



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO 17 OF 2019

DANIEL C.A. SANGA.....1ST PLAINTIFF

CALISTUS BUTIYA.....2ND PLAINTIFF

JAMES SAKWA.....3RD PLAINTIFF

RAPHAEL GIKERA.....4TH PLAINTIFF

VERSUS

MICHAEL ABALA WANGA.....1ST DEFENDANT

SAFARI KITHI.....2ND DEFENDANT

AGLEAN CHELIMO.....3RD DEFENDANT

HARUN ANUNDA.....4TH DEFENDANT

ROBERT KATSUTSU.....5TH DEFENDANT

HARUN BOWEN.....6TH DEFENDANT

MOSES ONONO LORRE.....7TH DEFENDANT

RULING

INTRODUCTION

1. The Plaintiffs' Notice of Motion application dated and filed on 28th January 2019 was brought pursuant to the provisions of Order 40 Rules 1, 2, 3, 4 and 9 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act and all enabling provisions of the law. Prayer Nos (1) and (2) were spent. They abandoned Prayer No (4) therein. It sought the following remaining orders:-

1. Spent

2. Spent.

3. THAT pending the hearing and determination of this suit an order of Injunction do issue restraining the Defendants by themselves and/or through their agents, servants and employees from carrying out the affairs of the Association of Kenya Medical Laboratory Scientific Officers (AKMLSC) and convening and/or holding its Annual Delegates Meeting Scheduled for 16th February, 2019.

4. Abandoned

5. THAT this honourable court be pleased to make any other order it may deem fit in the interest of justice.

6. THAT costs of this application be provided for.

THE PLAINTIFFS' CASE

2. Their application was supported by the Affidavit of the 1st Plaintiff that was sworn on 28th January 2019. The Plaintiffs stated that they were bonafide members of Association of Kenya Medical Laboratory Scientific Officers (AKMLSO) (hereinafter referred to as "the Association"). They annexed in evidence copies of payslip, a remittance summary and membership cards as proof of the same.

3. Their case was that the Defendants had unlawfully, illegally and wrongfully convened an Annual Delegates Meeting (hereinafter referred to as "ADM") on 16th February 2019 to elect the officials of the Association yet they had not been registered with the Registrar of Societies as the Association's officials. They averred that this was in contravention of the Societies Act and the judgment that was delivered on 14th November 2018 in **NRB JR No 279 of 2016**.

4. It was their contention that the Defendants were elected on 5th March 2015 and that their three (3) term having elapsed, they could not purport to convene the meeting. They further pointed out that the Defendants had unlawfully and wrongfully issued a Notice on 8th January 2019 under the Constitution of 2008 as opposed to the Constitution of 2001 in contravention with the directive of the Registrar of Societies issued on 21st April 2016.

5. They averred that the mode of advertisement of the positions was in contravention of Gazette Notice No 10 which provided for the mode of electing representatives.

6. They added that some of the Defendants had cleared themselves to contest as officials of the Association yet they were facing serious criminal charges relating to omission and/or commission against the Association and in particular, the 1st Defendant had already been convicted in Kiambu Criminal Case No 201 of 2016.

It was their further averment that the elections should be conducted in accordance with the Associations Constitution under the supervision of the Registrar of Societies.

7. They urged this court to allow their present application because the manner the Notice was issued was shrouded in secrecy denying candidates ample time to campaign.

THE DEFENDANTS' CASE

8. In opposition to the said application on 5th February 2019, the 7th Defendant swore a Replying Affidavit on behalf of the Defendants. The same was filed on even date.

9. They contended that since the Association had not been enjoined in the proceedings herein and the Plaintiffs were not bonafide members, then their suit should fail. They added that they were the duly elected officials which they said had been affirmed by the Registrar of Societies and in the judgment that was delivered in **Nairobi JR No 279 of 2016**.

10. They denied that they had been convicted and sentenced and that in fact the 1st and 7th Defendants had been acquitted of their offences. They pointed out that the 4th Defendant remained innocent until proven guilty.

11. It was their argument that the notice for the ADM was duly issued and circulated in the newsletter so as to notify members of the meeting.

12. They contended that the present application was frivolous, premature and had been accentuated by malice and urged this court to dismiss the same with costs to them.

LEGAL ANALYSIS

13. In his judgment of 14th November 2018, in **NRB JR No 279 of 2016**, Mativo J directed the Association members to **"have the dispute resolved by a court of law or hold a properly convened Annual General Meeting (AGM) and undertake fresh elections strictly in conformity with the dictates of the law and the Associations by-laws."**

14. In her letter of 18th January 2019, the Registrar of Societies pointed out that the elections should be conducted in accordance with the Constitution of 2001 that the Registrar's office had approved and that it had no objection to the date taken for holding the ADM and National elections.

15. In a letter of 8th January 2019 by the 4th Defendant who the Associations Secretary General, he informed the Registrar of Societies that the Independent Electoral Committee (hereinafter referred to as "IEC") was in the process of preparing for the ADM and National Elections.

16. Notably, in a letter dated 23rd November 2018, the 4th Defendant notified the Registrar of Societies that the ADM that had been scheduled for 8th December 2018 was postponed to 15th December 2018 and then postponed to a later date in February 2019.

