



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NUMBER 415 OF 2015

BERNARD NTHULI. 1ST PLAINTIFF

MARTIN MUSYIMI. 2ND PLAINTIFF

LYDIA D. WANJIKU. 3RD PLAINTIFF

VERSUS

CHARLOTTE HACKETT. 1ST RESPONDENT

WYCLIFF NANDAMA. 2ND RESPONDENT

STANLEY WAITHAKA. 3RD RESPONDENT

R U L I N G

The Applicants/Plaintiffs approached this Honourable Court by way of a Notice of Motion dated 7th December, 2015, brought under Section 3A of the Civil Procedure Act and Order 40 of the Civil Procedure Rules Cap 21 Laws of Kenya.

The application seeks 14 prayers as hereunder: -

1. That this application be heard ex parte in the first instance and directions given on the hearing inter partes.
2. That this application be certified urgent and heard immediately or as this Honourable court may deem fit.
3. That an order do hereby issue directing the 1st, 2nd and 3rd Defendants to restore and maintain the status quo of the Kenya Christian Industrial Training Institute prior to 11th November, 2015 pending hearing and determination of this application.
4. That an order do hereby issue directing the 1st, 2nd and 3rd Defendants to restore and maintain the status quo of the Kenya Christian and Industrial Training Institute prior to 11th November, 2015 pending hearing and determination of this suit.
5. That an order of temporary injunction restraining the 1st, 2nd and 3rd Defendants from removing the 1st, 2nd and 3rd Plaintiffs from the Board of Governors of the Kenya Christian Training institute pending hearing and determination of this application.
6. That an order of temporary injunction restraining the 1st, 2nd and 3rd Defendants from removing the 1st, 2nd and 3rd Plaintiffs from the Board of Governors of the Kenya Christian Training Institute pending hearing and determination of this application.

7. That an order of temporary injunction do hereby issue restraining the 1st, 2nd and 3rd Defendants from removing the 1st Plaintiff as chairman of the Board of Governors of Kenya Christian Industrial Training Institute pending hearing and determination of this application.
8. That an order of temporary injunction do hereby issue restraining the 1st, 2nd and 3rd Defendants from removing the 1st Plaintiff as Chairman of the Board of Governors of Kenya Christian Industrial Training Institute pending hearing and determination of this application.
9. That an order of temporary injunction do hereby issue restraining the 1st, 2nd and 3rd Defendants from removing the 1st Plaintiff as Chairman of the Board of Governors of Kenya Christian Industrial Institute pending hearing and determination of the suit.
10. That an order of temporary injunction do hereby issue restraining the 1st, 2nd and 3rd Defendants from removing the 3rd Plaintiff as Secretary to the Board of Governors and as Director and Principal of the Kenya Christian Industrial Institute pending hearing and determination of the suit.
11. That an order of temporary injunction do hereby issue restraining the 1st, 2nd and 3rd Defendants from removing the 3rd Plaintiffs as Secretary to the Board of Governors and as Director and Principal of the Kenya Christian Industrial Institute pending hearing and determination of the suit.
12. That an order do hereby issue directing the 1st, 2nd and 3rd Defendants to give access to the 1st, 2nd and 3rd Plaintiffs to the premises, offices and business of Kenya Christian Industrial Institute pending hearing and determination of the suit.
13. That an order do hereby issue directing the 1st, 2nd and 3rd Defendant to give access to the 1st, 2nd and 3rd Plaintiffs to the premises, offices and business of Kenya Christian Industrial Institute pending hearing and determination of the suit.
14. That costs of this application be awarded to the Applicants.

It is premised on the grounds set out on the body of the application and it is supported by the annexed affidavit of **LYDIA D WANJIKU** (the 3rd Plaintiff herein) sworn on the 7th December, 2015 and a further affidavit by the same deponent sworn on the 27th April, 2016.

The deponent who is the Secretary to the Board of Governors and the Principal of Kenya Christian Industrial Training Institute (herein referred to as KCITI) depones that, the Board of Governors is responsible for the management of KCITI and that as per article 8 of the Constitution of KCITI, a general meeting of the Board of Governors must have a quorum of not less than two thirds of the members.

The Applicants and the Respondents herein are members of the Board of Governors and that no business of the Board can be conducted without a quorum of at least four members. That on the 10th November, 2015, she received a phone call from James Kaparo a guard of the KCITI who informed her that the 1st Defendant/Respondent had stormed the Institute's gate with three (3) vehicles full of security guards who took over the manning of the gate.

That she was also informed that her office was broken into and was locked with an extra padlock, that the Accounts Office keys were surrendered to the security guards on instructions of the 1st Respondent. That she was also telephoned by the manager who informed her that she had been barred from entering the gate.

