



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 76 OF 2020

KENNETH JUMBA.....PLAINTIFF/APPLICANT

VERSUS

JOSHUA OGOL.....1ST DEFENDANT/RESPONDENT

FRANCIS MUNYAO.....2ND DEFENDANT/RESPONDENT

DENNIS OPIYO.....3RD DEFENDANT/RESPONDENT

BENARD ONYANGO..... 4TH DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant took out the motion dated 4th June 2020 in which he sought for *inter alia*:

i. Spent

ii. THAT pending the hearing and determination of this suit, this honourable court be pleased to issue a conservatory order of temporary injunction directing the respondents to continue to recognize the plaintiff/applicant as the chairman of Toi Open Air Market Traders Society and to allow the plaintiff/applicant to carry out, unhindered, all his duties as such chairman.

iii. THAT pending the hearing and determination of this suit, this honourable court be pleased to issue an order of injunction restraining the respondents, whether acting by themselves, their agents, or any other person or entity, from organizing, supervising or conducting the society's elections for Toi Open Air Market Traders Society until an election is officially called for and help up.

iv. THAT an order that the officer commanding station Kilimani Police Station and City Inspectorate Officers for supervise the enforcement of these orders.

v. THAT the costs of this application be awarded to the plaintiff/ applicant in any event.

2. The applicant filed an affidavit and a further affidavit he swore in support of the motion. The defendants/respondents filed the replying affidavit of Dennis Opiyo and grounds of opposition to resist the application.

3. When the motion came up for interpartes hearing, this court issued orders directing learned advocates to file and exchange written submissions.

4. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the application. I have further considered the rival written submissions plus the authorities cited.

5. It is the submission of the plaintiff that the defendants/ respondents have purported to interfere with his reign as the chair of Toi Open Air Market Traders Society by breaking into his office, taking over the management of some projects at the market, calling for campaigns to succeed the plaintiff/applicant despite campaigns being suspended by the Election Mediation Committee.

6. The plaintiff further averred that the defendants wrote to the Registrar of Societies alleging change of chairmanship of the society as well as using their servants and or agent to organize a coup over the power of the plaintiff/applicant as the chairman of the society.

7. It is also pointed out that the 1st respondent has now purported to assume the role of the chairmanship of the society without an election being held as required under the constitution of the society. The plaintiff further argued that there is a cause of action in the suit that must be addressed by this court.

8. The defendants/respondents on their part are of the submission that the plaintiff's motion lacks merit and further that there is no cause of action. It is pointed out that there is no description of the defendants in the pleadings. It is also argued that the defendants have no ostensible authority or legal capacity in their individual capacities to bind the society in this suit.

9. It is further pointed out that the plaintiff has not demonstrated to this court that they had utilized the society's constitution Governing Council article 9 thereto in subjecting any member or official for failure to comply with the constitution.

10. In short, the defendants argued that the plaintiff has not raised any justiciable issues against the defendants on any rights to property, contract or any other known legal right of the society which they have purportedly breached so as to warrant a grant of the orders sought against them.

11. In response, the plaintiff pointed out that the current dispute has been subjected to the Election Mediation Committee. It is also argued that there is no provision in the Society's Constitution that prohibits resolution of the society's disputes by court.

12. A careful consideration of the rival arguments will reveal that the defendants have raised a preliminary objection. The question is whether this court has jurisdiction to entertain this suit. According to the defendants, the plaintiff should have exhausted the internal mechanism to resolve the dispute. It is pointed out that Article 9 of the Society's Constitution provides that the Governing Council as an organ offer disciplinary action against the respondents before approaching the court.

13. The plaintiff on the other hand is of the submission that where matters affecting legal rights are an issue, the courts cannot shut their eyes by declining jurisdiction. The plaintiff also argued that the respondents are conflicted in that they are members of the Governing Council and it is trite law that one cannot be a judge, jury and prosecutor in his own case, therefore the dispute complained of cannot be resolved by any other entity other than the court of law.

