



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO 26 OF 2003

ZAKAYO KAGOMBE NDERU APPLICANT

VERSUS

KENYA NATIONAL CHAMBER OF

COMMERCE & INDUSTRY & ANOTHER.....RESPONDENT

RULING

The applicant in this application was a member of the first respondent, The Kenya National Chamber of Commerce until 5th February 2003 (although in his affidavit paragraph 20 he says that his membership was terminated vide a letter dated 5th February 2002, I accept this as a typing error as the same letter Exh II and all other facts of the case show it could have only been 5th February 2003 and not 2002). Vide a letter dated 5th February 2003, his membership was terminated. Earlier on he had objected against increment of members annual subscriptions and had also sought the resignation of the second respondent on grounds that as the second respondent was now a member of parliament and a cabinet minister, he was no longer qualified to head the first respondent. After his membership was terminated he felt aggrieved and filed this suit together with this application.

In this application which was dated 10th February 2003, the applicant Zakayo Kagombe Nderu is seeking three main orders and is also praying for costs. The main orders he is seeking are as follows:

“3. That, a mandatory injunction do issue compelling the first defendant to reinstate the plaintiff ’s membership in the first defendant pending the hearing of his suit.

4. That, an injunction do issue restraining the first defendant through its agents, assigns and/or employees from demanding and/or collecting from the plaintiff the annual subscription fee revised as at 2nd January 2002 pending the hearing and determination of this suit.

5. That, an injunction do issue restraining the second defendant from discharging and/or executing his duties as a Chairman of the first defendant Mombasa branch pending the hearing of this suit.

The grounds for the same application are that the first defendant has irregularly, maliciously, illegally and unilaterally terminated the membership of the plaintiff in the first defendant; that the second defendant is illegally occupying the office of the Chairman of the first defendant and that the plaintiff stands greatly prejudiced, isolated and disadvantaged if the orders herein are not granted. There is also an affidavit in support of the application and several annextures to the same affidavit.

The respondents opposed the application and filed nine grounds of opposition. In a summary the respondents contend that the applicant has no *locus standi* to institute the present suit against the respondents; that the applicant has not complied with requirements of order 1 rule 8 of the Civil Procedure Rules; that attacks on the 2nd respondent are tainted with personal vendetta; that plaintiff's rights have not been infringed in any way; that the orders sought cannot be granted at this stage; that some of the orders sought have been overtaken by events; that no basis has been laid for seeking prayer 5 in the Notice of Motion; that termination of the plaintiff's membership was occasioned by the plaintiff's failure to pay his annual subscriptions to the first defendant for a period of over one year and thus there was nothing malicious, illegal or unilateral in the same termination of the plaintiff's membership; that the 2nd defendant is not illegally occupying the office of the Chairman of the first defendant, that there is no prejudice or disadvantage which has been occasioned to the plaintiff; that article 25 or any other article of the first defendant's

Memorandum and Articles of Association have not been breached and that the applicant/plaintiff should have involved the provisions of the first defendant's said Articles of Association before resorting to litigation.

The applicant is seeking, in my mind two mandatory injunctions and these are in respect of prayers 3 and 5 as in prayer 5, although the applicant does not specifically state that he is seeking mandatory injunctions he is in fact seeking the court orders to stop the said defendant from doing what he had been doing earlier on. Obviously prohibitory injunction cannot prohibit a person from carrying out what he has already carried out. This order is seeking to order the second respondent to stop doing what it had been doing and is thus strictly not normal prohibitory injunction. I will consider each prayer in turn.

First I will consider prayer 3 which is seeking a mandatory injunction to compel the first defendant to reinstate the applicant. The law as concerns the principles under which a mandatory injunction would be issued is now well settled and there are several authorities on the same. I will refer to three only. The first is the now well known case of *Locaball International Finance Ltd vs Agro Export & others* otherwise known as the *Sea Hawk Case* (1986) (1 All ER page 901). In that case it was stated as follows:

"A mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover before granting a mandatory injunction, the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted that being on a different and higher standard than was required for a prohibitory injunction."

The second such authority is a Kenya decision in the case of *Kamau Muchua vs Ripples Limited*, CA Civil Appeal No 106 of 1992 where the Kenya Court of Appeal stated:

"A party as far as possible ought not be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act."