She reported the matter at Pangani Police Station where she was given a police officer to accompany her and on reaching the offices of KCITI she found a security vehicle parked vertically blocking the gate and on entering the office she found approximately 10 people, one of them was going through the files and documents on the desk of her secretary while the 1st Respondent was putting files in a big suit case. As she was leaving the premises she was stopped at the gate and forced back to her office where she collected her personal effects and as she was leaving the 1st Respondent informed her that she was on compulsory leave and she was asked for the passwords and keys for the KCITI.

That since then i.e. on 11th November, 2015, the 1st, 2nd Applicants and herself have not had access to the premises, business affairs, management and control of KCITI. She further avers that since then, the

Respondents have in contravention of the Constitution of KCITI purported to remove the Applicants as members of the board. She further avers that the Respondents have purported to remove the 1st Applicant as the Chairman of the Board and herself as the Secretary to the Board and the Principal thus denying him access to the premises, affairs, business management and control of KCITI.

The Respondents have opposed the application vide a replying affidavit sworn by the 1st Respondent Charlotte Hackett on 15th December, 2015. He depones that he, together with the 2nd and 3rd Respondents are Board members of KCITI. That KCITI which is registered as a Non-Governmental organization has eight members of the Board of Governors and they are the ones who signed the original constitution who are

- a) Ezekiel Nandama
- b) Berkeley Hackett
- c) Joyce Ndubi
- d) Moses Rawago Otieno
- e) Charlotte Hackett
- f) Bernard Nthuli
- g) Stanley Waithaka
- h) Charles Coulston

He avers that the Institute was founded by the late Berkeley Hackett who upon his demise, Bernard Nthuli (1st Plaintiff) took up the mantle of Chairing the meetings mostly for the purposes of organizing Mr. Hackett's funeral arrangements and the day to day decisions that had to be made by the board regarding the running of the school. The 3rd Plaintiff has been appointed the Principal of the college and by virtue of her position as per the provisions of Clause 4(d) of the Constitution, she became a member of the Board while the 2nd Plaintiff was a close affiliate of KCITI but has never been appointed to the Board under Clause 3(d) of the Constitution of KCITI.

That within no time, the Plaintiffs/Applicants who are also relatives entrenched themselves as office bearers of the Board of Governors with the 1st Plaintiff taking the position of the Chairman while the 3rd Plaintiff was the Secretary despite the fact that her position as the Principal only mandated her to be an ex-officio member of the Board. That the 2nd Plaintiff took up the position of a Board member without any elections being conducted.

It is further averred that the purported members of the Board started making decisions that were openly biased and contrary to the Constitution of KCITI for instance Rachel Njeri who is a sister to the 3rd Plaintiff and married to the 2nd Plaintiff was made a signatory to the accounts of the college without following up the proper mandate of appointment and a brother to the 3rd Plaintiff was employed as an operations manager on the strength that his salary was to be catered by a donor and without any proof that the money was indeed remitted to KCITI.

That due to the mismanagement by the applicants, the institution started making huge loses. There was staff and student's unrest and student's admission was at an all time low and any attempt to call for an extraordinary meeting to manage the crisis was rebuffed by the Plaintiffs.

As a result, the deponent together with other Members of the Board sought the intervention of Non-Governmental Organization's Co-ordination Board which upon carrying out its investigations noted key

weaknesses in the institution and proposed some solutions and measures that needed to put in place. In a bid to comply with the requirements of the NGO Board, the firm of Siero & Associates Certified Public Accountants were appointed under Clause 15 of the Constitution of KCITI to carry out audit of the books of accounts and to establish what was ailing the institution.

An interim audit report containing some findings was prepared and a final one dated 8th December, 2015 forwarded to the Board of Governors of KCITI. The auditors found inter alia that there was no evidence that Students fees through cash payments were being totally banked and this made reconciliation of cash receipts and total banking difficult. It also found that there was apparent conflict of interest in the Board as the acting Chair 1st Applicant is the father to the 2nd Plaintiff while the 3rd Respondent is a daughter and sister in law to the 1st Plaintiff and 2nd Plaintiff respectively. Some appointments of employees were found to have been through vested interest of the Board members and the 1st and 3rd Plaintiffs had received amounts totaling to Kshs.801,235/- as Board of Governors expenses which expenses were not adequately supported.

That following that report, a meeting of the Board was convened on 7th November, 2015 to discuss acts of misconduct that had been raised in the audit report against the 3rd Respondent and it was resolved that she be sent for compulsory leave pending full audit of losses incurred. A subsequent meeting was held on 28th November, 2015 to deliberate on the 1st Plaintiff's gross misconduct and continued position as a board member. The Board resolved to remove him as Board Member and a directive was given to the security personnel to deny them access to the institution's premises in a bid to curb any interferences by the said persons. The board appointed Wycliff Mugabane Nandama as the New Chairman and it is averred that since the changes were undertaken, the institution is now on an upward climb and for those reasons the Respondents avers that it is not in the best interest of the institution if the Plaintiffs are reinstated as Board members.

