



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Misc Civil Application No 78 Of 1998 (O S)
Commercial Bank Of Africa Limited and Kenya Medical Women's &
Another
High Court Of Kenya At Nairobi August 8, 2000
Milimani Commercial Courts
T Mbaluto, Judge
Misc Civil Application No 78 Of 1998 (O S)

August 8, 2000 T Mbaluto, Judge delivered the following judgment.

This suit has been brought by way of interpleader under Order XXXIII of the Civil Procedure Rules by Commercial Bank of Africa. The bank seeks two orders:-

“1. THAT this Honourable Court do determine the question whether the funds held by the Applicant should be deposited in or paid or transferred into Court or disposed of in such manner as this Honourable Court may direct.

2. THAT the Applicant's costs of these proceedings be paid out of the monies in the said account.”

The applicant is a commercial bank operating in this country. It has amongst the accounts at its Wabera Branch a foreign currency account number 85000031, which was opened upon application by the 1st respondent. The signatories to the account are the 2nd defendant (who was a mandatory signatory) with the 3rd, 4th and 5th respondents as the alternative second signatories. The opening of the account was approved by the Central Bank of Kenya to cater for the First Regional Congress for Africa and the Near East Congress of the Medical Womens International Association (MWIA).

As the name shows, the 1st respondent is an association of Kenya Women Doctors and MWIA is its international equivalent.

On November 13, 1996, a person known as Abigail Kidero, who described herself as the Executive Officer of the 1st respondent wrote to the applicant advising of new office bearers of the 1st respondent. Those new officers were said to be the 7th, 8th and 9th respondents. In the letter, Mr Kidero stated that the 7th, 8th and 9th respondents were the officers authorised to operate the accounts. In response to that letter, the applicant wrote to the 1st respondent on December 5, 1996 explaining its inability to effect the changes. In the same letter, the applicant sought from the 1st respondent clear-cut guidance as to how to go about the issue of signatories and disbursement of funds in the account. Following that letter, it became clear to the applicant that a serious dispute had arisen between the 2nd, 3rd, 4th and 5th

respondents on one part and the 6th, 7th and 8th respondents on the other. As a result of the dispute, the applicant froze the account and thereafter commenced these proceedings. The applicant states that it has no interest in the money in the subject account other than the usual banking charges and costs of these proceedings.

Although this matter was hotly contested and a lot of evidence tendered, the facts of the matter are not all that complicated. Indeed in my view, it is a matter which could have been resolved on the basis of agreed facts. Briefly stated, the facts giving rise to the dispute are that in December 1993, the International Organisation of Medical Women known as Medical Women's International Association (MWIA) held at the Safari Park Hotel Nairobi, a Regional Congress for Africa and Near East. The region is one of the 8 regions into which MWIA is divided. That Regional Congress was organised by Kenya Medical Women's Association (KMWA) with assistance from MWIA. For that purpose, KMWA constituted a committee called the Congress Organising Committee (COC) which comprised personalities from KMWA itself, representatives from Government Ministries, NGOs as well as international agencies such as WHO. At the material time, Dr. Anuja Kapila, a consultant anaesthetist who is the 4th respondent in this matter was the chairperson of KMWA. According to her evidence, she served in the council of KMWA for 12 years. Dr Kapila told this court that the Africa and Near East Region was the only region of MWIA which prior to the congress of 1993, had not hosted a regional congress. For that reason, KMWA under her chairmanship was eager to host it. The other reasons for KMWA eagerness to host the congress was the fact that at that time, the President elect of MWIA not only hailed from the region but was also from Kenya. She was Dr Florence Manguyu (3rd respondent).

I think it is necessary at this stage to briefly look at the 3rd respondent's role in both MWIA and KMWA as well as in COC so as to appreciate what role she played in the organization of the congress. She testified (and this was not challenged) that she is a founder member of KMWA, one of its past presidents, secretary and assistant secretary. She is also the immediate past president of MWIA and has been sitting in MWIA's executive committee since 1987. At its first meeting, COC elected her as its chairperson. Other persons elected to senior positions of COC were Dr Evelyn Magaiyu, who then was the secretary of KMWA, as its secretary and Dr Lucy Muchiri, the Treasurer of KMWA as Treasurer, a post which was later to be taken over by Dr. Marina Gondi.

The main task of COC was to solicit for funds for the congress and Dr. Kapila told this court that they obtained funds from all possible sources including the U.N, NGOs, Government Ministries and donor agencies. The funds so collected were to be utilized in accordance with the requirements of the donor agencies and in that regard the donors required KMWA to open separate accounts in the name of the congress. The donors also had to approve the signatories of the accounts as well as the auditors of the particular accounts. Those approved signatories were the chairperson, secretary and treasurer of COC with Dr Kapila in her capacity as chairperson of KMWA as the fourth signatory.