14. The plaintiff expressly deponed in part in paragraph 6 of the further affidavit as follows:

“6. That in response to paragraph 10 of the replying affidavit, I reiterate that the subject dispute has been brought to the attention of the election mediation committee”

15. This assertion is not controverted by the defendants. It is therefore not true that the plaintiff did not follow the internal dispute resolution mechanism provided for under the constitution of the society. The other issue which is debatable is whether it is fatal when one skips such a mechanism and prefer to go to court directly. In my view, it is always desirable to follow the internal dispute resolution mechanism before approaching the court. However, where the constitution of the society or the Act does not clearly state whether the court's jurisdiction is original or appellate, it is not fatal when one approaches the court without utilizing the alternative dispute resolution mechanism. In the end, I find no merit in the preliminary objection.

16. Having disposed of the preliminary objection, I now turn my attention to the merits of the motion. The principles to be applied in determining an application for injunction were settled in the case of **Giella =vs= Cassman Brown & Co. Ltd1973 E.A 358**. First an applicant must show that he has a prima facie case with a probability of success. The plaintiff has stated that in the month of May 2020, the defendants purported to interfere with his reign as chairman of Toi Open Air Market Traders Society. It is stated that the defendants broke into the plaintiff's office and took over the management of some projects at the market.

17. It is also stated that the defendants campaigned to succeed him yet campaigns had been suspended by the Election Mediation Committee. It is the plaintiff's submission that no election has been held to bring an end to his reign therefore the defendants committed an illegality to oust him from his seat.

18. The defendants are of the submission that the plaintiff's suit does not disclose any cause of action against them. It is stated that the defendants have not been sued in their respective official capacity in the society. The defendants denied the allegation that they broke into the plaintiff's offices and stated that there are no physical structures capable of being broken into.

19. The defendants also denied interfering with society's management. The defendants however aver that they have instead in their respective official positions and duties duly conducted their responsibilities pursuant to the society's constitution. The defendants further averred that it is the plaintiff who hired goons to attack the society's market on 18th May 2020. It is clear from the material placed before this court that the dispute is on questions touching on governance.

20. The question as to whether the plaintiff was properly replaced is an issue which can be determined in a trial. I am satisfied that the plaintiff has shown that he has a prima facie case with a probability of success.

21. The **second** principle is that an applicant must show the irreparable loss he would suffer if the order for injunction is not granted. The plaintiff has stated that he has already suffered harm by the untoward action by the defendants. The defendants have failed to state the irreparable loss.

22. With respect, I am persuaded by the submissions made by the defendants that the plaintiff has failed to show the irreparable loss he would suffer if the order for injunction is not granted. The plaintiff has been unable to explain to what extent is the loss he has so far suffered is irreparable.

23. The **third** condition is that where the court is in doubt, it should decide the application on the balance of convenience. According to the plaintiff, the balance of convenience tilts in his favour based on the facts and evidence in the case. He argued that if the order sought is granted his rights as the chairman of the society will be protected and that peace will prevail in the market.

24. The plaintiff has alluded in his averments that the 1st defendant illegally took over as the chairman of the society thus replacing him. The plaintiff appears to admit that his tenure as chairman expired but he is still holding on as the chairman until elections are called and held as per the Society's Constitution.

25. It would appear the defendants have taken over the management of the society. They have been at helm since the month of May 2020 or thereabouts. If the order sought is granted it will interfere with the management of the society which has been in existence for the last six (6) months.

26. The question as to whether the defendants are legally in office or not has to be determined at the trial of this suit. If the order is granted, the status quo may be interrupted. I think the balance of convenience in the circumstances of this case tilts in favour of the defendants.

27. In the end, I find no merit in the plaintiff's motion. The same is dismissed with costs abiding the outcome of this suit.

Dated, signed and delivered online via Microsoft Teams at Nairobi this 9th day of October, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant