



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 55 OF 2018**

**LABAN ONDITI RAO.....PETITIONER**

**- VERSUS -**

**KIPRONO KITTONY.....1ST RESPONDENT**

**KENYA NATIONAL CHAMBER OF COMMERCE & INDUSTRY...2ND RESPONDENT**

**JUDGMENT**

1. **LABAN ONDITI RAO**, the Petitioner, described himself in this suit as the National Vice-Chairman of the 2<sup>nd</sup> Respondent, **Kenya National Chamber of Commerce and Industry**. The petitioner also filed this case against the 1<sup>st</sup> Respondent, **Kiprono Kittony**. The 1<sup>st</sup> respondent at the material time was the National Chairman of the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent was established for, amongst other objects, to promote co-ordinate and protect commercial and industrial interest in Kenya in general and of the members in particular; to promote trade within and outside Kenya; to establish, maintain, organize, manage and finance trade and industrial exhibitions and displays, in matters affecting the interest of commerce and industry; and to promote support or oppose legislation and bureaucratic measures in its members' best interest.

2. The Petitioner filed this petition seeking prayers for, an order of certiorari, to bring before this court for purpose of quashing the Respondents' two letters both dated 1<sup>st</sup> February 2017; an order of mandamus, compelling the Respondents to restore the petitioner to the position he held prior to the afore stated letters; and an order for compensation for the alleged violations of the Petitioner's rights.

3. Parties were directed by the court, more than once, that this case would proceed for hearing by way of oral evidence. I don't know whether it is because of the passage of time, but it did seem that the interest in proceeding with this case by both parties has waned. When this matter appeared before me on 1<sup>st</sup> March 2020, after the matter was mentioned, parties informed me that they had filed their documents in this matter, and they requested that I write the judgment on the basis of those documents. In other words, parties consented to this matter being heard on the documents on record. The only documents before me are the petition and the supporting affidavits, filed by the Petitioner and on behalf of the Respondents I have the grounds of opposition and answer to the petition.

4. The Petitioner by his pleadings stated that he was elected as the Vice-Chairman of the 2<sup>nd</sup> Respondent at an annual general meeting of 14<sup>th</sup> July 2016. On being elected the Petitioner embarked on his duties as the Vice-chair and a Director of the 2<sup>nd</sup> Respondent.

5. On 1<sup>st</sup> February 2017 the Petitioner received two letters from the 2<sup>nd</sup> Respondent which letters suspended him from the office of Vice Chair of the 2<sup>nd</sup> Respondent and removed him from being a member of the 2<sup>nd</sup> Respondent's Board of Directors.

6. One of those letters was written under the letterhead of the 2<sup>nd</sup> Respondent and signed by the 1<sup>st</sup> Respondent and by the company secretary of the 2<sup>nd</sup> Respondent. The letter informed the Petitioner this:

**“RE: SUSPENSION AS NATIONAL VICE CHAIRMAN**

**Following a board meeting held on 1<sup>st</sup> February 2017 at Heritage House Nairobi [it] was unanimously resolved that you be suspended from office with immediate effect.**

**This is in line with the provisions of Chapter 6 of the constitution of Kenya. In [view] of the criminal charge you are facing**

relating to the City Cabanas Land that cast the Chamber in bad light.

**You are required to clear your personal belongings from the office by close [of] business on 2<sup>nd</sup> February, 2017.”**

7. The second letter stated that the Petitioner had been removed from the Board of directors of the 2<sup>nd</sup> Respondent. That second letter was signed by 10 directors of the 2<sup>nd</sup> Respondent.

8. The Petitioner by his petition stated that on being elected as the Vice chair of the 2<sup>nd</sup> Respondent, on 14<sup>th</sup> July 2016, he had legitimate expectation that he would serve his three years in that office uninterrupted and any interruption would abide with the Constitution of Kenya and with the Article of association of the 2<sup>nd</sup> Respondent. He stated that the said two letters were sent to him under instigation of the 1<sup>st</sup> Respondent. That those letters were inconsistent with the internal procedures and the Articles of Association of the 2<sup>nd</sup> Respondent. That those letters violated the Petitioner’s rights under the Constitution of Kenya and the Fair Administrative Action Act No. 4 of 2015. The Petitioner deposed in his affidavit in support of the petition that the Respondents did not give him prior and adequate notice of the intention to either remove him or suspend him. That he was not given an opportunity to be heard. In the Petitioner’s view the Respondent’s act were malicious, arbitrary, capricious and unreasonable.

9. The Petitioner relied on an affidavit sworn by Benjamin Onkoba. Onkoba stated that he was a director of the board of director of the 2<sup>nd</sup> Respondent. He represented the Nyanza Region in that board. He further deposed:

**“THAT on 25<sup>th</sup> January 2017 I received information from a mutual friend of Mr. Laban Onditi Rao (the Petitioner) and I, that the said Laban Onditi Rao (National Vice Chairman of the Kenya National Chamber of Commerce and Industry) had been arrested over land at City Cabanas, Nairobi allocated to the Chamber. I later learnt that the National Vice Chairman had been arraigned in court on 26<sup>th</sup> January 2017 charged with an offence involving the aforesaid City Cabanas land.”**

10. Onkoba stated that he received a notice of an ordinary board meeting of the 2<sup>nd</sup> Respondent on 27<sup>th</sup> January 2017. The meeting was scheduled to take place on 1<sup>st</sup> February 2017. That it was at that meeting, which the Petitioner attended, a report called **“Tenga Report”** was tabled. That the 1<sup>st</sup> Respondent asked how many of the directors supported a motion that the Petitioner be requested to step aside while he was being prosecuted in a criminal case at Milimani court. That only three directors raised their hands in support of that motion. It was then that the 1<sup>st</sup> Respondent requested the Petitioner to leave the room. That after the board meeting the 2<sup>nd</sup> Respondent’s company secretary requested the directors to sign a letter removing the Petitioner from the board. Onkoba said that he declined to sign that letter but later found a signature appended next to his name, on that letter, which prompted him to report the forgery of his signature on that letter to the police. He stated that his said complaint was still under investigation by the police.

11. The Respondents filed answer to the petition. The 1<sup>st</sup> Respondent, in that answer, pleaded that the petition raised no cause of action against him and therefore prayed that the petition be struck with costs. The Respondents also pleaded that the removal of the petitioner was in accordance with the 2<sup>nd</sup> Respondent’s Article of Association and further that the petitioner was granted opportunity to present his case and to be heard after there were allegations of the Petitioner having a conflict of interest with the interests of the 2<sup>nd</sup> Respondent.

#### **ANALYSIS AND DETERMINATION**

12. As I stated above parties were directed to proceed with this case by oral evidence. Those directions were given on 22<sup>nd</sup> October 2018 and again were repeated on 13<sup>th</sup> June 2019. Parties however failed to adduce oral evidence but instead requested, on 1<sup>st</sup> March 2020, the court to decide the case based on the documents filed.

13. The petitioner bore the burden of proof to prove his case. The standard of proof, this being a civil case, is on a balance of probability. The petitioner’s claim is that his rights were violated when he was suspended from holding the office of the Vice Chair and when he was removed from being a director of the 2<sup>nd</sup> Respondent.

14. The court in the case **Eunice Wayua Munyao v Mutilu Beatrice & 3 others [2017] eKLR** considered who bears the burden of proof and had this to say:

**“EAST PRODUCE (K) LIMITED -VS- CHRISTOPHER ASTIADO OSIRO IN CIVIL APPEAL NO. 43 OF 2001** where it was held that:-

**“It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku –Vs- Kenya Cargo Hauling Services Ltd 1991 where it was held that “there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.”**

15. Another useful discussion is to be found the case **Eastern Produce (K) Ltd – Chemomi Tea Estate v Bonfas Shoya [2018] eKLR** thus:

**“In TREADSETTERS TYRES LTD –VS- JOHN WEKESA WEPUKHULU [2010] eKLR where Ibrahim J. allowed an Appeal quoted Charles worth & Percy On Negligence, 9<sup>th</sup> edition at P. 387 on the question of proof, and burden thereof where it is stated:-**

**“In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferred and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.”**

16. The Petitioner had a burden to adduce evidence which needed to be proved on a balance of probability. Borrowing from the reasoning in the case **Eastern Produce (k) Ltd Chemomi Tea estate** (supra) the petitioner was required to prove that his rights under the constitution and under the article of Association were breached.