The congress organised by COC was apparently successful and after all the accounts had been taken and audited, it was established that there was a surplus of funds. That exercise of completing the accounts and auditing took roughly 2 years, between December 1993 when the congress took place, and 1995 when the audited accounts were submitted to the donors for approval. In accordance with the requirements of the donors, the surplus funds could not be utilized or disbursed without the donors approval. Different donors gave different directives with regard to the funds they had contributed. Some requested refunds and that was done. Others like Norad and Sida approved specific post congress use of their funds. Accordingly, both donor agencies after receiving requests in that respect by the organisers of the congress approved the expenditure of the surplus funds on post congress activities pertaining to the Africa and Near East Region. The approval from Sida was even more specific. Authority was given to use "the surplus of the funds ... to support the implementation of the Plan of Action and to set up a Liaison Centre for monitoring the same".

The money held by the applicant at Wabera Branch is commonly acknowledged to be part of the surplus funds donated by both Sida and Norad. In view of what is stated above, the funds are clearly not the property of KMWA and the organization has no right to it. It is the property of the two donor agencies, which agencies have however given directions as to how the funds are to be utilized. Indeed in its letter of approval, Norad states:-

“Projects elements addressing issues pertaining only to one country may not be supported

Given that KMWA is a one country association, how it hopes to satisfy such a requirement is beyond reason. In my view, by disputing the manner the donor agencies have directed the surplus funds be utilized, KMWA has not only antagonized those two donor agencies which are generally acknowledged to be some of the most generous in the world in their support for social programs, but has also taken a stand in the matter which is contradictory to the position it had earlier taken. I say so because at the Annual General Meeting of KMWA held on March 26, 1994 at which said meeting the officials now spearheading the fight for the surplus funds to revert to KIMWA were elected, the following resolution was passed:-

“that the congress surplus was for post-congress activities and thereafter the surplus would be redirected as per donors’ guidelines.

” Also at a subsequent joint KMWA/COC meeting held on January 31, 1995 the following resolution was passed:-

“It was concluded that all congress issues including financial would be handled by the 1993 COC whose chairperson is Dr Manguyu (3rd respondent). She would then write to the Donors and MWIA on these issues. KMWA would send all copies of any correspondence related to the Congress to Dr Manguyu in good time for response.”

I, of course, recognise that it is KMWA’s contention that the congress was organised by KMWA and that without its initiative the congress would not have been held. There is also sufficient evidence to show that KMWA officials do recognise that the funds from various donors had different conditionalities which had to be met. One of such conditionalities, as the letters from Norad and Sida show is that any surplus funds could not revert to the national association. Since the congress held at Safari Park Hotel was not a MWIA congress but a Regional Congress for the Africa and the Near East, it clearly follows from this that if indeed there is a surplus of funds available, such surplus must be shared out amongst all the National Associations in the Region. The fact of the matter is that both Sida and Norad have directed how the funds now standing in the account of the applicant bank are to be utilized and there is therefore nothing to be shared out.

KIMWA also accused the Congress Organising Committee of using improper methods to obtain directives from donor agencies on how the surplus funds were to be used. If that were the case, it would in my view have been the easiest task in the world for KMWA to contact those same donor agencies with a view to correcting the position. The fact that KMWA has not done anything to directly challenge the authority given by the donors to the officials of the 2nd respondent but has instead elected to wage an unnecessary local skirmish with the officials of the 2nd respondent clearly demonstrates that KMWA has absolutely no faith in its own case. In the event, the answers to the issues arising from this matter are as follows-

(a) The funds the subject of the dispute between KMWA and LCMWA were provided by SIDA and NORAD.

(b) The purpose for which the funds were provided was to finance the holding of the Regional Congress for Africa and Near East of MWIA.

(c) The surplus funds now being held by the applicant are the property of the two donor agencies mentioned above but in their letter dated November 15, 95 and September 22, 1995 both Norad and Sida respectively have authorised the group comprising Mrs Gondi and others to use the funds for post congress activities as outlined in their letter of June 8, 1995.

(d) The costs of the applicant of this application shall be paid out of the monies in the said account but each of the respondents will bear her/its own costs.

(e) In view of the above, there will be an order directing the applicant to permit the Mrs Gondi and the other officials of the Liaison Centre for Medical Women in Africa (LCMWA) to continue operating the account in the same manner they were doing prior to the onset of this dispute.