



REPUBLIC OF KENYA



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**Kenya Hospital Association Ltd v Rono & 9 others; Kambuni
(Interested Party) (Civil Suit E233 & E015 of 2024 (Consolidated))
[2024] KEHC 15845 (KLR) (Commercial and Tax) (13 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15845 (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
(FORMERLY HCCHR PETITION NO. E236 OF 2024)**

BETWEEN

KENYA HOSPITAL ASSOCIATION LTD PLAINTIFF

AND

DR. EDWIN KIPNG'ENO RONO 1ST DEFENDANT

DR. AGNES GACHOKI 2ND DEFENDANT

DR. FRANK MWONGERA 3RD DEFENDANT

DR. LUKA MUSAU 4TH DEFENDANT

DR. BYAKIKA TIMOTHY 5TH DEFENDANT

DR. JD PATEL 6TH DEFENDANT

DR. SAMUEL OWINGA 7TH DEFENDANT

DR. PATRICK OLANG 8TH DEFENDANT

DR. KEVIN ARUNGA 9TH DEFENDANT

DR. DAVID OTIENO 10TH 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 (hereinafter the hospital). The defendants are all 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 hospital's Board of Management. Additionally, the Chairperson and Vice Chairperson of MAC are nominated as members of the said 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 a Special General Meeting (SGM) to be held on 25th 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), who also acts as the Secretary of both ASA and MAC on 8th April 2024. The CEO vide a letter dated 24th April 2024 indicated that the requisition of the SGM did not comply with the Regulations of ASA and as such, could not take place.
3. Be that as it may, the SGM took place on 25th April 2024 resulting in the appointment of the 1st and 2nd defendants as the interim Chairperson and Vice Chairperson of MAC. The interested party was recalled as Chairperson of MAC. This outcome of the SGM was later communicated to the plaintiff's CEO and the Board of Management.
4. Subsequently, the plaintiff's CEO vide an internal memo dated 29th 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.
5. It is the aforementioned set of circumstances that instigated a number of suits being filed at 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. Among the suits filed are HCCOMM No. E233 of 2024 filed at the instance of the plaintiff; HCCOMM No. E015 of 2024 (formerly HCCHR Petition No. E236 of 2024) which was filed by the 1st defendant initially at the Civil Division of the High Court at Nairobi and thereafter transferred to the Commercial Division. Both suits were consolidated and HCCOMM No. E233 of 2024 designated as the lead file.

DIVISION - 2nd to 10th Defendants' Application:

6. The 2nd to 10th defendants' Notice of Motion dated 16th August 2024 is premised on sections 780 and 782 of the *Companies Act*, sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, and order 40 rules 2, 4 and 8, and order 51 rule 1 of the Civil Procedure Rules. The 2nd to 10th defendants seek inter alia:
 - vi. That this Honourable Court be pleased to issue an order of temporary injunction restraining the plaintiff, whether by themselves, agents, employees or any person whatsoever, from approving, signing or concluding the intended capital expenditure borrowing for and on



behalf of the plaintiff in the sum of Kshs. 4,208,623,000 or any part thereof or any other capital expenditure on any equipment purchase or acquisition and any spending on projects recently advertised until conclusion of the Extra Ordinary General Meeting of the plaintiff incepted and intended for the next few days, or until further orders of the Honourable Court. (sic)

- ix. That this Honourable Court be pleased to issue an order of temporary injunction restraining the plaintiff, whether by themselves, agents, employees or any person whatsoever, from the process of acquiring a new Health Management Information System (HMIS) and Enterprise Resource Planning (ERP) when there is an ongoing court process about another HMIS and ERP which contract was executed last year but was cancelled under unclear circumstances this year until conclusion of the Extra Ordinary General Meeting or until further orders of the Honourable Court.
 - x. That this Honourable Court be pleased to give such further orders and/or directions that it deems necessary, equitable, fair and just in the circumstances of the case.
 - xi. That the costs of this application be provided for.
7. The application is supported by an affidavit sworn by the 2nd defendant on 16th August 2024, and the 2nd to 10th defendants' written submissions dated 21st November 2024. The tenor of the 2nd to 10th defendants' application is that the plaintiff's Board of Directors have acted and continue to act oppressively and prejudicially to the interests of the plaintiff's members and their actions are nearly grounding the hospital to a halt. Consequently, the members of the plaintiff have been constrained to exercise their rights under section 277 of the *Companies Act* by requisitioning for the convening of an Extra Ordinary Meeting of the plaintiff with the sole agenda of recalling/disbanding the entire Board of Directors and replacing them with a competent Board of Directors. The requisition was served upon the Board of Directors on 2nd August 2024 hence under section 278 of the *Companies Act*, the 2nd to 10th defendants contend, the said directors were required to convene the Extra Ordinary Meeting within 21 days.
8. The 2nd to 10th defendants urged that despite the foregoing, the Board is in the process of committing the plaintiff and its assets to a syndicated loan of Kshs. 4,208,624,000/=, which it has no capacity to repay. They contend that obtaining the said loan will drive the plaintiff to insolvency and the directors' insistence to commit the hospital to the said loan is in bad faith. They are also apprehensive that the plaintiff's fixed deposit accounts and provident fund may be misappropriated as a result of the Board's mismanagement. The 2nd to 10th defendants argue that they have met the requisite threshold to warrant the issuance of the injunctive orders sought as set out in the *Giella V Cassman Brown*, [1973] EA 358.
9. On 19th August 2024 this Court certified the 2nd to 10th defendants' application as urgent and issued the following ex-parte interim orders:

“ ...

- ii. That pending the inter partes hearing of this application a temporary injunction is issued prohibiting the 1st respondent (plaintiff), whether by themselves, agents, employees or any person whosever, from approving, signing, or concluding the intended capital expenditure borrowing for and on behalf of the plaintiff in the sum of Kshs. 4,208,623,000 or any part thereof or payment of any project's capital expenditure.
- iii. That pending the hearing and determination of this application a temporary injunction is issued prohibiting the plaintiff, whether by themselves, agents,



employees or any person whosever, from approving, signing, or concluding the intended capital expenditure borrowing for and on behalf of the plaintiff in the sum of Kshs. 4,208,623,000 or any part thereof or payment of any project's capital expenditure.

- iv. That pending the inter partes hearing of this application a temporary injunction is issued restraining the plaintiff, whether by themselves, agents, employees or any person whosever, from appropriating funds out of the fixed deposit accounts and the provident funds of the plaintiff or any part thereof.
- v. That pending the hearing and determination of this application a temporary injunction is issued restraining the plaintiff, whether by themselves, agents, employees or any person whosever, from appropriating funds out of the fixed deposit accounts and the provident funds of the plaintiff or any part thereof.
- ...
- vii. That pending the inter partes hearing of this application a temporary injunction is issued restraining the plaintiff, whether by themselves, agents, employees or any person whosever, from appropriating funds out of the fixed deposit accounts and the provident funds of the plaintiff or any part thereof, until conclusion of the Extra Ordinary General Meeting or until further orders of this Honourable Court.
- viii. That pending the hearing and determination of this application a temporary injunction is issued restraining the plaintiff, whether by themselves, agents, employees or any person whosever, from appropriating funds out of the fixed deposit accounts and the provident funds of the plaintiff or any part thereof, until conclusion of the Extra Ordinary General Meeting or until further orders of this Honourable Court.”

- 10. In opposition to the application, the plaintiff filed a notice of preliminary objection dated 19th August 2024, a replying affidavit sworn by Gilbert Nyamweya, the plaintiff's company secretary, on 6th September 2024 as well as written submissions dated 25th September 2024.
- 11. The totality of the plaintiff's case is that the 2nd to 10th defendants' application is incurably defective and incompetent for want or form. In particular, that the said application is not anchored on any final orders sought in the consolidated suit contrary to order 40 rule 2 of the Civil Procedure Rules. Towards that end, it was the plaintiff's submissions that firstly, the consolidated suit at hand concerns the leadership of MAC, the validity of the SGM held on 25th April, 2024, and purported appointment of the defendants into MAC. The consolidated suit neither pertains to the plaintiff's Board of Management nor the conduct of the affairs of the hospital as purported by the 2nd to 10th defendants' application.
- 12. Secondly, that the application introduces a new and inconsistent cause of action which can only be subject of a fresh action; and thirdly, that the application is a camouflaged derivative action hence incompetent for want of leave of the court. Further, that this court lacks jurisdiction to interfere with the internal affairs of the plaintiff in the manner contemplated by the application; and that the application seeks orders for and against third parties who are not party to the suit in violation to their right to fair hearing under Article 50 of *the Constitution*.



