



Angwenyi v Nairobi Cosmopolitan Conference Limited & 3 others (Miscellaneous Application E095 of 2021) [2021] KEHC 115 (KLR) (Commercial and Tax) (8 October 2021) (Ruling)

Neutral citation: [2021] KEHC 115 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E095 OF 2021**

A MABEYA, J

OCTOBER 8, 2021

BETWEEN

EZEKIEL OSUGO ANGWENYI APPLICANT

AND

NAIROBI COSMOPOLITAN CONFERENCE LIMITED 1ST RESPONDENT

HUMPHREY MACHARIA NGUMA 2ND RESPONDENT

SAMUEL KIYUKA MASARA 3RD RESPONDENT

REGISTAR OF COMPANIES 4TH RESPONDENT

RULING

1. Before Court is an application dated 10/2/2021 brought under Order 51 Rule 1 & 3 of the *Civil Procedure Rules* 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Section 118 of the *Companies Act*.
2. The application sought inter alia injunctive orders against the 2nd, 3rd and 4th respondents restraining them and their servants, from interfering or altering the directorship of the 1st respondent company.
3. It also sought orders directing the 4th respondent to rectify the company records of the 1st respondent's company directorship and membership at the registry, and orders nullifying any acts executed by the 2nd, 3rd and 4th respondents on behalf of the 1st respondent.
4. The Summons was supported by the affidavit of Ezekiel Angwenyi sworn on 10/02/2021. His case was that the 1st respondent ("the Company") was registered by the Seventh Day Adventist Church in March, 2015, to which he was a member. That he was its director as well as member along with the 2nd and 3rd respondents. That he was also the appointed treasurer of the company.



5. He compiled an audit report dated 2/07/2020 after suspecting mismanagement of company funds. The report implicated the 2nd and 3rd respondent which cause a strain amongst the three. That the applicant realized through the company's e-citizen account that directorship and membership details had been altered. His name now reflected as a director only, as opposed to director/member whilst the 2nd and 3rd respondent were reflected as both director/member.
6. That the 2nd and 3rd respondents had forged documents for alleged resolutions of an AGM held on 22/09/2020 of which he had not been notified. That the 3rd respondent had also lodged a forged letter and affidavit alluding to the applicant's resignation from the company. That upon inquiry by the 4th respondent on whether the applicant was resigning from directorship, the applicant protested whereby the 4th respondent rescinded the applicant's removal as director. The 4th respondent therefore reinstated him as a director.
7. However, the 4th respondent added more directors who were allegedly appointed at the said AGM. It was the applicant's case that all acts done pursuant to the aforesaid forgery were illegal and void, and that the appointed directors posed a possibility of continued misappropriation of the company's funds.
8. The 1st, 2nd and 3rd respondent filed joint grounds of opposition dated 16/4/2021. They contended that the applicant had withheld material facts. That the applicant's removal was pursuant to sections 139 and 287 of the *Companies Act* and not on the alleged resignation letter. That the 4th respondent's power to make such changes had not been challenged, and the applicant had failed to enjoin the other directors hence could not obtain adverse orders against them. That granting of the orders sought without a hearing would be premature, and the applicant had not met the grounds for injunctive orders.
9. The 2nd and 3rd respondents filed a replying affidavit sworn by Humphrey Nguma Macharia. It was contended that the applicant was not a director of the company. That the audit of 2/07/2020 was requested for by the board of directors and did not implicate the 2nd and 3rd respondent as alleged. Allegations of forgery were denied and it was claimed that the applicant was removed from directorship pursuant to a board meeting of 7/01/2021 and a notice was duly served on the applicant. That the company lodged its application for the applicant's removal with the 4th respondent who effected the changes.
10. The 4th respondent filed his written submissions dated 24/06/2021 in which he made reference to his replying affidavit dated 4/05/2021. I have keenly gone through this court's "CTS" filing system as well as the court file in an attempt to trace this affidavit, but could not see the same. In this regard, any factual matters alluded to in the said submissions cannot hold.
11. Be that as it may, I have seen and considered all the pleadings, the evidence and submissions on record. This is an injunction application.
12. The preliminary issue raised by the 4th respondent is that under order 51 of the Civil Procedure Rules, the application ought to have been by way of a Notice of Motion and not Chamber Summons. That is a technical objection. Article 159 of the *Constitution of Kenya* discourages technical objections. No prejudice was suffered by any party by the application being a summons.
13. On the merit the applicant's case is based on the allegation that the 2nd and 3rd respondent illegally attempted to remove him from the directorship of the company. He annexed minutes of an AGM allegedly held on 22/09/2020 wherein he was removed as a director, and other persons appointed to directorship. He claimed that he was not notified of such a meeting. The respondents did not present any evidence of service of such notice.



