



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Hospital Association Ltd v Rono & 9 others; Kambuni  
(Interested Party) (Civil Suit E233 & E015 of 2024 (Consolidated))  
[2024] KEHC 15844 (KLR) (Commercial and Tax) (13 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15844 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E233 & E015 OF 2024 (CONSOLIDATED)  
FG MUGAMBI, J  
DECEMBER 13, 2024**

**BETWEEN**

**KENYA HOSPITAL ASSOCIATION LTD ..... PLAINTIFF**

**AND**

**DR. EDWIN KIPNG'ENO RONO ..... 1<sup>ST</sup> DEFENDANT  
DR. AGNES GACHOKI ..... 2<sup>ND</sup> DEFENDANT  
DR. FRANK MWONGERA ..... 3<sup>RD</sup> DEFENDANT  
DR. LUKA MUSAU ..... 4<sup>TH</sup> DEFENDANT  
DR. BYAKIKA TIMOTHY ..... 5<sup>TH</sup> DEFENDANT  
DR. JD PATEL ..... 6<sup>TH</sup> DEFENDANT  
DR. SAMUEL OWINGA ..... 7<sup>TH</sup> DEFENDANT  
DR. PATRICK OLANG ..... 8<sup>TH</sup> DEFENDANT  
DR. KEVIN ARUNGA ..... 9<sup>TH</sup> DEFENDANT  
DR. DAVID OTIENO ..... 10<sup>TH</sup> DEFENDANT**

**AND**

**DR. FRED KAMBUNI ..... INTERESTED PARTY**



## RULING

1. The plaintiff is a company limited by guarantee and provides health care services under the name of Nairobi Hospital (hospital). The defendants are members of the hospital's Admitting Staff Association (ASA), by virtue of being medical and dental practitioners who have admitting rights within the hospital. As per the Regulations of ASA, the members thereof elect the Medical Advisory Committee (MAC), which is tasked with an advisory role to the Plaintiff's Board of Management. Additionally, the Chairperson and Vice Chairperson of MAC are nominated as members of the plaintiff's Board of Management.
2. It would appear that discontent arose with the leadership and composition of MAC, which led to some members of ASA requisitioning for Special General Meeting (SGM) to be held on 25<sup>th</sup> April 2024. The agenda of the SGM was, 'recall of the Medical Advisory Committee'. The requisition and notice of the intended SGM was served upon the plaintiff's Chief Executive Officer (CEO), James Nyamogo, who also acts as the Secretary of both ASA and MAC on 8<sup>th</sup> April 2024. Apparently, the CEO vide a letter dated 24<sup>th</sup> April 2024 indicated that the requisition of the SGM did not comply with the Regulations of ASA and as such, could not take place. Be that as it may, the SGM took place on 25<sup>th</sup> April 2024 resulting in the appointment of the 1<sup>st</sup> and 2<sup>nd</sup> defendants as the interim Chairperson and Vice Chairperson of MAC. The outcome of the SGM was later communicated to the plaintiff's CEO and the Board of Management.
3. Subsequently, the plaintiff's CEO vide an internal memo dated 29<sup>th</sup> April 2024 indicated that the SGM was irregularly convened hence the resolutions made therein were of no legal effect. Further, by letters of even date, under the hand of the CEO, the defendants were suspended from ASA on allegations of misconduct for promoting, organising and/or participating in an irregular SGM contrary to the Regulations of ASA and the plaintiff's Articles of Association. The defendants were also invited to show cause as to why an adverse finding should not be made against them by providing written responses to the allegations of misconduct.
4. It is the aforementioned set of circumstances that instigated a number of suits being filed by the parties herein in different Divisions of the High Court, a situation that, I must admit, has not been particularly helpful. The proliferation of suits and applications has complicated the resolution of the issues at hand, delaying a more expeditious outcome. Of significance are four suits namely, HCCOMM No. E233 of 2024 filed at the instance of the plaintiff; HCCOMM No. E015 of 2024 (formerly HCCHR Petition No. E236 of 2024) filed by the 1<sup>st</sup> defendant which was consolidated with HCCOMM No. E233 of 2024; HCCOMM No. E293 of 2024 (formerly HCJR No. E013 of 2024 and HCCC No. E099 of 2024) filed by the 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup> and 10<sup>th</sup> defendants herein; and HCCOMM No. E300 of 2024 (formerly HCCC No. E098 of 2024) filed initially at the instance of the 1<sup>st</sup> and 2<sup>nd</sup> defendants but the 1<sup>st</sup> defendant withdrew the suit on his part by a Notice of Withdrawal dated 14<sup>th</sup> May 2024.
5. A plethora of interlocutory applications have since been filed in the aforementioned suits, some of which seek more or less similar orders. It is on that basis that on 4<sup>th</sup> June 2024 Mabeya, J. issued directions that all the four suits be heard together and the pending applications therein be disposed of. Further, this Court issued orders on 4<sup>th</sup> November 2024 directing that no more applications should be filed in the said four suits in order to expedite the determination of the applications that were pending at the time.



