene Annual General and Extra Ordinary General Meetings; that they have frustrated attempts by the Plaintiffs to reform the Chamber and ignored the Plaintiffs' requisition to convene an Extra Ordinary General Meeting to discuss the affairs of the Chamber.
- (5) Another complaint made by the Plaintiffs against the First and Second Defendants is that on the 14th October 2005, they, the said two Defendants, convened a meeting of the Governing Council of the Chamber at which a resolution was passed to suspend both Plaintiffs from the Chamber.
- (6) According to paragraph 13 of the Plaint, the Registrar of Societies was supposed to be joined as the Fourth Defendant but he is not named as a defendant in the title to the suit.
- (7) The reliefs sought are an injunction to restrain the First and Second Defendants from suspending the Plaintiffs or companies associated with them from membership of the Chamber and an order compelling the First Defendant to call an Annual General Meeting of the Chamber.
- (8) Simultaneously with the filing of the Plaint, the Plaintiffs also took out a Chamber Summons under Order 39 rules 1, 2 and 3 of the Civil Procedure Rules and sought orders restraining the Defendants from suspending them and their companies from the Chamber and directing that an Extra Ordinary General Meeting of the Chamber be held in Nairobi within a specified period of time with the participation of the Plaintiffs and members of the Kenya National Chamber of Commerce and Industry Reform Group. The affidavits in support of this application were sworn by the two Plaintiffs and Kenneth Gitobu who, as I have already said, withdrew his case against the Defendants.
- (9) It is that application which I have heard and which is now the subject of this ruling. In his affidavit made on the 17th November 2005, Winston Kang'ethe, the First Plaintiff, repeats in great detail the averments contained in the Plaint and also attaches the relevant documentary evidence. Edward Kings Onyancha Maina, the Second Plaintiff, also filed an affidavit on the 17th November 2005 which, though signed before one Mburu Mbugua, Esq. Advocate and Commissioner for Oaths, is not dated.
- (10) Initially, the Plaintiffs were represented by one Advocate but on the 26th January 2006, the Second Plaintiff, Edward Kings Onyancha Maina filed a Notice to Act in Person under Order 3 rule 9 of the Civil Procedure Rules.
- (11) The Defendants filed a Defence on the 27th June 2006 denying the Plaintiffs' claim in its entirety. They deny being involved in fraudulent or illegal activities. In response to the complaint by the Plaintiffs that their suspension was illegal, the Defendants state in paragraph 8 of the Defence that pursuant to Article 11 of the Articles of Association of the Chamber, the Governing Council met and passed a resolution by a majority of the quorum to suspend the First and Second Plaintiffs and that the reasons for the action were communicated to them.
- (12) In the course of his submissions, the Second Plaintiff urged me to reject the affidavit of Titus Ruhiu, the Second Defendant, on the ground that he is not an official or officer of the Chamber. With respect, I think that submission is totally misplaced because Mr. Ruhiu is the Chief Executive Officer of the Chamber and is in law entitled to act on its behalf. He would have been entitled to file an affidavit even if he had not been cited as a defendant. Secondly, having decided to name Mr. Ruhiu as a defendant in the suit, the Plaintiffs cannot now turn around and say that Mr. Ruhiu should not be allowed to appear and defend himself against the very serious allegations made against him by the Plaintiffs.
- (13) As I have already indicated, the first order sought by the Plaintiffs in this application is an injunction restraining the Defendants from suspending them. The Plaintiffs were suspended on the 14th October 2005.

Article 11 of the Articles of Association of the Chamber states —

“11. (a) The Governing Council shall have the power by majority vote to suspend any member from membership for reasonable cause and for any period not exceeding three months.

(b) During this period of suspension the member forfeits all rights and privileges except that of appeal pursuant to Article 12.” [Emphasis added].

(14) Article 12 provides that a member whose membership has been terminated or suspended has a right of appeal to an Extra-ordinary General Meeting. The appeal is to be lodged with the Chief Executive in writing within thirty days from the date of receipt by the member of the notice of suspension or expulsion.

The decision to suspend the Plaintiffs was communicated to them by Mr. Ruhui by his letter dated the 18th October 2005. The reasons for the decision were explained along with their right of appeal. They were accused of using chamber letterheads and filing false resolutions with the Registrar of Companies. The Plaintiffs did not appeal against their suspension under Article 12. Instead of exercising their right of appeal, they elected to go to court. There is a clear procedure for appeal provided in the Articles of the Chamber and unless the Plaintiffs can show that they were not notified of their suspension before the time limited for lodging an appeal had elapsed, they have no right to ask the court to revoke the suspension.

Apart from that, the suspension, according to the clear language of Article 11, was only for a period not exceeding three months. So as of now, there is no suspension in force that this court can be asked to revoke.

(15) The Plaintiffs’ second complaint is that the First Defendant refused to convene an Extra Ordinary General Meeting of the Chamber after the Plaintiffs had requisitioned him to do so by letter dated the 15th September 2005. On receipt of that letter the Second Defendant wrote back to the Plaintiff on the 20th September 2005 and confirmed that the Defendants were willing to convene an Extra Ordinary General Meeting but on the condition that the Plaintiffs authenticated the requisitions for such meeting by providing identity card numbers, registration certificates, renewal of membership receipts and business licences. The Plaintiffs did not provide that information. Looking at the lists of the persons whom the Plaintiffs claim had signed the requisition, it is not difficult to see the reason why the Defendants asked the Plaintiffs to provide those details.

(16) After reading the affidavit of Mr. Ruhui bearing date the 1st December 2005, the Second Plaintiff swore a lengthy and somewhat rambling affidavit running into some forty-six paragraphs on the 3rd August 2006, but he made no attempt to respond to the explanation given by Mr. Ruhui for not convening the Extra Ordinary General Meeting. The First Plaintiff also failed to deal with this point in his supplementary affidavit dated the 2nd August 2006. The result of this studious silence is that the Second Defendant’s explanation is unchallenged and, in my view, must be accepted. Even if an explanation had been attempted, I would have rejected it in view of the scantiness of the particulars of identification given by the Plaintiffs.

(17) I listened very carefully to the lengthy submissions of learned counsel and the Second Plaintiff but in view of what I have already said, the Plaintiffs have not established a *prima facie* case with a probability of success to merit or entitle them to the reliefs they seek in this application.

Accordingly, the Chamber Summons filed on the 17th November 2005 fails and it is ordered that the application be and is hereby dismissed with costs to the Defendants.

Dated and delivered at Nairobi this Second day of February 2007.

P. Kihara Kariuki

Judge