The last decision I will refer to is the case of *Malindi Air Services vs Halima Abdinoor Hassan*, Kenya Court of Appeal Civil Application No NAI 202 of 1998 which I feel summed up the law on the issue of mandatory injunctions. It states:

"A mandatory injunction at an interlocutory stage is rarely granted; only when the plaintiff's case is clear and incontrovertible."

Is the case before me in as far as it claims that the termination of the applicant's membership was unlawful incontrovertible? To answer this question the court has to consider the letter of termination of membership against the provisions of the Articles of Association as well as the only affidavit available (one filed by the applicant) and the grounds of opposition while at the same time the court must be mindful of the fact that it is not deciding this matter finally. The applicant says in his affidavit that he felt

unhappy with increment of the annual subscription and wrote to the first defendant challenging the same increment. He subsequently declined to pay the revised subscription till the issue was sorted out. He did not receive any response. Later after the general elections held in the country on 27th December 2002, in which the 2nd defendant was elected as a member of parliament he wrote a letter dated 14th January 2003 asking the second respondent to resign from the chair of Mombasa Branch of the first defendant. The first respondent responded and said it would communicate with the applicant later but one day later the applicant reiterated his call for second respondent's resignation and on 5th February 2002, the first defendant terminated the applicant's membership. The letter terminating applicant's membership is dated 5th February 2003 and it states as follows:

"Mr ZK Nderu

PO Box 90193

Mombasa

Dear Sir

RE: KENYA NATIONAL CHAMBER OF
COMMERCE AND INDUSTRY MOMBASA
BRANCH

We wish to refer to your letter addressed to our National

Chairman regarding the affairs of the Branch which you seem to be addressing at personal levels and wish to respond as follows:

(i) This headquarters has noted with concern the disrespect you have portrayed against Hon Minister Najib Balala who we highly respect and whom we are proud of on his election and appointment as a minister.

(ii) This headquarters has all the machinery to handle all the Branches countrywide and well versed with the Memorandum and Articles of Association of the Chamber.

(iii) This headquarters through the Branch has noted that you never renewed your membership for the year 2002 and 2003, hence you ceased to be a member of the Chamber and Management in March 2002 as stipulated by the rules of the Governing Council.

(iv) This headquarters through the branch as required by law has deleted your membership from the Branch register hence any communication from yourself, your company will be ignored as it will be treated as null and void.

(v) Finally this headquarters does not deal or personalise issues hence the need for yourself to take any action against a person and not create misunderstanding within the chamber Branch and the headquarters.

With the foregoing we would wish to advise you that Kenya National Chamber of Commerce and Industry headquarters has the sole responsibility on how to run the affairs of the Branches countrywide as required by the Companies Act cap 486, hence the need for you to stop any further communication to the headquarters regarding the Mombasa Branch which you are not a member.

We do hope that the above will enable you to stop interfering with the affairs of a company which you are not a shareholder, hence legal action maybe taken against you at your own risk.

Yours faithfully

TG RUHIU

CHIEF EXECUTIVE”

I have perused the letters dated 14th January 2003 addressed to Hon Najib Balala, MP, the 2nd respondent herein and letter dated 29th January 2003.

The two letters, no matter what one thinks of their contents have nothing to do with the applicant's membership of the first defendant. Whereas I can easily see how they solicit the contents paragraph 1(i) of the letter from the first defendant I have reproduced hereinabove, I cannot see how the question of the applicant's membership and termination of the same as direct responses to his pleas for resignation of the 2nd respondent. Be that as it may, accepting as it is not in dispute that the applicant had not paid his or his companies subscription for sometime (he himself says so at paragraph 10 of his affidavit) was the right procedure followed in terminating his membership. I was referred to Article 8 and Article 10 of the first respondent's Memorandum and Articles of Association. Mr Buti says there are mandatory and permissive provisions as one peruses the two articles. In order to see if a *prima facie* case has been established as to whether the right procedure was followed or not in terminating the applicant's membership, I will now turn to the same Articles for their intent and purposes. Article 8 states as follows:

“8. A member of the Chamber shall cease to be a member is such member:

(a) resigns by giving one month's notice in writing of resignation

(b) becomes of unsound mind

(c) fails to pay his subscription in terms of article 10.

.....

PROVIDED always that any member who ceases to be a member shall remain liable in terms of the

Memorandum and Articles of Association for all contributions and subscriptions falling due within the year in which he ceases to be a member.”