## **Introduction:**

6. Accordingly, this ruling will dispose of nine (9) applications which, though brought separately by the parties herein, are intertwined so as to put to good use valuable judicial time. The applications in question are as follows:
  - a. HCCOMM No. E233 of 2024:
    - i. Plaintiff's application dated 1<sup>st</sup> May 2024
    - ii. 1<sup>st</sup> defendant's application dated 7<sup>th</sup> May 2024
    - iii. 1<sup>st</sup> defendant's application dated 2<sup>nd</sup> July 2024
    - iv. 2<sup>nd</sup> to 10<sup>th</sup> defendants' application dated 14<sup>th</sup> May 2024
    - v. Plaintiff's application dated 16<sup>th</sup> May 2024
  - b. HCCOMM No. E236 of 2024:
    - i. 1<sup>st</sup> defendant's application dated 7<sup>th</sup> May 2024
    - ii. Plaintiff's application dated 15<sup>th</sup> May 2024
  - c. HCCOMM No. E293 of 2024 :
    - i. 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup> and 10<sup>th</sup> defendant's application dated 6<sup>th</sup> May 2024
  - d. HCCOMM No. E300 of 2024:
    - i. 2<sup>nd</sup> defendant's application dated 6<sup>th</sup> May 2024

## **SUBPARA (a) HCCOM No. E233 OF 2024: Plaintiff's Application dated 1<sup>st</sup> May 2024:**

7. The plaintiff's Notice of Motion dated 1<sup>st</sup> May 2024 which is premised on sections 1A, 1B and 3B of the [Civil Procedure Act](#), and orders 40(1) and 51 of the Civil Procedure Rules seeks inter alia,
  - i. Spent.
  - ii. ...
  - iii. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from carrying themselves or purporting to carry themselves as members and/or Chairperson and Vice Chairperson of MAC respectively and or members of the Board of Directors of the plaintiff.
  - iv. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue a temporary injunction restraining the 3<sup>rd</sup> to 10<sup>th</sup> defendants from carrying or purporting to carry themselves as members of MAC.
  - v. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue a temporary injunction restraining the defendants from carrying out or purporting to carry out the mandate of MAC including calling meetings and/or passing any resolutions.
  - vi. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue a temporary conservatory order restoring the status quo ante by reinstating the interested party having been properly elected as the Chairperson of MAC.



