



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 96 OF 2012

1.DANIEL NGOIMA

**2.DUNCAN K. SINGI (SUING ON OWN BEHALF AND THAT OF KITUI
BRANCH**

**KENYA NATIONAL CHAMBER OF COMMERCE & INDUSTRY
PLAINTIFFS/RESPONDENTS**

VERSUS

**THE KENYA NATIONAL CHAMBER OF COMMERCE
.....DEFENDANTS/APPLICANTS**

RULING

1. The application dated 17/9/2013 and the application dated 7/11/13 were heard simultaneously.
2. The application dated 17/9/2013 seeks orders that “this Honourable Court be pleased to set aside the orders of the court made on the 18th May 2012 which were premised on **Mwera J.** orders, which orders did not exist as at 21st May 2012.”
3. The application is supported by an affidavit sworn by **Benson Momanyi** who has described himself as the **Chief Executive Officer** of the **Kenya National Chamber of Commerce and Industry**.
4. It is contended that the consent order herein was entered into fraudulently and in secrecy and locked out many interested parties. It is further stated that the elections were not conducted as per the orders of the court which has lead to wrangles between the newly elected officials and the previous officials who had to vacate office.
5. The background to the application is that the **National Chamber of Commerce & Industry** (hereinafter the chamber) had several suits filed in the High Court from the year 2009. The cases were determined and elections carried out at the National and County levels. The Applicants’ complaint is that the National elections were not carried out in compliance with court’s orders. It is averred that in the instant case, the chamber was not properly served.
6. The application is opposed. The replying affidavit sworn by **Duncan Singi** who has described himself as the acting Chairman of the **Kitui Branch** of the **Kenya National Chamber of Commerce & Industry** denies fraud. It is averred that the issues raised by the Applicant relate to the Chambers National office but not the **Kitui branch**. That the order made by **Justice Mwera** which order is complained about has not been exhibited.
7. On the question of service, it is contended that the Applicant was properly served. That the firm of **M/s S.N. Gikeria & Co. Advocates** entered appearance on behalf of the Applicant. That the consent order was entered into by mutual agreement of the parties through their advocates on

record.

8. According to the Respondents, there are no wrangles at the **Kitui branch** and no elections have yet been held at the **Kitui branch**.
9. The application dated 7/11/2013 seeks orders *inter alia* that, the Defendant, its agents, servants, employees and/or persons acting under its instructions and in particular the people whose names appear in exhibit “D2” and “D3” in the supporting affidavit (i.e. **Joel Wilson Muema, Hassan Ahmed, Bart Mbuvi, Kennedy Malusi, Everlyne Mwikali** and **Florence Mbithe**) be summoned to appear in court in person for purposes of rendering an apology to the Court and correcting through print media the allegations contained in exhibit “D2” and “D3”.
10. The Applicant’s complaint is that the said **Joel Wilson Muema, Hassan Ahmed, Bart Mbuvi, Kennedy Malusi, Everlyne Mwikali** and **Florence Mbithe** who purport to be officials of the Defendant at the **Kitui branch** have been holding meetings and releasing news through both the electronic and print media that this court through its ruling dated 30/10/2013 reinstated and validated the elections of the new officials. It is contended that the consent orders were not quashed by this court. That in any event there is no application before this court seeking to quash the consent orders or to reinstate the former officials into office. The Applicants have further asserted that they are validly in office until fresh elections are called by the Defendant.
11. The application is opposed. According to the replying affidavit sworn by **Laban Onditi Rao** who has described himself as the Vice Chair **Kenya National Chamber of Commerce & Industry, Duncan Singi** the 2nd Plaintiff/Applicant is not the acting Chairman of the **Kitui branch**. That the elections were held on 30/3/2012 and the new officials elected into office. That the new officials include **Joel Mwema Wilson** as the Chair person and **Sheik Ahmed Salim** as the vice Chair person. That the registration of the new officials has already been carried out by the Registrar General in compliance with the **Companies Act Cap 486 Laws of Kenya**.
12. It is further stated that **Daniel Ngoima** the 1st Plaintiff went into politics and is now an elected member of the **County Assembly of Kitui**.
13. The applications were argued by way of written submissions which this court has duly considered.
14. The orders made herein on 18/5/2012 were entered into by the consent of the parties. The said orders were as follows:-
 1. **“Elections held on 30/3/2012 and subject of these proceedings do and are hereby nullified.**
2. **Elections of the Kitui Branch – Kenya National Chamber of Commerce and Industry be conducted as stipulated by the Honourable Justice Mwera in Nairobi HCCC No. 253 of 2007 on 6/7/2011 and 19/7/2011.**
3. **The status quo before 30/3/12 in so far as the management and control of the Kitui Branch, Kenya National Chamber of Commerce be restored and stand maintained till elections stipulated in clause (2) above are held and concluded.**
4. **There be no orders as to costs and the suit be marked as settled on the above terms.”**

Malonza & Co. Advocates appeared for the Plaintiffs while **S.N. Gilera & Associates** appeared for the Defendant.

15. The grounds to be considered by the court in determining whether to set aside a consent judgment or orders are the same as the grounds which would justify the setting aside of a contract or certain conditions remain unfulfilled. (See **Flora N. Wasike v. Destimo Wamboko [1982-88] 1 KAR 625**).
16. The allegation in the case at hand is that the consent order was entered into fraudulently. Although it is alleged in paragraph No. 9 of the affidavit of **Benson Momanyi** that there was no proper service upon the chamber and that a particular person who had his own political interests and who gave out the instructions for the consent to be entered into, the affidavit evidence fails to name same person.
17. On the allegation that the consent order was entered into fraudulently, the affidavit evidence herein fails to meet the high standards to prove fraud. In the **Case Central Bank of Kenya Ltd –**

Vs- Trust Bank Ltd & 4 Others Civil Appeal No. 215 of 1996 the Court of Appeal in considering the standard of proof required where fraud is alleged had this to say-

“Fraud and conspiracy to defraud are very serious allegations. The onus of *prima facie* proof was much heavier on the Appellant in this case than in an ordinary Civil Case.”

18. On 30/10/13, by the consent of the parties herein through **Malonza Advocates** for the Plaintiffs and **Ogeto Advocates** for the Defendant prayer No. b of the application dated 17/9/13 was allowed. The said prayer reads as follows:-

“There be a temporary stay of the consent order made by the parties by way of consent letter reference No. PMM & CO./N/616 dated 17th May 2012 and the extracted order made on 21st May 2012 pending the hearing of this application.”

It is therefore crystal clear that this court made no orders quashing, validating or reinstating any person or parties to this suit into office. However, the prayers herein are not for the editors of the newspaper publications in question to be summoned, but the persons named in the said newspaper articles. If the persons named in the application dated 7/11/2013 have committed any acts of contempt of court, then the appropriate application ought to be made.

19. For the aforestated reasons, both applications are dismissed with costs.

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 11th day of March 2015.

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B. THURANIRA JADEN

JUDGE