14. In the absence of the Notice convening the alleged AGM, there is doubt as to whether there was any such AGM of 22/09/2020. It also follows that there is doubt on the authenticity of the minutes of the alleged AGM. Further, the AGM being doubtful, there is also doubt as to the subsequent removal of the applicant from the directorship and the attendant appointment of any new directors of the company.
15. The applicant also contended that there was a forged letter and affidavit alluding to his resignation. I have seen the said documents. I have also seen the signatures affixed on those documents as well as the signatures appearing in the applicant's pleadings before me. Even without the assistance of a handwriting expert witness, it is prima facie clear to the naked eye that the two signatures are not remotely similar.
16. The court is under a duty to satisfy itself on whether a writing was made by one party and not the other. Section 50 (1) of the Evidence Act Cap 80 provides that;

“When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is admissible”.
17. In *Simon Horner v Michael John Mwaura & 3 others*, when addressing an issue of forgery, the court referred to the case of *Davis vs Magistrates Ofedinburgh* 1953 SC 34, where the role of a handwriting expert was explained as;

“their duty is to furnish the judge ... with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge ... to form (his or her) own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the judge”.
18. In *Asira vs Republic* , the court stated: -

“The most an expert on handwriting can properly say is not that somebody definitely wrote a particular thing but that he does not believe a particular writing was by particular person or that the writings are so similar as to be undistinguishable.
19. In the present case, the applicant himself stated on oath that he never signed the impugned documents. I also compared the applicant's signature in his affidavits vis a vis that seen in the subject affidavit and resignation letter and found that they do not resemble. On prima facie basis, the applicant has made a case that he never resigned as contended by the 2nd and 3rd respondent.
20. The applicant specifically contended that the forged documents were lodged by the 3rd respondent. He presented the Notice of Cessation of directors which clearly indicated that the document was lodged by the 3rd respondent.
21. Despite such direct and damning allegation against him, the 3rd respondent did not address those allegations. Instead, the 2nd and 3rd respondent only gave a blanket denial of forgery, claiming that the issue was under investigation with the DCI.



22. The applicant also contended that upon receiving communication from the 4th respondent inquiring on his intended resignation, he protested the same vide an email that was presented to this court. That upon such protest, the 4th respondent rescinded the removal and reinstated him to directorship. All the parties agreed to this fact. However, the applicant contended that the 4th respondent added four more directors which had been allegedly appointed at the AGM of 22/09/2020.
23. Although the Court lacked the benefit of the 4th respondent's replying affidavit, the court could however infer from its submissions that it argued that the applicant was notified of the special resolution lodged with the 4th respondent on 5/03/2021.
24. Be that as it may, there was no explanation as to how and why the 4th respondent added the allegedly appointed directors when the alleged AGM was never held and having been presented with forged resignation documents. The actions of the 4th respondent were never explained. To allege that their absence from the proceedings bars the court from correcting a wrong is a defeatist assertion by the respondents. A null act is void. One cannot put anything in nothing and expect anything.
25. The 2nd and 3rd respondent produced a ruling delivered by the subordinate court in E2391 of 2020. Amongst the directions given in that ruling was that the company had three directors being the applicant, 2nd and 3rd respondent. This ruling was delivered on 24/12/2020. The 2nd and 3rd respondent also produced a board resolution on the removal of the applicant as a director. It referred to a board meeting held on 7/01//2021 wherein it was resolved that the applicant was removed from directorship.
26. The alleged meeting was held after the subordinate court ruling which reaffirmed the applicant's directorship and power to authorize all withdrawals from the company's accounts. This also raises suspicion on the motive of the 2nd and 3rd respondent, and points towards a desperate attempt to remove the applicant from directorship irregularly.
27. None of the parties produced the Memorandum and Articles of Association of the company. The respondents having found that they could not perfect the forgery they had perpetrated resorted to what the call a board meeting to remove the applicant from directorship.
28. With greatest respect, removal of a director under section 139 and 289 of the *Companies Act* relied on by the respondents is by the Company and not the board. The board of directors cannot constitute the company. It is the members of the company who can do what the respondent's purported to do. In this regard, the purported resolution of 7/1/2021 by the board could not remove a director in a properly called meeting (be it AGM or Special).
29. The applicant prayed for orders directing the Registrar of Companies to rectify the company records. He prayed that the names added by the 4th respondents be deleted, and only the names of the applicant, 2nd and 3rd respondent be retained as directors and members of the company.
30. On a prima facie basis, it would seem that the acts perpetrated by the respondents pursuant to the alleged AGM are illegal. The Court cannot countenance the continuation of what is manifestly unlawful.
31. Accordingly, I am satisfied that the applicant has established a prima facie case with a probability of success.
32. The second limb of *Giella v. Cassman Brown* case is whether the applicant will suffer irreparable loss and damage. I find in the affirmative. A wrong committed to the applicant in his membership and directorship of the company cannot be compensated by an award of damages.



33. On the 3rd limb, the balance of convenience tilts in favour of maintaining the status quo ante.

34. Accordingly, I allow the application and grant prayers 2, 3 and 4 of the Summons with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021.

A. MABEYA, FCI Arb

JUDGE