- vii. That the costs of the application be provided for.
8. The application is supported by an affidavit sworn by the plaintiff's CEO, James Nyamongo, on even date, and the plaintiff's written submissions dated 14<sup>th</sup> October 2024. To sum up the grounds in support of thereof, the plaintiff contends that an internal memo dated 24<sup>th</sup> April 2024 under the hand of the CEO indicated that the requisition of the intended SGM scheduled for 25<sup>th</sup> April 2024 was contrary to the Regulations of ASA and therefore could not take place; that in utter disregard of the aforementioned communication, the defendants together with other members of ASA proceeded with the said SGM; that the SGM was not only irregularly convened but was also not quorate hence any resolutions made therein had no legal effect; that MAC plays a crucial role in the management of the hospital; that the orders sought will ensure that the leadership of MAC is properly constituted in accordance with the Regulations of ASA and the plaintiff's Articles of Association as well as smooth running of the hospital pending determination of the suit; and that the plaintiff has met the requisite test for granting the orders sought.
9. On 5<sup>th</sup> May 2024 Mabeya, J. certified the above application as urgent and issued ex-parte interim orders as set herein under:
- “(a) That pending the hearing and determination of this application inter partes, a temporary injunction is issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from carrying or purporting to carry themselves as members and/or Chairperson or Vice Chairperson of MAC respectively, or members of the Board of Directors of the plaintiff.
- (b) That pending the hearing and determination of this application inter partes a temporary injunction is issued restraining the 3<sup>rd</sup> to 10<sup>th</sup> defendants from carrying or purporting to carry themselves as members of MAC.
- (c) That pending the hearing and determination of this application inter partes a temporary conservatory order restoring the status quo ante is issued reinstating the interested party as the Chairperson of MAC.”
10. On his part, the interested party supports the application on the same grounds as the plaintiff through his replying affidavit and written submissions both dated 19<sup>th</sup> November 2024. The 2<sup>nd</sup> to 10<sup>th</sup> defendants vide their written submissions dated 21<sup>st</sup> November 2024 oppose the plaintiff's application on the grounds that the orders sought with respect to reinstatement of the interested party as Chairperson of MAC can only be sought by the said interested party; this Court cannot issue conservatory orders with respect to events that have already taken place; and that the plaintiff has not satisfied the three-prong test for issuance of the orders sought.

**1<sup>st</sup> Defendant's Application dated 7<sup>th</sup> May 2024:**

11. The 1<sup>st</sup> defendant's Notice of Motion dated 7<sup>th</sup> May 2024 is anchored on sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*, order 2 rule 15, order 40 rule 7 and order 51 rule 1 of the Civil Procedure Rules. The application which seems to have been filed in response to the plaintiff's application dated 1<sup>st</sup> May 2024 set out in above, seeks the following orders:
1. Spent
  2. Spent
  3. That the orders issued on 5<sup>th</sup> May 2024 be reviewed, varied and set aside in their entirety.



4. That the application dated 1<sup>st</sup> May 2024 and the entire suit filed by James Nyamongo be dismissed in its entirety.
5. That the costs of this application be provided for.
12. The grounds upon which the 1<sup>st</sup> defendant relies on are that firstly, the ex-parte interim orders dated 5<sup>th</sup> May 2024 were obtained through misrepresentation and non-disclosure of material facts. Towards that end, the 1<sup>st</sup> defendant claims that the plaintiff misrepresented that the requisition of the SGM was not supported by the requisite number of members of ASA; that the CEO has power to summon or call meetings of ASA; and that the CEO had authority to file the suit yet no meeting of the plaintiff's Board was called to authorise the same. Further, that the CEO had failed to disclose that the interested party had attended, officiated and participated in the SGM. Secondly, that the said orders have the effect of interfering with the internal management of the plaintiff contrary to this Court's pronouncement in *Seruji Limited V Savannah Cement Limited; Savannah Heights Ltd (Interested Party)*, [2021] KEHC 26 (Seruji Limited Case). Lastly, that the entire suit is an abuse of the court process.
13. In opposing the 1<sup>st</sup> defendant's application, the plaintiff relies on the affidavit sworn by its CEO on 16<sup>th</sup> May 2024 and its written submissions dated 14<sup>th</sup> October 2024. In that regard, it asserts that the said application is premised on falsehood and misinformation; the 1<sup>st</sup> defendant has not demonstrated the information that has allegedly been withheld by the plaintiff; the CEO has requisite authority from the plaintiff to swear affidavits on its behalf; the CEO's responsibility while acting as the Secretary of ASA and MAC includes convening and recording minutes thereof; and that the 1<sup>st</sup> defendant's application lacks merit.

