



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO.7 OF 2017

GREAT LAKES UNIVERSITY OF KISUMU.....APPLICANT

GREAT LAKES UNIVERSITY

OF KISUMU STUDENTS ORGANIZATION.....APPLICANT

-VERSUS-

THE CHAIRPERSON, GOVERNING COUNCIL, GREAT LAKES

UNIVERSITY OF KISUMU & 3 OTHERSRESPONDENT(S)

RULING

By a plaint filed herein on 27th March 2017 the plaintiff's prayers against the defendants are for -

- a) A declaration that the First Respondent has no mandate to call, convene, or chair meetings of the Second Respondent, to pass resolutions or implement any purported resolutions of the Second Respondent.***
- b) A declaration that first and second defendant's decision of January 30th, 2016 suspending the vice chancellor is null and void as the defendant's did not and do not have the authority, either individually or jointly to suspend or dismiss the Vice Chancellor or appoint any.***
- c) A declaration that the first and second defendant's decision dismissing the vice chancellor was made without authority by the first and second defendants which was already dissolved.***
- d) A declaration that the third defendant is not a valid holder of the office of the vice chancellor, his appointment and installation having been in flagrant breach of the law and in a chaotic environment.***
- e) A permanent injunction barring the defendants jointly and severally through their agents and servants from changing the mandate of the accounts of GLUK or interfering with the existing accounts opening parallel accounts.***
- f) An order nullifying the appointment and installation of the third respondent as the vice chancellor of GLUK.***
- g) An order abolishing and reversing the action of the Fourth Respondent purporting to***

terminate the services or membership of three (3) members of the Board.

h) An order reversing and abolishing the decision of the fourth defendant crafting a draft TICH Constitution.

i) A declaration that the draft TICH constitution,2015 is null and of no legal consequences.

j) A declaration that the TICH Trust is the lawful sponsor of GLUK and not the TICH General Assembly;

k) Costs of the Suit and interest.

By way of counterclaim the defendants filed a joint defence in which they deny the plaintiff's claim and sought the dismissal of the suit. **The Great Lakes University of Kisumu** the plaintiff in the counterclaim prays against

1. RT. REV.DR.FRANCIS MWAYI ABIERO.....1st Defendant

2. PROF.RICHARD MUGA.....2nd Defendant

3. PROF.ATIENO ANNE NDEDE AMADI.....3rd Defendant

is for -

a) A Declaration that the 1st and 2nd Defendant's tenure of office as Trustees of the Plaintiff University, have ceased with effect from the 18.2.2017 when their appointments was revoked by the Sponsor of the Plaintiff University.

b) A Declaration that the 3rd Defendant having been dismissed from employment as a Vice Chancellor of the Plaintiff University, she ceased to be a member of the University in any manner including purporting to act in concert with the 1st and 2nd Defendants, either as Trustees or as agents or employees of the Plaintiff,or otherwise continuing to undertake any transactions on behalf of the Plaintiff University.

c) An order of Permanent injunction restraining the 2nd Plaintiff in the original plaint,1st,2nd and 3rd Defendants in the counterclaim,from howsoever, interfering or continuing to interfere with the affairs of and the peaceful operations of the Plaintiff University, or its smooth operations or otherwise continuing to transact any business in the name of the Plaintiff University or otherwise acting as agents or employees of the said University, whether as Trustees or Vice Chancellor or both, or in any capacity at all.

d) General damages against 1st ,2nd and 3rd Defendants to the Counterclaim for the loss and damage incurred by the University on account of their unlawful conduct of interference.

e) Costs of this suit and interest on (d) and (e) herein.

Contemporaneously with the plaint the plaintiffs filed a Notice of Motion seeking orders that plaintiffs-

1. Spent

2. A declaration that first and second defendant's decision of January 30th, 2016 suspending the vice chancellor is null and void as the defendants did not and do not have the authority, either individually or jointly to suspend or dismiss the Vice Chancellor or appoint any.

3. A declaration that the first and second defendants' decision dismissing the vice chancellor was made without authority by the first and second defendants which was already dissolved.

- 4. A declaration that the third defendant is not a valid holder of the office of the vice chancellor, his appointment and installation having been in flagrant breach of the law and in a chaotic environment.**
- 5. A permanent injunction barring the defendants jointly and severally through their agents and servants from changing the mandate of the accounts of GLUK or interfering with the existing accounts opening parallel accounts.**
- 6. An order nullifying the appointment and installation of the third respondent as the vice chancellor of GLUK**
- 7. An order abolishing and reversing the action of the Fourth Respondent purporting to terminate the services or membership of three (3) members of the Board.**
- 8. An order reversing and abolishing the decision of the fourth defendant crafting a draft TICH Constitution.**
- 9. A declaration that the draft TICH constitution,2015 is null and of no legal consequence.**
- 10. A declaration that the TICH Trust is the lawful sponsor of GLUK and not the TICH General Assembly;**
- 11. Costs of the suit and interest.**

Defendants who are the Respondents in the Notice of Motion filed a replying affidavit and a preliminary objection both dated 3rd April 2017. The latter was heard first and is the subject of this ruling.

On 5th April 2017 the court heard the Advocates for the parties on the preliminary objection. In my view the same is two prolonged. First,it is contended that the suit is incompetent for not being accompanied by a replying affidavit. Mr. Ragot for the Defendants/Respondents in the main suit and notice motion submitted that the verifying affidavit filed together with the plaint is deficient in two ways;firstly as it is sworn only by the 1st plaintiff who does not have authority in writing to do so on behalf of the 2nd plaintiff.