The Applicants filed a further affidavit on 27th April, 2016 sworn by the 3rd Plaintiff wherein it is deponed that the 3rd Respondent became a director of KCITI on 22nd January, 2012 and on the 19th December, 2007 the Board of KCITI added two more members, the 2nd Plaintiff and 2nd Defendant. That in January, 2010 she became a Director/principal and the Secretary to the Board and that the constitution does not provide for election of members of the Board of Governors but it provides for election of office bearers after a period of three years.

She denies the allegations of mismanagement or fraud leveled against her and avers that the investigations were done with ulterior motives. According to her the 3rd Respondent usurped the powers of the Board in contracting an audit firm to carry out audit since 2012 while the Board had resolved that the auditor should work under the Board and the period for review was the year 2014. She avers that the audit exercise and report are not sanctioned by the Board of Governors of KCITI and therefore, the same is null and void.

She further depones that the institution has a long outstanding practice and culture of employing family members and she alleges that the 3rd Respondent has relatives working at the Institution. She depones that the 1st Applicant was not invited for the meeting that took place on 9th November, 2015 and that she was also not invited for the meeting that took place on 28th November, 2015 and therefore, the two meetings are null and void.

The application was canvassed by way of written submissions which the parties duly filed. On their part and in addition to the averments contained in their affidavits, the Applicants submitted that a member of the Board who is absent for 3 consecutive meetings ceases to be a member and for that reason and in accordance with the Constitution, Joyce Ndubi, Moses Rawago Otieno and Charles Coulston had ceased to be Board members. Their names do not appear in any minutes after 16th August, 1993.

It was also submitted that the Non-Governmental Organizations Co-ordination Act and Regulations do not require regular election of office bearers. The Act only requires that, if there is a change of officers

such change should be notified to the Non-Governmental organizations Co-ordination Board, written consent of the Non-Governmental and Organizations Co-ordination Board is required before an NGO can amend its Constitution, before a branch can dissolve itself, change of office and has to furnish annual reports.

It was submitted that the KCITI complied with all the provisions of the Act and the alleged failure to conduct elections of office bearers was an internal matter that could not invoke the action of NGO Co-ordination Board. That there was no breach of Non-Governmental organizations Co-ordination Act that entitled the Respondents to take the action that they did and in any event, the Respondents were members of KCITI Board throughout and are estopped by their conduct from alleging breach of the KCITI's Constitution.

On the notice and quorum of meetings the applicants submitted that any meeting that was conducted without proper notice and quorum was a nullity and to support that contention, they relied on the Shackleton on the Law and Practice of Meetings which outlines what constitutes a valid notice and that any business conducted in a meeting for which notice was not issued is not valid.

It is the Applicants' contention that the actions by the Respondents purporting to terminate the 3rd Applicant as the Principal and Secretary and to remove the 1st Applicant as a member of the Board were undertaken during an improperly convened meeting. They pray for status quo prior to 11th November, 2015 and have relied on the case of **Gusii Mwalimu Investment Company Ltd & Others Vs Mwalimu Hotel Kisii Limited** Court of Appeal in Kisumu No. 160 of 1995.

The Defendants/Respondents filed submissions on 20th April, 2016 wherein they have set out the applicable law and principles. It has been submitted that the 2nd and 3rd Plaintiffs are unlawful Board Members. That the 1st and 2nd Plaintiffs became Board members without elections being conducted while the 3rd Plaintiff was a board member by virtue of her position as the principal of the institution and with termination of her employment as the principal, she lost her membership to the Board. As such, there is no doubt that the 2nd and 3rd Plaintiffs are unlawful Board members and their removal was rightly done by the defendants.

It was further submitted that the Applicants did not come to court with clean hands in view of the findings by the auditor and the Plaintiffs having failed to act fairly and justly are not entitled to an equitable remedy from this Honourable Court. That the Plaintiffs have not fulfilled the principles established in **Giella Vs Cassman Brown & Co. Limited (1973) EA 358** in that they have not established a prima facie case with a probability of success for grant of injunctive orders.

This court has carefully considered the application at hand, the affidavits and the submissions by the respective parties. The following are the issues for determination: -

1. Are the Plaintiffs lawful Board members of KCITI.
2. Whether the removal of the Plaintiffs by the defendants as Board Members of KCITI was rightfully done.
3. Are the Plaintiffs entitled to the orders sought in the application
4. Who should bear the costs of the application?