#### **1<sup>st</sup> Defendant's Application dated 2<sup>nd</sup> July 2024:**

14. The 1<sup>st</sup> defendant's Notice of Motion dated 2<sup>nd</sup> July 2024 is a carbon copy of his earlier application dated 7<sup>th</sup> May 2024, set out above, as far as the orders sought are concerned. In point of fact, some of the grounds in support of the applications dated 2<sup>nd</sup> July 2024 and 7<sup>th</sup> May 2024 are word for word. The 1<sup>st</sup> defendant only adds that the interim orders issued on 5<sup>th</sup> May 2024 are tantamount to the interested party being a court appointed director; that the said orders have enabled the interested party, and the Board of Directors to plunder the plaintiff by committing it to unwarranted financial obligations amounting to over Kshs. 2,000,000,000/=; and that as a result, members of ASA have commenced the process of removal of the current Board of Directors; and it is interest of justice for the orders sought to be granted
15. In response, the plaintiff lodged grounds of opposition dated 24<sup>th</sup> September 2024 to the effect that the application dated 2<sup>nd</sup> July 2024 offends the doctrine of sub-judice as it is a restatement of the 1<sup>st</sup> defendant's application dated 7<sup>th</sup> May 2024; the application seeks to introduce new and inconsistent cause of action as far as it purports to speak to the plaintiff's Board of Directors and their removal from office as well as the affairs of the said Board; and that the application is an abuse of the court process. The plaintiff reiterates as much in its written submissions dated 14<sup>th</sup> October 2024.

#### **2<sup>nd</sup> to 10<sup>th</sup> Defendants' application dated 14<sup>th</sup> May 2024:**

16. Equally, the 2<sup>nd</sup> to 10<sup>th</sup> Defendants' Notice of Motion dated 14<sup>th</sup> May 2024 seeks review and/or an order setting aside the ex-parte interim orders granted on 5<sup>th</sup> May 2024. On their part, the 2<sup>nd</sup> to 10<sup>th</sup> Defendants rely on the affidavit sworn by the 4<sup>th</sup> defendant on even date wherein it disposed that the plaintiff is not an affected party as far as the issues concerning the SGM held on 25<sup>th</sup> April 2024 and the appointment of MAC therein; the plaintiff's application dated 1<sup>st</sup> May 2024 is meant to coerce the 2<sup>nd</sup>



to 10<sup>th</sup> defendants into allowing illegalities and assist the interested party to usurp as the Chairperson of MAC despite being removed from office; the 2<sup>nd</sup> to 10<sup>th</sup> defendants suspension from ASA is not only contrary to the Regulations of ASA but also discriminatory; the 2<sup>nd</sup> to 10<sup>th</sup> defendants cannot attend to their patients, some of who are admitted to the hospital, on account of the said suspension; the plaintiff is purporting to call for an AGM with the interested party as the chairperson of ASA despite having been removed from office; and that immense prejudice and damage will be occasioned to the 2<sup>nd</sup> to 10<sup>th</sup> defendants if the ex-parte interim orders of 5<sup>th</sup> May 2024 continue to subsist.

The defendants also reiterate the grounds advanced in opposition to the plaintiff's application dated 1<sup>st</sup> May 2024 in support of their application.

