



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 366 of 2007**

**RICHARD KROP & ENOCK ROTICH.....PLAINTIFF**

**VERSUS**

**TEGLA LOROUPE & 3 OTHERS.....DEFENDANT**

**RULING**

The Plaintiff herein moved to Court and filed a claim against the defendants vide a plaint dated 23<sup>rd</sup> April, 2007. They have described themselves in paragraph 4 of the plaint as the coordinator and assistant co-ordinator of Tegla Lorupe Peace Foundation and they comprise the secretariat charged with the day to day running of the affairs of the Foundation. Their grievance or cause of action is found in paragraph 5,6, 7 and 8 of the plaint. The summary of the same is that the first defendant purported to hold a meeting on 1.4.2007 in which she jointly with the 3<sup>rd</sup> and 4<sup>th</sup> defendants where strangers to the foundation purported to suspend the Plaintiffs from the secretariat of the foundation. They contend that the said purported meeting as well as the suspension was invalid as the meeting was not convened in accordance with the rules, neither was the decision taken by the board as the first defendant allowed strangers to participate in the meeting. That the defendants have purported to disband the Secretariat which is lawfully established and manned by the plaintiffs. By reason of the defendants action complained of, the defendant's action have affected the plaintiffs operations. In consequence thereof the plaintiff seeks an injunction to restrain the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants by themselves, their servants, agents/employees and/or supporters to be restrained from:-

- (a) Interfering with the plaintiff's management and running of the Tegla Lorupe Peace Foundation and/or presenting themselves to any other institution as officials of the society until the hearing and the determination of the suit.
- (b) From purporting to assume the responsibility of running the applicant society.
- (c) From interfering with the current executive office/secretariat as constituted by the plaintiffs.
- (d) From giving effect to the deliberations of the meeting of the first defendant held on 1<sup>st</sup> April, 2007 or any consequential meetings orders touching on the Tegla Lorupe Peace Foundation pending the hearing of this application.

The plaint also seeks a declaration that the meeting convened by the defendant on the 1<sup>st</sup> April 2007 and all consequential orders/directions made by the defendants at all touching on the foundation are null and void. There is also a claim for any other relief that the court may deem fit to grant and costs.

In response to that claim the defendants have put in a defence dated 8<sup>th</sup> may 2007. The averments relevant to the ruling are set out in paragraph 4,5 and 6 of the defence. The summary of them is that the plaintiffs were volunteers, that the board of trustees was entitled to reject and or terminate the plaintiff's volunteer services as and such the plaintiffs have no cause of action against the defendants and their claim should be dismissed with costs.

It is against the foregoing background that the plaintiffs have in place an interim chamber summons dated 23<sup>rd</sup> April, 2007. The interim application seeks injunctive orders in terms of those set out in the plaint which the court has already summarized at the outset of this ruling. The grounds in support are set out in the body of the application, supporting affidavit, further affidavits, annexures and oral submissions in court. The major ones are that:-

- (1) The meeting of 1.4.2007 is irregular as it was not convened in accordance with the rules as set out in the trust deed.
- (2) The annexures relied upon do not reveal that the applicants were mere volunteers but trustees of the Foundation.
- (3) As trustees, they applicants are required to account to donors for funds received towards projects supervised by them and this might result in penal consequences to them.
- (4) That in the course of their work, they have entered into various projects on behalf of the foundation and that is why the defendants have passed a resolution calling upon the applicants to account for funds form donors given for projects under their supervision.
- (5) It is on the basis of the foregoing matters that they seek to be reinstated to their former position so that they continue with their work pending the hearing of the suit.
- (6) They are likely to suffer irreparable harm as they are not only accountable to the people entrusting them with trust funds but they too are also beneficiaries.

In opposition to the application the respondents rely on the grounds in the replying affidavit and supplementary replying affidavit and the major grounds are that:-

- (1) The stand of the Respondents' is that the applicants were volunteers and not employees as there is no letter of employment, pay slip which have been exhibited.
- (2) The applicants do not feature in the trust deed as trustees. Neither have they exhibited an application to the relevant minister for them to be appointed as trustees. It would therefore be wrong for this court to treat them as such.
- (3) The applicants seem to be wanting to impose themselves on to the respondents as employees, which action this court cannot sanction as it has no power to impose an employee.
- (4) They maintain that the application cannot be under order 39 Civil Procedure Rules as there is no property involved as required by rule 1, and no contract involved as required by rule 2 of the said rules.
- (5) They contend the application in support of the application is defective as it has been sworn in plural contrary to the provisions of order 18 Civil Procedure Rules.
- (6) The orders sought cannot be granted as the orders they are seeking have already been overtaken by events. To get them back the applicants ought to have sought a mandatory injunction.
- (7) The applicants lack locus standi to agitate anything on behalf of the Foundation as the law requires that such actions be brought in the name of the Foundation as by law required.