That article clearly provides for the conditions under which one would cease to be a member of the first respondent and it is clear that under

Article 8(c) one would cease to be a member when one fails to pay his subscriptions in terms of Article 10. What does Article 10 state? It states as follows:

“10. No member may exercise any of the rights and privileges of membership if his subscription remains unpaid for more than two months after it is due. If the subscription remains unpaid for more than four months after due date the Membership Committee may terminate the membership.”

This provision, in my mind gives dimension to article 8(c). Thus my understanding is that whereas article 8 applies in general to conditions under which a member may cease to be a member, article 10 makes it clear first that on the question of failure to pay subscriptions a member is not allowed to exercise any of the rights and privileges of membership of the subscription is not paid for two weeks and if the subscription continues unpaid for more than four months as apparently the case here (see letter dated 5.2.2002 paragraph 1(ii)) then the Membership Committee may terminate the membership. Thus under Articles 8(c) a read with Article 10, if the Applicant had not paid his subscription for the year 2002 and 2003, then the correct body that could have terminated his membership is the Membership Committee. Otherwise, Article 9 would come into play.

Article 9 states:

“9. The governing Council may terminate the membership of any member who by his conduct renders himself unfit in the opinion of a majority of the Governing Council to remain a member of the chamber.”

Thus if the first defendant felt that applicant’s action in pressing for Hon Balala’s resignation was a conduct that rendered the applicant unfit to remain a member of the Chamber, then a majority of the Governing

Council was the correct body to terminate his membership. I have not been told by the respondent – particularly by the first respondent as to whether the Membership Committee deliberated on termination of membership of the applicant. I have not been told by the same respondent as to whether the Governing Council deliberated on the matter. I mention both bodies because the letter terminating the applicant’s membership contains complaints which would border on conduct of the applicant and also bases the termination on failure to renew membership and these to my mind mean that although failure to renew membership was put forward as the main reason for termination, on critical analysis of the letter, it emerges that that could have only been for window dressing whereas the reason could be the applicant’s alleged disrespect to the minister.

Whichever was the reason and/or the motive, one aspect appears clear to me and that is that a *prima facie* case has been demonstrated by the application that neither Membership Committee nor Governing Council made the decision to terminate his membership. It is to me incontrovertible that this termination even if it was warranted in substance, was not procedurally carried out. In my opinion, even if the applicant was

“recalcitrant,” still procedure in terminating his membership must be followed. That being the case, I have no option but to grant prayer 1. (see decision of Bosire J (as he then was) in *Belle Maison Ltd vs Yaya Towers Ltd* HCCC No 225 of 1992).

I will now consider prayer 4. I do agree with Mr Buti the learned counsel for the respondents in his submission that this prayer cannot succeed because clearly the applicant did not show any demand or any evidence threatening to collect annual subscription fee. It is true that equity does not act in vain. Further, the applicant as far as that prayer is concerned, is not coming to Court with clean hands. He has refused to pay the same subscription now for over a year (from January 2002 – see paragraph 8 of the affidavit). He cannot expect the court to be a party to that type of conduct. That aspect could have only been considered if it was brought up immediately the circular was issued. Now the applicant is guilty of laches from what I have stated above.

Prayer 5 fails because from records the said respondent became Chairman of the 1st respondent before he was elected to the parliament and before he was appointed to the cabinet. Surely he is not chairman illegally and his election to that post was not unlawful. Circumstances have now changed and he now cannot be elected to the same post if any elections were to be held. Article 25 says:

“25 Neither a minister nor a civil servant of the Government of Kenya or of the East African Community shall be eligible for election as an officer of the Chamber.”

That provision is clearly unambiguous. All it says is that at the time of election, a person who is a minister cannot stand for election. One who had been elected must not stand at the next election. Further the applicant has not shown me any provision in the Articles of Association where it is provided that when a person who is a leader of the first respondent is appointed a minister, he has to resign from the Chamber leadership and within what time he is required to so resign. The applicant may have certain feelings about the second respondent but whatever they are as a court of law, I do not go by the law and evidence and so far, no legal provisions of factual provisions have been adduced to warrant the granting of the order sought.

In conclusion, prayer 3 of the application dated 10th February 2003 is granted. Prayers 4 and 5 are dismissed. The respondent will have one third of the costs of the entire application.

Dated and delivered at Mombasa this 19th day of March, 2003

J.W. ONYANGO OTIENO

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JUDGE