17. It is instructive to point out that on 16<sup>th</sup> May 2024 Mabeya, J. certified the aforementioned application as urgent and issued ex-parte interim orders in the following terms:
  - i. Pending the inter partes hearing and determination of this application, an order is issued allowing and facilitating the 2<sup>nd</sup> to 10<sup>th</sup> defendants to continue to operating at the hospital.
  - ii. Pending the inter partes hearing and determination of this application a conservatory order is issued directing the plaintiff to allow and facilitate the 2<sup>nd</sup> to 10<sup>th</sup> defendants to continue operating and offering medical services at the hospital.
  - iii. Pending inter partes hearing and determination of this application, an order is issued restraining the plaintiff and its agents, nominees, proxies or any other party whatsoever from calling conducting and presiding over the AGM meeting scheduled for 23<sup>rd</sup> May 2024.”
18. In response, the plaintiff filed a replying affidavit sworn by the CEO on 29<sup>th</sup> May 2024. The plaintiff avers that the interim orders obtained pursuant to the 2<sup>nd</sup> to 10<sup>th</sup> defendants' application were obtained through misrepresentation and non-disclosure of material facts. In that, to begin with the said defendants failed to disclose to the Court that there are other pending suits seeking more or less similar orders. For instance, HCCC No. E098 of 2024 (which was transferred to the Commercial Division and assigned HCCOMM No. E300 of 2024) and HCCC No. E099 of 2024 (which eventually transferred to the Commercial Division and assigned HCCOMM No. E293 OF 2024) wherein similar applications both dated 6<sup>th</sup> May 2024 were filed in the said suits. However, the Court declined to grant ex-parte interim orders therein. According to the plaintiff, it is thereafter that the said defendants filed the application dated 14<sup>th</sup> May 2024 with the aim of forum shopping. Furthermore, that the 2<sup>nd</sup> to 10<sup>th</sup> defendants failed to disclose the foregoing in a bid to gain undue advantage and deceive this Court.
19. Besides, the plaintiff argues that it is clear that the AGM the 2<sup>nd</sup> to 10<sup>th</sup> defendants' application speaks to was issued by the CEO on 17<sup>th</sup> April 2024 as evinced in the notice thereof annexed to the defendants' application. Likewise, that it is evident from the said notice that the AGM was in respect of ASA as opposed to the plaintiff as alleged by the 2<sup>nd</sup> to 10<sup>th</sup> defendants. The plaintiff avers that the suspension of the defendants from ASA was not only provisional but also in line with the Regulations of ASA; the defendants were invited to show cause or provide written statements as to why adverse findings should not be made against them with regard to the allegations of misconduct but the said defendants are yet the submit the same; there are laid out procedures concerning disciplinary action against members of ASA, which the defendants have circumvented by filing numerous suits and applications; and the suspension of the defendants does not pose danger to any patients as the hospital is adequately staffed with professionals.



**Plaintiffs' Application dated 16<sup>th</sup> May 2024:**

20. The plaintiff's application dated 16<sup>th</sup> May 2024 which is premised on sections 1A, 1B and 3B of the Civil Procedure Act, and order 51 of the Civil Procedure Rules seeks:
- i. That this Honourable Court be pleased to vacate and set aside ex parte interim orders issued on 16<sup>th</sup> May 2024 pending the hearing and determination of the suit.
  - ii. That this Honourable Court be pleased to strike out the 2<sup>nd</sup> to 10<sup>th</sup> defendants; application dated 14<sup>th</sup> May 2024 in its entirety.
  - iii. That costs of this application be provided for."

The plaintiff's application is based on same grounds advanced in opposition to the 2<sup>nd</sup> to 10<sup>th</sup> defendants application dated 14<sup>th</sup> May 2024.

21. Opposing the application, the 2<sup>nd</sup> to 10<sup>th</sup> defendants rely on grounds of opposition dated 25<sup>th</sup> September 2024. The gist of the grounds of opposition is that there is nothing to substantiate the issues raised therein which are at best speculative and full of conjecture; the interested party has not challenged his removal as the Chairperson of MAC and the plaintiff cannot challenge the same on his behalf; and therefore, the application is an abuse of the court process and should be dismissed.