(8) They maintain that the applicants have not brought themselves within the ingredients governing the granting of the relief's sought of an injunction.

(9) That the balance of convenience is in favour of the respondents. On that account the respondents urged the court to disallow the application with costs to them.

In response to the respondents counsels' submission, Counsel for the applicant reiterated the earlier submissions in support of the application and then stressed the following additional points:

(1) That the applicants are not agitating the case as employees or volunteers terms introduced by the respondents. But are agitating it as Trustees and documentations exhibited show the applicants relationship with the Foundation dating back from 2003.

(2) They maintain it is not necessary to produce documentary proof to prove conditions of service as such terms can be implied.

(3) They have annexed minutes and contracts to show that applicants were appointed together with other Trustees and they have been carrying out activities and rendering service on behalf of the Foundation.

(4) That there is no certificate of incorporation of the Trust herein and this being the case then the rights and duties and obligations of the parties invoked arise from the relationship of the parties concerned. The court is supposed to look at the documentation exhibited on Trusteeship but not to take into consideration the fact that the procedure under Section 3,4 and 5 of the Trustee perpetual succession Act has not been followed.

(5) They maintain that the supporting affidavit is not defective as it has been sworn in the first person and in any case that is an irregularity as to form which is curable under the same rules.

(6) They maintain their application is properly anchored on order 39 Civil Procedure Rule as activities or actions complained of go to affect the right of the applicants. They maintain a contractual relationship exist between the parties and this need not be in writing. It can be implied. The contract between the applicants and the foundation is covered under sub rule 2 of order 39.

(7) That the applicants are not asking to be reinstated as employees but have laid out, circumstances under which the applicants were kicked out of the Foundation and it was that status that the court is being asked to remedy.

(8) That the applicants have brought the action for themselves and the Foundation.

(9) They maintain that this is a proper case in which injunctive relief should issue as damages will not be adequate to cover the loss that applicants are likely to suffer herein.

On the courts assessment of the facts herein it is clear that from the reading of the prayers in the plaint, prayers in the interim application, they are similar and to this court has to be cautious in dealing with the application so as to avoid short circuiting the plaint. The application under review is an interim application. It is brought under the provisions of order 39 rules 1,2, and 3 of the Civil Procedure Rules. In order to succeed the applicants have to show that their claim is well laid and that they are within the ambit of the ingredients governing the granting of such reliefs as set out in the landmark case of **GIELLA VERSUS CASSMAN BROWN & CO. LTD [1973] E.A. 358. Further since the grievance touches on the provision of the Trustees (perpetual success/Act Cap.164 Laws of Kenya**

**before dealing with the merits the application has to pass the technical test of being supported by a proper affidavit. This technicality has arisen because the respondent has argued that the supporting affidavit is defective as it has been sworn in plural as opposed to it being sworn in the first person and which defect is not curable under the relevant rules. The supporting affidavit was**

sworn on the same date it was filed. A perusal of the same reveals that the first sentence of the introduction reads “*we Richard Krop and Enock Rotich of Post Office Box Number 67266-00200 Nairobi within the Republic of Kenya do hereby solemnly make oath and state as follows:*” This is clear evidence that it is a joint affidavit. Further a perusal of paragraph 1,2,3,5,6,7,8,9,10,11,12,13 are all sworn in plural. Proof of this is as here under stated:-

- (i) Paragraph 1 – we are male adults”
- (ii) Paragraph 2 – “we are National co-ordinator and assistant co-ordinator”
- (iii) Paragraph 3 – we are founder members.
- (iv) Paragraphs 5 – “in the course of our running of the affairs”
- (v) Paragraph 6 “purported to suspend us.”
- (vi) Paragraph 7 vide our advocates letter”
- (vii) Paragraphs 8 “That we believe”
- (viii) Paragraph 9 “it is our honest belief:
- (ix) Paragraph 10 – “We have been unable to carry”
- (x) Paragraph 11 “that we are unable to fully”
- (xi) Paragraph 12 “some of our personal items”
- (xii) Paragraph 13 – “that we therefore seek”