On the issue of whether the Plaintiffs are lawful Board Members of KCITI and in establishing the bona fide Board of Directors, the first stop should be the Constitution of KICTI. Clause 3(a) of the said Constitution provides: -

“a) Members of the Board shall be those who originally signed this constitution.

b) New members may be added by majority vote of current members of the Board.

On the other hand the officer bearers as per clause 4 of the constitution shall be

1) Chairman

2) The vice chairman

3) The secretary

4) The treasurer

5) The principal

Who shall serve for a term of 3 years and upon expiry, they shall be able to be re-elected for consecutive terms.”

It is clear from the Constitution that as at 10th August, 1993 there were eight Board Members namely:-

1. Ezekiel Nandama – Who was the Chairman
2. Berkeley Hackett - The Treasurer
3. Joyce Ndubi – The Secretary
4. Moses Rawago Otieno - Member
5. Charlotte Hackett – member
6. Bernard Nthuli - Member
7. Stanley Waithaka – Member
8. Charles Coulston – Principal

According to the list above and going by the Constitution of KCITI the 1st Plaintiff, 2nd and 3rd Defendants are the Bona fide Board members of KCITI.

The other way provided for by the Constitution for becoming a member of the Board is under Clause 3(b) of the Constitution which provides that a new member may be added by majority vote of current members. It has been averred that on the 19th December, 2007, the second plaintiff and the 2nd Defendant were added as members of the Board. The minutes of that meeting have been annexed to the further affidavit and marked “A”. The court has perused the said minutes and minute 1.2 thereof, reads: -

“The Board officially welcomed Mr. Martin Musyimi who together with Mr. Wycliffe Nandama are to be added to the Board. Mr. Nandama sends his apologies for non-attendance at the meeting which was due to other pressing matters.”

It is noted that save what is stated, therein, there is no indication in the said minutes that the addition of the two Board Members was discussed as an agenda in the meeting and that the decision was supported by majority Board members. My understanding of that minute 1.2 is that the two board members were to be added to the Board. It is not clear from the minutes when that was to be done as there is no indication as to whether that was an agenda in the meeting that took place on the 19th December, 2007. It cannot, therefore, be said that the two were added as members during that meeting.

What about the 3rd Plaintiff? In her further affidavit, she depones that he became a Director of the Institute on the 22nd January, 2012. She further depones in paragraph 4 of the same affidavit that latter in January, 2010, she became a Director/Principal and the Secretary of the Board.

The two statements are contradictory as it is not clear when she became a Director. It is however clear from the Constitution that she held her position as a member of the Board by virtue of Clause 4(d) of the Constitution which provides that she shall remain in office as long as she is employed by the Institution. It then follows that when her employment is terminated, membership of the board shall automatically be terminated. The Board held a meeting on 7th November, 2015 and after deliberations, she was sent on compulsory leave following what the board referred to as complaints relating to the conduct of her office. It is noted that the meeting of 7th November, 2015 was attended by five Bona fide members of the board

who also signed the minutes. The members present resolved to send the 3rd Plaintiff on compulsory leave which then meant that her engagement as the Principal/Secretary of the Institution was terminated and/or affected. She could no longer act as the Principal/Secretary which she held as an office bearer and by virtue of which, she was a member of the Board. This then meant that upon termination of her employment as the Principal she automatically ceased to be a Member of the Board. The Board sent her on compulsory leave as an employee and this court has no jurisdiction to adjudicate on matters between an employee/employer as this is within the jurisdiction of Employment and Labour Relations Court. This court cannot order for her reinstatement to the Board due to the foregoing reasons.

With regard to the 1st Plaintiff/applicant, he is a bona fide member of the board and any attempt to remove him from the Board in the circumstances that it was purportedly done by the Defendants was illegal.

The list of Board Members forwarded to the Non-Governmental organizations Co-ordination Board on 31st March, 2015 cannot supersede that which is in the Constitution of KCITI unless it can be shown that new members were added by the majority vote of the current members which has not been shown to the satisfaction of the court.

From the foregoing, it is clear from the evidence on record and the submissions of the parties that the orders sought by the 2nd and 3rd Plaintiffs cannot be granted as they have failed to establish a prima facie case. However, the 1st Plaintiff, has made a prima facie case and in the premises, the Defendants are hereby ordered to restore and maintain the status quo of KCITI. Prior to the 11th November, 2015, with respect to the 1st Plaintiff pending the hearing and determination of the suit.

In relation to the 2nd and 3rd Plaintiffs the application is dismissed. The costs of the application shall be in the cause.

Dated, signed and delivered at Nairobi this 15th day of September, 2016.

.....

L NJUGUNA

JUDGE

In the presence of

..... **for the 1st, 2nd and 3rd Plaintiffs**

..... **for the 1st, 2nd and 3rd Defendants**