



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 17 OF 2019

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

CALITUS BUTIYA.....2ND PLAINTIFF

JAMES SAKWA.....3RD PLAINTIFF

RAPHAEL GIKERA.....4TH PLAINTIFF

VERSUS

MICHAEL ABALA.....1ST DEFENDANT

SAFARI K KITHI.....2ND DEFENDANT

AGLEAN CHELIMO.....3RD DEFENDANT

HARUN ANUNDA.....4TH DEFENDANT

ROBERT KATSUTSU.....5TH DEFENDANT

HARUN BOWEN.....6TH DEFENDANT

MOSES ONONO.....7TH DEFENDANT

RULING

INTRODUCTION

1. The Plaintiffs' Notice of Motion application dated 7th March 2019 and filed on 7th March 2019 was brought pursuant to the provisions of Order 40 Rule 1, 2, 3, 4, 9 of the Civil Procedure Rules, Section 1A, 1B, 3A, and 63 (e) of the Civil Procedure Act and all other enabling provisions of the law. Prayers Nos(1) and (2) were spent. It sought the following remaining prayers:-

1. Spent

2. Spent.

3. THAT pending the hearing and determination of this suit an order of injunction restraining the Defendants by themselves and/or through their agents, servants, and employees from operating the accounts of the Association of Kenya Medical Laboratory Scientific Officers (AKMLSO) in Standard Bank (K) Ltd and Equity Bank (K) Ltd.

4. THAT the Honourable Court be pleased to make any other order it may deem fit in the interest of justice.

5. THAT the costs of the application be provided for.

THE LEGAL ANALYSIS

2. The Plaintiffs' present application was supported by the Affidavit of the 1st Plaintiff herein. It was unsworn. The court will revisit this issue a little later in the Ruling herein. He swore his Supplementary Affidavit on 23rd April 2019. The same was filed on 24th April 2019. In response to the said application, on 21st March 2019, the 7th Defendant swore the Replying Affidavit on his own behalf and on behalf of the 1st -6th Defendants.

3. Before this court could delve into the merits of the Plaintiffs' present application, it noted that the said application was incompetent and defective by virtue of not having been supported by a dated affidavit.

4. Section 5 of the Oaths & Statutory Declarations Act Cap 15 (Laws of Kenya) provides that:-

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

5. This court noted that omission to have the affidavit dated is not a procedural technicality that can be overlooked by virtue of Article 159(2) (d) of the Constitution of Kenya, 2010. It is a substantive issue because the provision in the Oaths and Statutory Declarations Act is couched in mandatory terms. The court therefore disregarded the said Supporting Affidavit.

6. However, as the 1st Plaintiff also filed a dated Supplementary Affidavit, this court opted to consider the same purely in the interests of justice and so as to do substantive justice to parties by considering the merits or otherwise of the said application. It noted that the Plaintiffs were members of AKMLSO who had been paying subscription fees and that they had every right to raise issues concerning the said Association.

7. It was their contention that the Defendants had mismanaged funds and failed to share the Audited accounts. They added that the said Defendants were also not legitimately in office. They were thus agitating that fresh elections be held.

8. On the other hand, the Defendants contended that the Plaintiffs were not bonafide members of the Association and hence lacked the *locus standi* to institute the present suit. They also averred that the Plaintiffs had not demonstrated how they had mismanaged the funds or that they had been denied any access to the Association's books. It was their contention that the Plaintiffs were misusing the court process.

9. In their Written Submissions dated and filed on 26th June 2019, the Plaintiffs questioned the legality of the Defendants in the office of the Association and whether the Defendants had the mandate to operate the operations of the accounts of the Association. They had also submitted on whether they were bonafide members of the Association. They were emphatic that they were bonafide members of the Association and were therefore entitled to the orders sought in their Plaint.

10. The Defendant submitted on the said issues in their Written Submissions dated and filed on 3rd July 2019. They were categorical that the Plaintiffs' suit was frivolous and that the Plaintiffs had come to court with unclean hands.

11. Notably, in applications for an interlocutory injunction, the court must be satisfied that an applicant had met the criteria set out in the celebrated case of **Giella vs Cassman Brown [1973] E A 333**. An applicant seeking an interlocutory injunction must demonstrate that he has a *prima facie* case with a probability of success, that damages would not be adequate compensation if the injunction was not granted or that the balance of convenience tilted in his favour.

12. Unfortunately, the Plaintiffs did not demonstrate that they had met the aforesaid criteria. Instead, they and the Defendants delved into the merits of their respective cases. The issues they had raised therein were matters of evidence that could not be dealt with at this interlocutory stage.

13. Accordingly, without belabouring the point, this court came to the firm conclusion that the Plaintiffs did not demonstrate that they were entitled to the orders that they had sought.

DISPOSITION

14. For the foregoing reasons, the upshot of this court's Ruling was that the Plaintiffs' Notice of Motion application dated and filed on 7th March 2019 was not merited and the same is hereby dismissed with costs to the Defendants.

15. It is so ordered.

DATED and DELIVERED at NAIROBI this 11th day of December 2019

J. KAMAU

JUDGE