In contradiction of the plural deponing above paragraph 14 there of states that “herein is true to the best of my knowledge information and belief”. Below, it is shown that it is sworn by the said Richard Krop, Enock Rotich and then it is signed by two different signatures against each name. When raised the applicants’ counsel has urged the court to ignore the objection saying that the same relates to want of form and it is curable under Order 18 Civil Procedure Rules.

It is currently submitted that order 18 Civil Procedure Rules is the relevant provision of law to be turned to in determining whether that supporting affidavit is defective or not.

This court in its own ruling in the case of **MESHACK RIAGA OGALO AND 7 OTHERS VERSUS HENRY MICHAEL OCHIENG AND 4 OTHERS, NAIROBI HCCC ELC.30 OF 2007** delivered on 27<sup>th</sup> day of July 2007 had an occasion to rule on a similar objection. At page 11 of the said ruling line 3 from the bottom the court made the following observations.

*“The applicant has argued that the defect is curable under order 18 Civil Procedure Rules. Rule 3(1) of Order 18 Civil Procedure rules provides that an affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove. Rule 4 on the other hand provides that every affidavit shall state the description, the place of abode and postal address of the deponent. The operative words in rule 3(1) and rule 4 refer to “a deponent” and not “deponents” This being the case the proper construction of these two provisions, is that the intention of the rules committee is that there shall be one deponent” to an affidavit and if there is need for more than one, then the additional parties swear supporting affidavits. If joint affidavits were receivable in evidence there would have been provision for words such as these “or deponents” in both rules 3(1) and 4.*

This court is alive to the provisions of rule 7 which states “*The Court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or*

*otherwise on the title or other irregularity in the form thereof. The irregularity envisaged by this rule is one that is minor and does not go to the root of the affidavit”.*

This court still stands by that reasoning that there is no provision under Order 18 Civil Procedure rules for a joint affidavit. As regards the consequences that can befall such a deponement this court still stands by its approval of the decision in the case of **RAJPUT VERSUS BARCLAS BANK OF KENYA LTD** and others **NAIROBI HCCC 38 of 2001** quoted at page 12-13 of the said own ruling where the holding was that such an affidavit is incurable and it should be struck out.

As reasoned in the cited ruling applying that to the facts herein it is clear that in the absence of provisions for joint deponents in the relevant rules, the supporting affidavit herein is incompetent. It is incurably defective. Its defects are not due to want of form but due to an illegality. The offending portions have to be struck out. Once struck out it means the supporting affidavit will be left without the introductory part. It will also lose paragraphs 1,2,3,5,6,8,9,10,11,12 and 13. Once struck out the backbone of the affidavit goes. The remaining paragraph 4 and 7 cannot support the prayers sought. Paragraph 14 is displaced as it is framed in singular while the rest of the affidavit has been deponed and signed in plural.

The striking out of the supporting affidavit alone is sufficient to dispose off the application but since other issues have been raised it is better to rule on them firstly for purposes of generating jurisprudence and secondly for purposes of completing the argument. The Court is of the view that a litigant is entitled to a decision on grievances raised in any argument even if not in their favour. The first stop will be the provisions of Order 39 rules 1,2, and 3 Civil Procedure Rules. This arises as a result of the argument by the respondents of the applicants is not properly anchored on those provisions. The interim reliefs as laid in prayer 2,3 and 4 of the application are seeking injunctive reliefs to restrain the defendants nos. 2,3 and 4 from:

- (a) Interfering with the applicants management and running of the **TEGLA LOROUPE FOUNDATION** and or presenting themselves to any other institution as officials of the Society
- (b) Purporting to assume the responsibility of running the Foundation from the applicants and also from interfering with the current executive official/secretariat as constituted by the Plaintiffs.
- (c) Giving effect, to the deliberations of the meeting of the respondents held on 1<sup>st</sup> April, 2007”.

