



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. E003 OF 2021

**COLLINS AJWANG (Suing as the Chairman – NATIONAL NURSES ASSOCIATIO
OF KENYA – KISUMU BRANCH.....1ST PLAINTIFF/APPLICANT**

**EMILY ACHIENG OGWANG (Suing as the Branch Treasurer – NATIONAL NURSES
ASSOCIATION OF KENYA – KISUMU BRANCH.....2ND PLAINTIFF/APPLICANT**

VERSUS

**ALFRED OBUYA OBENGO (Sued as the Chairman –
NATIONAL NURSES ASSOCIATION OF KENYA).....1ST DEFENDANT**

**JACINTA MOKI (Sued as the National Treasurer – NATIONAL NURSES
ASSOCIATION OF KENYA).....2ND DEFENDANT**

**STEVEN NJOROGE NGANGA (Sued as the National Secretary – NATIONAL NURSES
ASSOCIATION OF KENYA).....3RD DEFENDANT**

**JOSEPH MIRERE (Sued as the Chairman of the
Professional Conduct & Discipline Committee – NATIONAL NURSES
ASSOCIATION OF KENYA).....4TH DEFENDANT**

**NATIONAL NURSES ASSOCIATION OF KENYA
(Sued through its Chairman, Treasurer as its officials).....5TH DEFENDANT**

RULING

By an application dated 10th March 2021, the Plaintiffs have asked the Court to stop the Defendants from setting up a Team of Interim Officials for the Kisumu Branch of the NATIONAL NURSES ASSOCIATION OF KENYA (NNAK).

1. Secondly, the Plaintiffs asked the Court to stay the implementation of the report dated 15th December 2020, which was from the Professional Conduct and Disciplinary Committee.
2. Thirdly, the Plaintiffs asked the Court to maintain the Status Quo of the Kisumu Branch Officials of NNAK, as office bearers, until the main suit was heard and determined.
3. The 1st Plaintiff asserted that the 1st Defendant, who is the National Chairman of NNAK was doing everything possible to edge him out from the position of Chairman of the Kisumu Branch.

4. It was the case of the Plaintiffs that the actions being taken by the Defendants had been cunningly orchestrated by the 1st Defendant, so that the 1st Plaintiff would not be eligible to contest for the position of National Chairman of **NNAK**, during the elections which were scheduled to run between August and October 2021.
5. One of the steps that the Plaintiffs complained about was the disciplinary process against the 1st Plaintiff. The Plaintiffs pointed out that, whilst **NNAK**'s Constitution, as read with the Association's **Code of Conduct and Ethics** provides that the National Executive Council (**NEC**) could only suspend a member pursuant to a recommendation from the Branch leadership, the **NEC** had purported to take action against the 1st Plaintiff, in the absence of any recommendation from the leadership of the Kisumu Branch.
6. In answer to the application, the 1st, 2nd and 3rd Defendants pointed out that there had been ongoing investigations against the 1st Plaintiff, over allegations of bringing the Association into disrepute, and also for financial misappropriation.
7. Based on the Plaintiffs' case, I find that it is common ground that the said investigations were ongoing.
8. But the Plaintiffs denied being the authors of the letter which allegedly brought the Association into disrepute.
9. The Plaintiffs also denied the allegations levelled against them, on the grounds of financial misappropriation.
10. In effect, there are 2 sides to the assertions.
11. In relation to the letter which had brought the Association into disrepute, there was a report made to the police, and it does appear that the Directorate of Criminal Investigations was undertaking investigations into the alleged forgery of the 1st Plaintiff's signature.
12. One thing is clear, that there were ongoing investigations being undertaken by the relevant authorities.
13. The alleged financial misappropriation was the subject of audit inquiries, whilst the letter was being investigated by the Director of Criminal Investigations.
14. The Plaintiffs conceded that the Audit Report by the Association's Auditors, Messrs **OCHIENG-ONYANGO ASSOCIATES**, showed that the Kisumu Branch owed Kshs 264,445.50, to the National Office.
15. However, the Plaintiffs explained that the debt arose due to the failure by the Counties to deduct and to remit money through the check-off system.
16. Nonetheless, the Plaintiffs were quick to point out that that particular audit query had been resolved.
17. On the other hand, the Defendants' position was that the Plaintiffs were invited by the Disciplinary Committee to answer to the audit query.
18. Notwithstanding the invitation, the Plaintiffs are said to have failed to attend the meetings which had been called for by Disciplinary Committee.
19. But the Plaintiffs insist that they were never given a hearing before that Committee.
20. On the strength of the documents provided to the Court, I find, on a prima facie basis, that it is the Plaintiffs who failed to attend the meeting called by the Disciplinary Committee.
21. The right to a fair hearing does not mean that regardless of the circumstances, each person who is facing disciplinary issues, must literally be heard.
22. In my considered view, if it was mandatory that every such person be heard before it is deemed that he had been accorded a fair hearing, such requirement could play into the hands of the persons who were reluctant to face up to inquiries about their conduct, as the said persons could simply fail to attend the meetings.
23. It is enough that the Disciplinary Committee gave sufficient notice to the Plaintiffs; as by so doing, the Committee was providing an opportunity to the said Plaintiffs to present their respective cases for due consideration.
24. When the application came up before the Court on 21st April 2021, the Court directed that the status quo prevailing be maintained.
25. The parties were unable to agree on exactly what the said status quo was.
26. The Plaintiffs have submitted that the maintenance of the status quo meant that they remained the officials of **NNAK**- Kisumu Branch.
27. However, the Defendants pointed out that from December 2020, there were already new officials in place, albeit in acting capacities.