**(b) HCCOMM No. E236 OF 2024: 1<sup>st</sup> Defendant's Application dated 7<sup>th</sup> May 2024:**

22. The 1<sup>st</sup> defendant's Notice of Motion dated 7<sup>th</sup> May 2024 seeks the following orders:
- i. That pending the hearing and determination of the of this petition, a conservatory order be and is hereby issued staying the suspension of the 1<sup>st</sup> defendant as communicated vide letter dated 19<sup>th</sup> April 2024.
  - ii. That the costs of this application be borne by the respondents (plaintiff).
23. In support of this application, the 1<sup>st</sup> defendant relies on his affidavit sworn on even date which is to the effect that the defendants were completely locked out from accessing their patients in the hospital, some of who were in need of urgent medical attention; and that in turn, the lives of such patients were endangered contrary to their right to highest attainable standard health care under Article 43 of the Constitution; the plaintiff's CEO's conduct was in total breach of his authority as he is bereft of any authority to suspend the defendants as he purported to do so; and unless the orders sought are granted the 1<sup>st</sup> defendant's rights will be trampled on at the whim of the plaintiff and its CEO.
24. On 13<sup>th</sup> May 2024, L. N. Mugambi, J. certified the above application as urgent and issued inter alia ex-parte orders in the following terms:
- i. That pending the hearing and determination of this application, a conservatory order be and is hereby issued staying the suspension of the 1<sup>st</sup> defendant as communicated vide letters dated 29<sup>th</sup> April 2024.
25. In response, the plaintiff relies on a replying affidavit sworn by its CEO on 29<sup>th</sup> May 2024. In opposing the above application, the plaintiff reiterates the grounds it relied on in opposing the 2<sup>nd</sup> to 10<sup>th</sup> defendants' application dated 4<sup>th</sup> May 2024 filed in HCCOMM No. E233 of 2024.



### **Plaintiff's Application dated 15<sup>th</sup> May 2024:**

26. By a Notice of Motion dated 15<sup>th</sup> May 2024 anchored on rule 23(1) and 25 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, order 51 of the Civil Procedure Rules and sections 1A, 1B and 3B of the *Civil Procedure Act*, the plaintiff has urged the Court to grant the following orders:
- i. That this Honourable Court be pleased to vacate and set aside the ex-parte interim conservatory orders issued on 13<sup>th</sup> May 2024 pending the hearing and determination of the petition.
  - ii. That this Honourable Court be pleased to strike out the petition in its entirety with costs.
27. In support of the application, the plaintiff relies on an affidavit sworn by its CEO on even date. Likewise, the affidavit echoes the grounds advanced by the plaintiff in opposing the 2<sup>nd</sup> to 10<sup>th</sup> defendants' application dated 4<sup>th</sup> May 2024 filed in HCCOMM No. E233 of 2024.
28. The 1<sup>st</sup> defendant on his part, by his replying affidavit sworn on 24<sup>th</sup> May 2024, opposes this application. The 1<sup>st</sup> defendant avers that the plaintiff by a letter dated 17<sup>th</sup> May 2024, upon failing to obtain ex-parte orders sought in its application, proceeded to lift the suspension and restored all his rights as a member of ASA. Therefore, in his view, the letter of 17<sup>th</sup> May 2024 had the effect of discharging the suspension; and that the orders sought would serve no useful purpose as it would amount to blowing hot and cold on the part of the plaintiff. According to the 1<sup>st</sup> defendant, the application and the suit herein is not sub-judice as they raise issues which have not been raised in the other suits, to wit, the breach of his constitutional rights. In any event he contends he withdrew HCCC No. E098 of 2024 (currently HCCOMM No. E300 of 2024); he is not a party to HCJR No. E103 of 2024 (currently HCOMM No. 293 of 2024); that he has only learnt of the existence of HCCHR Petition No. 219 of 2024 in this matter and that he never authorised to be included in the said suit. He urges the Court to dismiss the plaintiff's application.

### **(c) HCCOMM No. E293 of 2024: The 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup> & 10<sup>th</sup> Defendants' application dated 6<sup>th</sup> May 2024:**