The argument of the respondent is that these reliefs are not covered by the provisions of order 39 rule 1,2,3 Civil Procedure Rules. They state: order 39 rule 1 “*where in any suit, it is proved by affidavit or otherwise:*

- (a) *that any property in dispute, in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution for a decree or*
- (b) *That the defendant threatens or intends to remove or dispose off his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.*

*The court may by order grant a temporary injunction to restrain such act or make such other order for the purposes of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit for restraining the defendant from committing a breach of contract or other injury of any kind whether compensation is claimed in the suit or not, the plaintiff may at any time after the commencement of the suit, and either before or after judgment apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of or any injury of a like kind arising out of the same contract or relating to the same property or right.”*

Applying these provisions to the facts herein it is clear that the applicants are not making assertion of any

right to any property. If anything they are worked out the property belonging to the Foundation. As to whether they are entitled to protect the same will depend on whether they qualify to do so under the relevant law namely the Trustees (perpetual successions) Act Cap.164 Laws of Kenya. As for rule 2 to apply there must be a threat of breach of a contract. When Respondents argued that no existence of a contract has been pleaded and exhibited in order to prove existence of a contract, the applicants stated that a contract can be implied from the relationship that has existed between the disputants from 2003 as shown by annexures. Indeed sub rule 2 provides for a threatened breach of a contract or right or injury to the same. In an interim application the court is supposed to act on the plain and obvious facts to justify issuance of an interim measure. Reliance on an implied contract calls for scrutiny of evidence and construction of the same which can only be done after a hearing. At the interim stage no evidence is to be adduced. On the face of the record, on the facts herein, no breach of contract has been pleaded and displayed herein. As for breach of a right, no breach of personal a right, has been complained of. If any thing, it is breach of the applicants right to Trusteeship to the Foundation which has been alleged. This two will depend on whether applicants qualify to complain under Cap.164 Laws of Kenya.

Next to be determined is satisfaction of the ingredients for granting an injunction. These are well laid down in the landmark case of **GIELLA VERSUS CASSMAN BROWN & CO.LTD (1973) E.A. 358**. These are found in holding iv, v, vi and these are:-

- (i). An applicant must show a prima facie case with a probability of success.
- (ii). An injunction will not normally be granted unless applicant might otherwise suffer irreparable injury.
- (iii) When the court is in doubt it will decide the applications on a balance of convenience.

Applying that to the facts herein, in order to succeed the applicants have to prove that they are Trustees of the Foundation and are entitled to protect their interests in the Foundation and also to protect the interests of the Foundation. This means that they have to bring themselves within the ambit of the provisions of Section 3 (3) of the Trustees (perpetual succession Act Cap.164 Laws of Kenya. The relevant portion states inter alia “The trustees shall there upon become a body corporate by the name described in the certificate and shall have perpetual succession and a common seal and power to sue and be sued in their corporate name and subject to the conditions and directions contained in the certificate ....”. Applying this provision to the facts herein it is necessary that a Trust deed be in existence setting out the terms and condition of the Trust. The second requirement is that there must be a certificate of incorporation. The Trust deed annexed to the supporting affidavit as annexure p1 was expunged alongside the striking out of paragraph 2 of the supporting affidavit. It no longer counts. The certificate of incorporation is not exhibited. It was agreed in the submission that those were being processed. In the absence of those two documents the issue of the Trustees and the legal personality of the Foundations do not arise.

Once the issue of Trustee and the Foundation legal penalty is removed, what the court is left with are individual disputants. It has to establish the capacity in which they are suing each other. The applicants have said they are not employees, neither are they volunteers, then nothing legal links them to the defendants. In the absence of existence of a legal right that applicants are claiming from the defendants, then there is nothing to show that they have any link with the unregistered Foundation which can be protected by an interim injunction.

Last to be considered is the case law relief on by the Respondents. As per their own submissions, it largely goes to fortify their stand that the court cannot impose an employee on an employer or alternatively the court cannot impose personal, relationships. In **OKONG’O VERSUS THE ATTORNEY GENERAL (1988) KLR 742**, At page 745 paragraph 1-5 it is observed the first is that at common law, by which this court is guided on contract (see law of contract Act Cap.23) specific performance of a contract of service has never been ordered. The reason is that the court felt it impossible to force the services of an employee on to an employer when the latter had lost all confidence and trust in the employee, how would the court supervise a contract it was asked, which involved so personal a relationship. On the basis of that observation holding 2 and 3 are to the effect that at common

law by which this court was guided on contract, specific performance of a contract of service has never been ordered because the court has never been ordered because the court has felt it impossible to force the services of an employee onto an employer when the later has lost all confidence and trust in the employee. It followed that once an employee has been dismissed whether rightly or wrongly, the dismissal stands, and if the contract has been broken by the employer, damages for breach of contract is the remedy to which the employee is entitled.