Secondly that the deponent is not authorized under seal to swear the affidavit which is sworn on behalf of a corporation and for these two reasons the affidavit and the suit offend the provisions of order for rule 4 of the civil procedure rules and should be struck out.

In support of this submissions Mr. Ragot relied on three cases:-

- 1. ABDI ALI NUR VRS TRANSAMI (KENYA) LTD NAIROBI HCCC NO.657 OF 2003.**
- 2. OCHIENG SESE VRS JOHNSON OCHARO KISII CIVIL CASE NO.65 OF 2003**
- 3. KAMAU AND OTHERS VRS MAINA AND OTHERS EAST AFRICA LAW REPORTS (2008) 1 (EA (HCK) 151.**

The second limb of the preliminary objection is that the orders principally sought in this suit are the same as in a suit filed by Professor Atieno Anne Ndede Amadi in a suit before the Employment and Labour Relations Court and as such the plaintiffs here have no locus stand to file this case;that they cannot properly file another suit on her behalf and this court must guard against abuse of its process.

The preliminary objection was opposed. On the replying affidavit, Mr. Siganga, Advocate for the Plaintiffs/Applicants,submitted that section 18(1) of the Charter of the Great Lakes University clothes the 1st plaintiff with the capacity to bring suits and that there is no requirement for a seal of the Board of

Trustees. Further that the quorum for making associations is four members and that therefore the 1st plaintiff has capacity to file the suit. On whether the 2nd plaintiff gave the 1st plaintiff authority to swear the replying affidavit. Mr Siganga urged this court to note that the pleadings herein were filed by persons not versed in the law and that given the oxygen principle it would be draconian to strike out the suit. He urged this court not to rely on the cases cited as the same were decided before enactment of the oxygen principle. Mr. Siganga further submitted that all the plaintiffs are asking is that this court restore order in the running of the University. He contended that section 29 (4) of the statute has a clear procedure for removal of the Vice Chancellor and this court would be interested to hear why it was not followed. In regard to the Vice Chancellor not being a party to this suit he submitted that she can so become through an amendment of the plaint and prayed that the preliminary objection be dismissed.

Having considered the submissions of Learned Counsel on the Preliminary objection I agree with Mr. Ragot that the verifying affidavit is deficient firstly because whereas there are two plaintiffs the affidavit is sworn by only the 1st plaintiff. The 2nd plaintiff has not filed an affidavit verifying the correctness of the amendments in the plaint and there is no written authority for the 1st plaintiff to do so on its behalf. In so far as the 2nd plaintiff is concerned therefore there is no verifying affidavit and that renders the suit incompetent.

Secondly we have evidence on record that the 1st plaintiff is a corporate body. This is evidenced by a certificate issued on 9th February 2012 by the Honourable James Orengo then Minister for Lands. This certificate was issued pursuant to an application made by the Trustees under section 3 (i) of the Trustees (Perpetual Succession) Act. Section 3 (3) of that Act provides that once such a certificate is issued the Trustees became a corporate body with a corporate seal capable of suing and being sued in its name. It is indeed on record that the Board of Trustees who are the 1st plaintiff have a common seal – See Article 20 of the Trust Deed which also provides that "***the seal shall not be affixed to any instrument except pursuant to a resolution of the board in the presence of the members one of whom shall be the chairperson and all of whom shall countersign***". Order 4 rule 4 of the civil procedure Rules requires that where the plaintiff is a corporation, as is the case here, the verifying affidavit shall be sworn by an officer duly authorized under the seal of the company to do so. Whereas the replying affidavit here is sworn by the chairman of the 1st plaintiff there is nothing to demonstrate that he was authorized to do so under the seal of the 1st plaintiff. Therein lies the deficiency in the affidavit. The question is whether this calls for striking out of the suit? It is my finding that the interest of justice and more so taking into account the oxygen principle cited by counsel would be best served by preserving the suit but asking the plaintiffs to file a compliant verifying affidavit. This should be done within seven days of this ruling.

That notwithstanding I find that the second limb of the preliminary objection also has merit to some extent. It is not disputed that there is a suit seeking the same or similar prayers in the Employment and Labour Relations Court. That suit was filed by the Vice Chancellor of the University. It is therefore not tenable that the plaintiffs in this case who have knowledge of that other suit have filed this one. They may or may not have locus to file this suit but it is an abuse of the court process that they have filed it while the one filed earlier is yet to be heard and determined. Moreover the prayers sought in this case save for prayers g-k are within the exclusive jurisdiction of the Employment and Labour Relations Court and this court would not have jurisdiction to hear them. Accordingly prayers a-h are struck out and this court makes orders as follows:-

- a) That the plaintiffs have seven (7) days to file a compliant verifying affidavit to regularize the plaint***
- b) That prayers a-h of the plaint are struck out and the hearing shall proceed only on prayers g-k and the counterclaim.***
- c) That the costs of this preliminary objections shall be in the cause.***

DATED AND DELIVERED THIS 4TH DAY OF MAY 2017

E.N.MAINA

JUDGE

In the presence of Mr. Ragot for Defendants/Respondents

N/A for Plaintiffs/Applicants

Court Assistant: Serah Sidera