29. The 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup> and 10<sup>th</sup> defendants' Notice of Motion dated 6<sup>th</sup> May 2024 is premised on articles 2(1) and (2), 22, 23, 27, 28, 35, 47(1)(2) and 159 of *the Constitution*, orders 51, 40 rules 2,3, and 8 of the Civil Procedure Rules and sections 3A and 63(c) and (e) of the *Civil Procedure Act*. It seeks the following terms:
- i. Spent
  - ii. Pending the inter partes hearing and determination of this suit, a conservatory order do issue staying the implementation of the letters dated 29<sup>th</sup> April 2024 issued by the plaintiff's CEO to suspend the 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup> and 10<sup>th</sup> defendants, their associates, assistants and nurses from ASA.
  - iii. Pending the inter partes hearing and determination of this suit, conservatory orders do issue against the plaintiff from interfering with, harassing the 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup> and 10<sup>th</sup> defendants, their associates, assistants and nurses in any manner whatsoever. (sic)
  - iv. Pending the inter partes hearing and determination of this suit, an order does issue directing the plaintiff to provide all the information, documents and criteria used by the plaintiff in arriving at decision in the letters dated 29<sup>th</sup> April 2024.
  - v. Any other relief as this Honourable Court may deem fit to grant.



- vi. Costs be provided for.
30. The application is supported by an affidavit sworn by the 4<sup>th</sup> defendant on even date. It's the 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup> and 10<sup>th</sup> defendants' position that the suspension barred them from attending to their patients in the said hospital, which in turn has led the said defendants to lose clients; and that the suspension violated Article 47 of *the Constitution*.
31. In opposing the application, the plaintiff relies on a replying affidavit sworn by its CEO on 19<sup>th</sup> June 2024. The plaintiff contends that the application is misplaced and frivolous as it seeks orders that are final in nature which cannot issue at an interlocutory stage; the matters raised in the application constitutes the plaintiff's internal disputes hence by dint of principle of exhaustion the same cannot be subject of the determination of the Court; that on account of multiplicity of suits, the said defendants are guilty of forum shopping; on account of the defendants conduct they were provisionally suspended pending substantive disciplinary action in line with the Regulation of ASA; and that the disciplinary action against the defendants is still pending.

**(d) HCCOMM No. E300 of 2024: 2<sup>nd</sup> Defendant's Application dated 6<sup>th</sup> May 2024:**

32. The 2<sup>nd</sup> Defendant's Notice of Motion dated 6<sup>th</sup> May 2024 mirrors the 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup> and 10<sup>th</sup> defendants' application of even date filed in HCCOMM No. E293 of 2024. Likewise, the affidavit in support thereof, sworn by the 1<sup>st</sup> defendant reiterates the same grounds.
33. In turn, the plaintiff has filed a replying affidavit and further affidavit sworn by its CEO on 13<sup>th</sup> May 2024 and 20<sup>th</sup> May 2024, respectively. The long and short of the plaintiff's response is that it reiterates the grounds in opposition to the 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup> and 10<sup>th</sup> application set out above. Additionally, the plaintiff argues that the application is spent since all orders therein have been overtaken by events; in the alternative, the orders cannot issue on account of subsisting orders issued in related suits; and that the application offends the doctrine of sub-judice.

**Analysis and determination**

34. Before delving into the merits of the aforementioned applications, it is crucial for this Court to once again address the conduct of the parties in filing these applications, many of which bear striking similarities, across different suits and divisions of the High Court. This fragmented and duplicative approach has not only added unnecessary complexity to the issues before the Court but has also strained the prudent use of limited judicial resources. I urge the parties and their advocates to henceforth act in a manner that facilitates, rather than impedes, the expeditious and efficient resolution of disputes, as mandated by Article 159 of *the Constitution* and section 1A (3) of the *Civil Procedure Act*.
35. I turn now to the applications, which I have carefully considered together with the responses, authorities and submissions. Broadly speaking, the applications can be categorized into two. Majority seek temporary injunctive and/or conservatory orders pending the hearing and determination of the four suits in issue and the others seek the review and/or setting aside of the ex-parte interim orders.
36. It is well established that any party approaching a court to seek ex-parte interim orders bears a duty of full and frank disclosure of all material facts. This duty is crucial for ensuring that the court makes an informed and balanced decision in the absence of the opposing party. As observed by Onguto, J.



in Republic V Kenya Medical Training College & Another Ex-Parte Kenya Universities and Colleges Central Placement Service [2015] eKLR:

“... I must state and emphasize the high duty of candour fixed upon any applicant to court, appearing ex parte. A party appearing before the court without notice to the other (ex parte) must exhibit a high quality and degree of sincerity and honesty. He must be guileless. He must be frank. He must be open. He must keep nothing that touches on the matter away from the court. He must act in utmost good faith. If he does not so act, he does so at his own risk.” [Emphasis added]

37. Equally, it is well settled that a party seeking interim injunctive orders must satisfy the three-tier test set out in the landmark case of *Giella V Cassman Brown*. Specifically, the applicant must demonstrate:

- i. a prima facie case with a probability of success;
- ii. that irreparable harm, not compensable by damages, would occur if the injunction is not granted; and
- iii. that the balance of convenience tilts in their favor.

38. Similarly, the purpose of an interim conservatory order is to maintain the status quo and preserve the subject matter of the dispute pending determination of the suit. This was noted in *Invesco Assurance Co Ltd V MW (Minor suing thro' next friend & mother (HW))*, [2016] eKLR. An applicant seeking an interim conservatory order is required to demonstrate:

- i. a prima facie case with a likelihood of success;
- ii. that failure to grant the order would render the suit nugatory; and
- iii. that granting the order would serve the public interest.

39. Applying the foregoing principles to the applications herein, I find that the four suits before me raise a prima facie case. However, as to whether the failure to grant the interim orders sought would render the suits nugatory or prejudice the parties, I take guidance from this Court’s pronouncement in *Damour Florian Emmeric V Director of Immigration Services*, [2022] KEHC 1556 (KLR) as follows:

“The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defence without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-à-vis the case of either parties.”

40. I am also mindful of the fundamental principle that courts should not interfere with the internal management of companies acting within their powers. As this court observed in the *Seruji Limited Case*:

“... the jurisdiction of the court to interfere in internal affairs of a company are limited. This is for good reason. Companies are legal persons that are operated using their constitutive documents.”

41. In light of the foregoing, I find that any interim orders issued in this case must avoid curtailing the plaintiff and its management organs from conducting their affairs in accordance with their constitutive documents and the law. What is more, the said orders should ensure that there is equality of arms



between the parties as they prosecute their respective cases. It is common ground that the effect of the ex-parte interim orders that are in place currently is that firstly, the resolution passed in the impugned SGM has not been effected and the defendants have not taken up positions in MAC by virtue of the said SGM. Secondly, the defendants' suspension from ASA, as communicated via letters dated 29<sup>th</sup> April 2024, has been halted, thereby granting the defendants access to the hospital.

42. In making the final orders, I have also considered the broader implications of this court's decisions. Interim orders that pre-emptively determine contentious issues or conclusively affect the rights of the parties must be avoided as this risk undermining the core objective of the substantive hearing. I have equally considered the public interest in ensuring that the governance and management of the plaintiff, which provides services to the public, remains stable and functional pending the resolution of disputes.

### **Disposition**

43. Accordingly, I hereby issue the following orders:
- i. An interim injunction is issued restraining the defendants from taking up office as members of MAC on the basis of the impugned SGM pending the hearing and determination of the four suits in issue.
  - ii. A temporary conservatory order restoring the status quo ante is issued reinstating the interested party as the Chairperson of MAC, pending the hearing and determination of the four suits.
  - iii. A temporary conservatory order is hereby issued staying the suspension of the defendants from ASA or from accessing the hospital on the basis of the suspension letters dated 29<sup>th</sup> April 2024 pending the hearing and determination of the four suits in issue.
44. Considering the outcome of the applications and the nature of the dispute, I direct each party to bear its own costs for the same. Leave is granted to any party desirous of appealing from this ruling. Certified copies of proceedings and the Ruling shall be availed upon payment of requisite fees. As earlier stated, it is imperative that the matter now proceeds to substantive hearing so as to allow the Court to deal with the dispute to finality at the earliest opportunity.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 13<sup>TH</sup> DAY OF DECEMBER 2024.**

**F. MUGAMBI**

**JUDGE**