17. Indeed, the 4th Defendant wrote several letters updating the Registrar of Societies on the progress that had been made in the holding of the ADM and in fact invited the Registrar of Societies to be an observer at the ADM that was scheduled to be held on 16th February 2019.

18. The Defendants did not, however, attach any Notices calling for the aforesaid meetings. The only Notice for the ADM to be held on 16th February 2019 that was adduced in evidence was dated 8th January 2019. It was circulated to all the Association's branches and also carried in the Association's Newsletter of January 2019.

19. Notably, the Notice for the ADM was issued pursuant to Part IV Section 14.0 of the Association's Constitution. The same provides as follows:-

14.0 ANNUAL DELEGATES MEETINGS

An Annual Delegates Meeting shall be held after every twelve (12) months. A notice in writing of such Annual Delegates Meeting, accompanied by the annual audited statement of accounts, auditors report and the agenda for the meeting shall be sent to all members not less than twenty-one (21) days before the date of the meeting, and/or by press advertisement not less than fourteen (14) days before the date of the meeting.

20. As the ADM is scheduled to be held on 16th February 2019, the Notice of 8th January 2019 therefore complied with Clause 14.0 of the Association's Constitution.

21. Turning to the Election Procedure, the same was provided in Clause 16.0 of the Association's Constitution. The same provides as follows:-

16.0 ELECTION PROCEDURES

The Secretary General will circulate a list of names of incumbent office bearers indicating whether or not an office bearer is eligible for re-election to all the Associations' branches.

16.1 NOMINATIONS

16.1.1 Any member wishing to be nominated for the post of officer of the Association, or office bearer, shall obtain a Nomination Form from the branch.

16.1.2 In order for a name to appear on the Nomination Form the registered member must have been a paid-up member for atleast five (5) consecutive years, in default, the nomination deemed null and void without further reference.

16.1.3 Nominations, consent to serve including the candidates' passport size photograph, personal biodata (summary of a CV) shall be received at the Associations Headquarters four (4) months prior to each meeting of the Annual Delegates Meeting held in connection with an election year. Names and details of candidates shall be printed and sent to the branches three (3) months before the Annual Delegates Meeting, through the Association's Newsletter (emphasis court).

22. It was evident that the list of the candidates was circulated in the newsletter less than the three (3) months stipulated in Clause 16.1.3 of the Association's Constitution. This was clearly in contravention of the Association's Constitution. On this ground only, the Plaintiffs were able to demonstrate that there was a *prima facie* case with a probability of success in line with the holding of **Giella –v- Cassman Brown & Company Ltd (1973) EA 358** where the principles of granting an interlocutory injunction had been set out.

23. It is important to point out that there was no evidence that was adduced by the parties that the decision of Mativo J directing that fresh elections be held had been set aside. The mechanism of conducting elections is well provided in the Constitution.

24. It would be insincere for parties to acknowledge provisions of the Association's Constitution in bits and pieces or in piecemeal to suit their respective case. If the Plaintiffs had conceded that Clause 16.1.3 of the Association's Constitution ought to have been complied with, it follows that all the sub clauses of Clause 16.0 of the Association's Constitution must be complied with. Further, the Plaintiffs' submissions that the elections of the Association's officials was as stipulated in Part II Section 3 (1) of The Medical Laboratory Technicians and Technologists Act Special Issue of 22nd January 2015 were therefore incorrect.

25. Although as this court found that the Plaintiffs had established a *prima facie* case, it took the view that it would not be prudent to grant an injunction pending the hearing and determination of the suit herein as the same would cause hardship to the Association's members. It would be in the interest of justice to grant an order that would not stall the operations of the Association. They are, however, at liberty to seek the intervention of the Registrar of Societies only within the limits of the Societies Act as the Association's Constitution is self-explanatory. Having the Registrar of Societies manage the ADM when the Secretary General has the duty to circulate the list of names of candidates would be *ultra vires* the Association's Constitution.

26. Going further, this court found that the Defendants' assertions that the Plaintiffs were not members of the Association as was shown in the 4th Respondent's letter of 31st January 2019 to the Association's advocate was not an issue this court could pronounce itself as that was clearly a matter to be canvassed during trial. It remained one (1) party's word against the other. This court therefore restrained itself in pronouncing itself on that issue.

DISPOSITION

27. For the foregoing reasons, the Ruling of this court is that the Plaintiffs' Notice of Motion application dated and filed on 28th January 2019 was merited. It is hereby directed that the Association holds its ADM and National Election strictly in accordance with the Constitution of 2001 as the Constitution of 2008 had not yet been approved by the Registrar of Societies. This order has been granted in terms of Prayer No (5) therein where the Plaintiffs had asked this court to make any other order that it would deem fit to grant in the interest of justice. The upshot of this decision is that the ADM Scheduled for 16th February 2019 is hereby adjourned to the date to be notified to members as aforesaid.

28. Costs of the application will be in the cause.

29. It is so ordered.

DATED and DELIVERED at NAIROBI this 14th day of February 2019

J. KAMAU

JUDGE