28. Based on the Report dated 15th December 2020, from the **NNAK** Professional Conduct and Disciplinary Committee, it does appear that on that date, the Committee recommended, inter alia, that the Plaintiffs should step aside from their positions.
29. The Disciplinary Committee noted that a detailed forensic audit would be carried out after the Plaintiffs had stepped aside.
30. The Committee further recommended that after the audit, any official who would be found culpable of embezzlement of members money, would be further investigated by the relevant government agencies, for purposes of prosecution.
31. The Court noted that on 25th January 2021, the National Executive Council held a meeting. One of the resolutions of the **NEC** was the suspension of Collins Ajwang from the “*branch executive leadership*.”
32. Pursuant to the provisions of **Article 5 VII** of the **NNAK Constitution**, the National Executive Council may suspend any person from membership if it is of the opinion that such a person behaved in a manner contrary to the interests and/or objectives of the Association.
33. Therefore, on a prima facie basis, the **NEC** had the mandate to suspend the 1st Plaintiff.
34. I appreciate that the Plaintiffs have expressed the view that the 1st Plaintiff was removed from the virtual **NEC** Meeting of 25th January 2021.
35. In effect, I understand the Plaintiffs to be intent on proving that the **NEC** deliberately barred him from participating at the meeting which eventually suspended him.
36. But the Defendants deny any such action: they insist that the 1st Plaintiff was accorded every opportunity to participate at the meeting.
37. At this interlocutory stage, and based on the contradictory positions espoused by the parties, this Court is unable to make a finding on the question whether or not the **NEC** had afforded the 1st Plaintiff an opportunity to be heard.
38. Although the 1st Plaintiff asserted that the minutes of **NEC** meeting were falsified, the Court has no material upon which it could verify that assertion at the moment.
39. Indeed, if the 1st Plaintiff had been removed from the virtual meeting, as he has deponed in his affidavit, it would be interesting to know how he was then able to determine that the minutes provided to him, had been falsified.
40. I also find that the **NNAK** Constitution has provisions for the procedure to be utilized in resolving disputes between the Association and its members.
41. The Association appears to have taken steps to comply with the said constitutional provisions. However, the Plaintiffs opted to move to court.
42. On a prima facie basis, I find that when the Constitution of an association contains provisions for how disputes should be resolved, members are obliged to demonstrate compliance with such provisions.
43. In this case, the Plaintiffs want the Court to stay the implementation of the Disciplinary Committee Report dated 15th December 2020.
44. I find, on a prima facie basis, that the said Report had already been implemented, when the National Executive Council held its meeting on 25th January 2021.
45. In effect, by 21st April 2021, when the Court directed that the status quo prevailing should be maintained, that implied that the decision made by **NEC** on 25th January 2021, remained in place.
46. However flawed the decision by **NEC** might be shown to be, by the Plaintiffs, it would remain effective until such time as the Court were to quash it through an appropriate order made in a Judicial Review process.
47. The Plaintiffs have moved the Court by a *Plaint*, seeking declaratory reliefs. In my understanding, such reliefs cannot be a substitute to the laid down process which could have, in the first instance, led to the quashing of the decisions made by both the Disciplinary Committee and the National Executive Council.
48. I find that by seeking a stay of the implementation of the report of Disciplinary Committee, the Plaintiffs do acknowledge the existence of the report. First, I find that the **NEC** has already taken action based on the said report, thus implying that the Plaintiffs’ application had been overtaken by events.
49. Secondly, the decision of the Disciplinary Committee and the decision of the National Executive Council cannot be put on hold after they had already taken effect.
50. In any event, as the Plaintiffs have acknowledged, the elections of the National Nurses Association of Kenya (**NNAK**) were scheduled to

take place between August and October 2021. That implies that as at the date of the Ruling, the elections have already commenced. In the circumstances, I find that the balance of convenience would, in any event, not favour the grant of orders that would impose the Plaintiffs on the Association at a time when their term was drawing to a close by effluxion, (if it were assumed that they had still been in office; which is not the case).

51. That is even more so, when it is considered that the grant of the reliefs sought in the application would also be tantamount to granting the reliefs sought in the Plaint, I decline to grant the final prayers at this interlocutory stage of the proceedings.

52. In the result, the application dated 10th March 2021 is dismissed, with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF SEPTEMBER 2021

FRED A. OCHIENG

JUDGE