17. What is clear is that the two letters the Petitioner received related to the two distinct offices he held in the 2<sup>nd</sup> Respondent. One related to his office of Vice Chairman and the other related to his office of director of the 2<sup>nd</sup> Respondent's board of directors. In respect to the office of Vice Chair the petitioner was suspended. There is no evidence before court whether that suspension continued or not. In respect to the office of director the Petitioner was removed.

18. The Petitioner's removal from the board was governed by the 2<sup>nd</sup> Respondent's Articles of Association. Under Article 80(j) the 2<sup>nd</sup> Respondent's board may request a director to resign. This is what that Article provides:

**“(j) He is requested, in writing, by all the other directors to resign.”**

19. All the provisions under that Article 80, from (a) to (k), are under the title **“DISQUALIFICATION OF DIRECTORS”**. What that title suggests is when any of the paragraphs under that Article is/are invoked the director who is the subject of that invocation is disqualified from being a director. In this case all the directors signed a consent for the removal of the petitioner from the board of directors, and although one director, Benjamin Onkoba, swore an affidavit that he did not sign that resolution, he was not subjected to cross examination since he did not adduce evidence as ordered by the court. In a Canadian case **R. v. Hart NSA 45 (CanLII)** the court had this to say about cross examination:

**“The right to cross-examine is a cornerstone of adversarial trial process. It is important vehicle for discovery of truth and is central to our understanding of fair procedure.”**

20. In this case parties were given opportunity to adduce evidence, in which case the witnesses would have been cross examined, but parties failed to follow the court's direction. It follows that the evidence of Benjamin Onkoba, which is so crucial to the decision whether the board's resolution was signed by all the directors, will be disregarded in the absence of Onkoba being cross examined. This holding is supported by the discussion in the case cited above, **R. V. hart** (supra), as follows:

**“This relatively scarce case law is summarized by Professor Schiff as follows:**

**On the rare occasions when a witness could not be questioned further after examination-in-chief was completed, courts have protected the right to cross-examination in various ways. If the witness refused to attend for cross-examination or, in attendance, refused to answer any questions, his testimony given in chief has been rejected. When the witness died or was wholly incapacitated by illness after examination-in-chief but before opportunity for cross-examination, some courts have struck out the testimony, or declared a mistrial. But, if responsibility for the lost opportunity did not rest with the witness or the party who called him, other courts and legal commentators have argued for the trial judge's exercise of a flexible discretion - the testimony in chief might stand accompanied by the judge's caution to the trier of fact about its dubious weight, or alternatively, completion of the testimony might be adjourned if a temporarily incapacitated witness could later attend. Absent fault of the witness or calling party, Wigmore encouraged admission of the testimony in chief if the loss of cross-examination caused the opposite party no material harm in the particular trial.** (S.A. Schiff, Evidence in the Litigation Process (Master Edition, 1993) at pp. 294-5, citations omitted). (emphasis added)”

21. Having disregarded the evidence of Onkoba it follows that my finding is that all the directors of the 2<sup>nd</sup> Respondent, except the Petitioner, did sign to disqualify the Petitioner from continuing to be a director.

22. Having reached that finding and because the other letter addressed to the Petitioner was one of suspension from the office of the Vice chair, and because no evidence was adduced to appraise the court on when, if at all, that suspension ended, the Petitioner's case fails. There is no evidence before court of wrongdoing by any of the Respondents.

23. Since both parties failed to adduce evidence in this case, which evidence I dare say would have assisted the court, each party will bear their own costs of this case.

24. The judgment of the court is therefore that the petitioner's case fails and it is hereby dismissed. Each party will bear their own costs.

**Orders Accordingly.**

**DATED, SIGNED and DELIVERED at NAIROBI this 5th day of MAY, 2020.**

**MARY KASANGO**

**JUDGE**

**ORDER**

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17<sup>th</sup> April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **5<sup>th</sup>** day of **May, 2020**.

**MARY KASANGO**

**JUDGE**