13. In any event, the plaintiff asserts that the purported requisition for the Extra Ordinary Meeting which was the basis of the 2nd to the 10th defendants' application, is impugned. This is because the plaintiff contends that some members of the plaintiff have expressed concern over inclusion of their names and signatures in the said requisition without their consent. Besides, the plaintiff submits that there are interim orders in force barring the publication of the requisition of the Extra Ordinary Meeting issued on 16th August 2024 in Milimani Commercial Magistrates' Court in MCCC No. E4166 OF 2024.
14. According to the plaintiff, the orders sought by the 2nd to 10th defendants are intended to interfere with the valid actions of the plaintiff's directors pursuant to its Articles of Association. The said orders will also affect the hospital's ability to provide quality healthcare services as the equipment sought to be acquired is necessary for the efficient running of the hospital. Besides, the plaintiff claims that the said defendants have not demonstrated that the actions in issue have been undertaken to prejudice the hospital in any way or that the plaintiff will be unable to meet its loan obligations under any financing agreement/arrangement.
15. The deponent contends that the plaintiff is a going concern whose accounts are audited annually by internal and external auditors including the Kenya Revenue Authority. Contrary to the 2nd to 10th defendants' assertions, the audit reports do not reveal any misappropriation and in fact, establishes the plaintiff's financial position is healthy. Furthermore, it is the plaintiff's position that the injunctive orders prohibiting it from accessing funds in its fixed deposit accounts and provident funds would cripple the hospital's ability to pay salaries and meet its contractual obligations. It is asserted that the interim ex-parte orders have exposed the plaintiff to liability due to failure to meet its contractual obligations. All in all, the plaintiff claims that the 2nd to 10th defendants' application is an attempt to misuse this Court to foment chaos in the running of the hospital.
16. With respect to the preliminary objection raised by the plaintiff, the 2nd to 10th defendants contend that the same is not a proper preliminary objection as it raises issues of fact as opposed to issues of law. Moreover, that the preliminary objection, as it stands, even if it were to be successful it will not dispose of the main suit. Accordingly, the 2nd to 10th defendants submit that the preliminary objection lacks merit and should be dismissed.

Plaintiff's Application:

17. Equally, the plaintiff filed the Notice of Motion dated 21st August 2024 seeking inter alia, review and/or setting aside of the aforementioned ex-parte interim orders issued on 19th August 2024.
18. The plaintiff's application is supported by affidavits sworn by Gilbert Nyamweya, the plaintiff's company secretary, on 21st August 2024 and 23rd September 2024 as well as the plaintiff's written submissions dated 25th September 2024. The application is anchored on more or less similar grounds raised in opposition to the 2nd to 10th defendants' application dated 16th August 2024.
19. The plaintiff additionally contends that the ex-parte interim orders are debilitating to the process of equipping the hospital with the necessary equipment which will ensure effective health care services; and that the said orders will expose the plaintiff to potential liability that may arise from failure to meet its contractual obligations. In laying emphasis, the plaintiff asserts that its current capital project commitments stand at Kshs. 978,114,925.26. Indeed, it was deposed that the said interim orders have exposed the plaintiff to potential contempt in HCOMM No. E033 of 2024 for failing to comply with consent order issued therein on 14th February 2024 which required it to deposit a specified amount in a joint interest earning account.



20. The plaintiff avers that the monies in the fixed deposit accounts is derived from operating revenue which is invested on a short-term basis of between 7 days to 6 months, and liquidated from time to time to fund the day-to-day operations of the hospital. Therefore, without access to the same that the affairs of the hospital will come to a grinding halt.
21. Besides, the plaintiff argues that the interim orders were obtained through misrepresentation and non-disclosure of material facts by the 2nd to the 10th defendants. In that regard, it's the plaintiff's contention that the said defendants failed to inform this court that firstly, the Board of Management in a meeting held on 26th June 2024, in exercise of its powers under the plaintiff's Articles of Association, resolved that the plaintiff pursues offshore financing options to finance CAPEX budget up to USD 40,000,000. That as such the plaintiff has since entered into a contract dated 29th July 2024 with Symbiafric Limited to source for funding for the capital expenditure. Secondly, that there is no impending Extra Ordinary General meeting in sight due to the interim orders in MCCC No. E4166 of 2024.
22. In any event, that issues touching on the propriety of the requisition for removal of the plaintiff's directors is subject of HCOMM No. E544 of 2024 and that the said Extra Ordinary General Meeting has been overtaken by event as a result of the interim orders issued on 12th September 2024 in the said suit. In the plaintiff's view the balance of convenience tilts in setting aside the interim orders issued on 19th August 2024.
23. In opposing the plaintiff's application, the 2nd to 10th defendants filed a replying affidavit sworn by the 2nd defendant on 16th September 2024, and written submissions dated 21st November 2024. The said defendants echoed the grounds they advanced in support of their application dated 16th August, 2024.