In the case of **CONSOLATA KIHARA AND 241 OTHERS VERSUS DIRECTOR KENYA, TRYPANOSOMIASIS RESEARCH INSTITUTE (2003) KLR 232**. At page 235 paragraph 35-40 and 236 paragraph 1 the observation states “*I think it is an elementary principle in our law, that in the ordinary situation of employer and employee cases, or cases which are sometimes referred to as cases of master and servant, if an employer or master wrongfully dismisses an employee or servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract. In a straight forward relationship of employer and employee, normally and apart from the intervention of statutes, there would never be a nullity in terminating an ordinary contract of employer and employee. Dismissal might be in breach of contract and so unlawful but it would only sound in damages*”. On the basis of that observation it was held inter alia that in normal situations of ordinary occurrence there cannot be specific performance of a contract of service and an employer can terminate the contract with his employee at any time and for any reasons or for none.

In the case of **BII VERSUS KENYA COMMERCIAL BANK LTD [2001] KLR 458**. At page 467 paragraph 5 -6 it is observed that “*unfair it may be but unlawful it cannot be. And the laws of Kenya do not know of the doctrine of unfair dismissal*”. On the basis of that observation it was held inter alia that termination of employment in accordance with the terms of a contract could not possibly be unlawful although it may be unfair and the Laws of Kenya do not know of the doctrine of unfair dismissal.

Applying the principles in the cited cases, it is clear that they relate to breaches of contract of employment and enforcement of rights and obligation arising under such contracts. They therefore deal with what is not under inquiry here as there is no allegation of an employer/employee relationship between the disputants.

The net result of the foregoing assessment is that the applicants interims application dated 23<sup>rd</sup> April, 2007 and filed the same date has been faulted and the same is dismissed for the following reasons.

- (1) Order 18 Civil procedure Rules on Affidavits does not make provision for duplex deponing of affidavits. Since the supporting affidavit is deponed by two persons, the same is an illegality and the same is struck out. Once struck out there is no basis on which the application can be anchored. In the absence of a supporting affidavit the subsequent supporting and supplementary affidavits supplement nothing to support or supplement and are therefore baseless. On this account since the law requires an application to be supported by an affidavit an application which is not supported by an affidavit cannot stand.
- (2) The purpose of an interim application is to forestall an impending happening of events. Where events sought to be forestalled have already taken place the proper remedy to be sought is a mandatory injunction to restore the disturbed status quo but not an interim application. Since what applicants sought to reverse had already taken place, granting of an interim application would not serve any purpose.
- (3) The reliefs sought in the interim application by the applicants can only be anchored on the provisions of order 39 rule 1 and 2 Civil Procedure Rules if they can pass the locus standi test of proof that the applicants are Trustees and are entitled to protect their own rights or interests in the Foundation and also for the rights of the Foundations. The Trust deed annexed as P.1 to paragraph 2 of the supporting affidavit was expunged when that paragraph was struck out and so there is nothing to prove existence of a foundation. The certificate of incorporation is not exhibited and so the trustees have no legal capacity to act in such likewise the foundation has no legal capacity to Act as such.
- (4) Once the claim of Trusteeship and Foundation have been robbed of their legal status what is left in

the arena are disputing individuals. Once the applicants assert that they are neither volunteers nor employees there is no relationship between the disputants that can give rise to rights, duties and obligations that can flow from the defendants to the applicants that are capable of being protected by an interim application.

(5) In view of No. 1-4 above there is nothing on the basis of which the ingredients of an interim application for an injunction can be tested.

(6) Case law on the employer/employee relationship and rights duties and obligations arising under such contracts have just been referred to and assessed in this ruling for purposes of jurisprudence only as the court has not been dealing with an employer, employee relationship.

(7) The Respondents will have costs of the proceedings herein.

**DATED, READ AND DELIVERED AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2007.**

**N. NAMBUYE**

**JUDGE**