Analysis and determination

24. I have carefully considered the applications, responses, and submissions by the parties. Beginning with the propriety of the plaintiff's preliminary objection dated 19th August 2024, I take cognisance of the locus classicus case of Mukisa Biscuit Manufacturing Co Ltd V West End Distributors, [1969] EA 696, wherein the nature of a preliminary objection was aptly set as follows:

“...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit ... [A] preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion ...”
25. Based on the foregoing criteria as to what constitutes a preliminary objection, I note that the plaintiff's preliminary objection raises issues of fact, some of which are disputed, as opposed to pure points of law. Moreover, the preliminary objection, as the 2nd to 10th defendants put it, and correctly so, cannot dispose the consolidated suit herein. Consequently, I dismiss the said preliminary objection.
26. Be that as it may, it is clear from my perusal of the consolidated suit that the cause of action in HCCOMM No. E233 of 2024, which was filed by the plaintiff, relates to the impugned SGM of ASA that took place on 25th April 2024, and the resolution passed therein appointing members of MAC. Likewise, the cause of action in HCCOMM No. E015 of 2024 (formely HCCHR Petition No. E236 of 2024) filed by the 1st defendant is anchored on the same SGM and the subsequent suspension of the defendants due to convening and participating in the same. All in all, the consolidated suit revolves



around the question of the composition and leadership of MAC as well as suspension of the defendants herein from ASA.

27. The 2nd to 10th defendants' application dated 16th August 2024 is anchored on a requisition for an Extra Ordinary General Meeting of the plaintiff made on 2nd August 2024 with intention of recalling the plaintiff's Board of Directors. The basis of the said requisition as set out in the defendants' application is on account of the current Board of Directors' alleged mismanagement of the plaintiff and its assets. The plaintiff's Board of Directors is a distinct body from ASA and MAC. Furthermore, it is not in dispute that the alleged mismanagement of the plaintiff's assets by the Board of Directors as well as their removal from office is not subject of the consolidated suit before me. It follows therefore that the application dated 16th August 2024 raises issues that are tangential to the cause of action and substratum of the consolidated suit. In the circumstances, can the orders sought by the 2nd to 10th defendants be issued?
28. I do not think so. This is because this would entail the Court delving into a cause of action that is neither before it nor anchored on the consolidated suit. To that extent, Lord Diplock in the case of *Siskena*, 1977 3 All ER at page 824 succinctly in his own words stated that: "A right to obtain an interlocutory injunction is not a cause of action, it cannot stand on its own. ..."
29. In any event, having perused HCCOMM No. E544 of 2024 which was filed at the instance of the plaintiff, I note that the requisition for Extra Ordinary General Meeting served on the plaintiff's Board of Directors on 2nd August 2024 is the subject of that suit wherein the same is challenged. Equally, I note that this court, (Mulwa, J.) pursuant to a Notice of Motion dated 12th September 2024 filed therein issued interim orders restraining the defendants therein from holding an Extra Ordinary Meeting of the plaintiff which was scheduled for 18th September 2024, and whose agenda included the removal of the plaintiff's Board of Directors.
30. Therefore, I find that the issues and orders sought in the 2nd to 10th defendants' application dated 16th August 2024 are better placed to be handled or raised in HCCOMM No. E544 of 2024. Accordingly, I decline to issue any orders sought in the said application and I hereby lift the ex-parte interim orders issued on 19th August 2024. I equally note that the 2nd to 10th defendants filed an application dated 22nd October 2024 seeking to have the plaintiff cited for contempt. The application is opposed. Having pronounced myself as above, it is not necessary to consider the application for contempt of court.

Disposition

31. The upshot of the foregoing is that the 2nd to 10th defendants' application dated August 16, 2024 is dismissed. The plaintiff's application dated August 21, 2024 is allowed. However, considering the outcome of the two applications disposed herein and the nature of the dispute, I direct each party to bear its own costs for the same.
32. In the intervening period, leave to appeal is granted to any party desirous of such. A certified copy of this ruling and proceedings should be availed upon payment of requisite fee.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 13TH DAY OF DECEMBER 2024.

F. MUGAMBI

JUDGE

