



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 33 OF 2012

REPUBLIC.....APPLICANT

VERSUS

REGISTRAR GENERAL.....RESPONDENT

AND

GERALD KAGUMO.....1ST INTERESTED PARTY

WILLIAM AMOLE.....2ND INTERESTED PARTY

PETER MAMBEMBE.....3RD INTERESTED PARTY

JOGRA FREIGHT FORWARDERS.....4TH INTERESTED PARTY

AND

BOAZ MAKOMERE

STEPHEN RAIJI

MARGARET DAUDI

TIMOTHY MAINA

RAY MWANTHI

GRACE CHEGE (AS THE INCUMBENT OFFICIALS OF

KENYA INTERNATIONAL FREIGHT & WAREHOUSING

ASSOCIATION –KIFWA).....PROPOSED INTERESTED PARTY

Ex-parte

WILLIAM OJONYO

HEZRON AWITI

WASHINGTON MUTHAMIA

BOAZ MAKOMERE

MOHAMED ALADINA

P. J. SHAH

RULING

This ruling is in respect of two applications both dated 6th February, 2014 and filed on the same date. One of the applications was filed by the proposed interested parties. The proposed interested parties namely Boaz Makomere, Stephen Raiji, Margaret Daudi, Timothy Maina, Roy Mwanthi and Grace Chege identified themselves as the incumbent officials of Kenya International Freight and Warehousing Association (KIFWA).

In the application brought under Articles 47, 165 and 159 of the Constitution, Order 45 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law, the proposed interested parties/applicants pray for orders that:

- “1. This application be and is hereby certified as urgent and the same be heard ex parte in the first instance.**
- 2. The proposed Interested Parties/Applicants be and are hereby granted leave to be enjoined as interested parties in this cause.**
- 3. The execution of the Consent Order recorded between the Ex Parte Applicants and the Respondent vide their letter of 26th September 2013 and adopted by the court on 19th November 2011 be and is hereby stayed pending the hearing and determination of this application.**
- 4. The Consent Order recorded between the Ex Parte Applicants and the Respondent vide their letter of 26th September 2013 and adopted by the Court on 19th November 2013 be and is hereby set aside.**
- 5. The Proposed Interested Parties be and are hereby granted liberty to file pleadings in response to proceedings already filed by the parties herein and the cause be set down for hearing on merits**
- 6. The costs of this application be borne by the Ex Parte Applicants.”**

The application is based on the grounds on its face and the supporting affidavit of Stephen Raiji sworn on 6th February, 2014.

From the documents filed by the proposed interested parties in Court, it emerges that they are the registered officials of KIFWA (hereinafter also referred to as the Association) since 15th October, 2012 and the Constitution of the Association mandates them to represent it in a case like this. The proposed interested parties concede that when this matter came to Court on 25th January, 2012 the ex-parte applicants namely William Ojonyo, Hezron Awiti, Washington Muthamia, Boaz Makomere, Mohamed Aladina and P.J. Shah were the officials of the Association.

The proposed interested parties assert that the moment they replaced the ex-parte applicants as officials of KIFWA, the ex-parte applicants ceased having the capacity to transact business for or on behalf of the

Association.

The proposed interested parties contend that notwithstanding the fact that they had been ousted, the ex-parte applicants went ahead and entered consent vide a letter dated 26th September, 2013 which was filed in Court on 2nd October, 2013. The consent was adopted as an order of the Court on 19th November, 2013.

The proposed interested parties argue that although there were interested parties on record, the consent in question was only signed by the advocates for the ex-parte applicants and the respondents. The interested parties who were already on record are Gerald Kagumo, William Amole, Peter Mambembe and Jogra Freight Forwarders.

It is the proposed interested parties' case that the consent dwelt on matters not before Court to wit the running of the affairs of the Association and the removal of the incumbent office bearers. They contend that the consent order had the effect of binding persons who were not parties to these proceedings and more so the proposed interested parties as the consent order stipulates that they vacate office. The proposed interested parties submit that the said consent order is illegal, illogical, mischievous and absurd as the parties who consented on behalf of KIFWA had no mandate to do so under the law and the Constitution of the Association. They submit that the Board of Trustees referred to in the consent order does not legally exist.

The ex-parte applicants opposed the application through an affidavit sworn by the 1st ex-parte Applicant, William Ojonyo on 24th February, 2014. He averred that the Association's elections were due in March, 2013 but the same were not called by the proposed interested parties who had been illegally in office for over one year. He deposed that the 1st proposed Interested Party was one of the ex-parte applicants in these proceedings and to the best of his knowledge instructions had not been withdrawn from their lawyers P. K. Kamau Advocates.

He averred that the 1st proposed Interested Party had written to P. K. Kamau Advocates several letters among them those dated 5th November, 2012 and 13th November, 2012 indicating that he was the chairman of KIFWA and he did not mind if the matter was settled by consent. Further, that through a letter dated 28th November, 2013 the 1st proposed Interested Party acknowledged receipt of the Consent Order and by a letter dated 6th January, 2014 indicated that his only quarrel was with the advocate's fee note and not the consent. It is the ex-parte applicants' case therefore that the 1st proposed Interested Party was aware of the consent and indeed supported it. Mr William Ojonyo avers that there exists a board of trustees duly appointed by KIFWA under Article 25 of its Constitution.

It is the ex-parte applicants' case that there are registered autonomous branches which are legally independent from the national office. He slammed the proposed interested parties for making contradictory averments in their affidavits. He asserted that the proposed interested parties are illegally in office and have blatantly disobeyed the consent order.

The ex-parte applicants concluded by arguing that KIFWA is already a party to these proceedings and there is no way it can again seek to be enjoined in the proceedings as an interested party.

A brief history will do. On 25th January, 2012 the ex-parte applicants approached this Court by way of a chamber summons application dated the same date and sought orders:

“1. THAT the applicants, WILLIAM OJONYO, HERZRON AWITI WASHINGTON MUTHAMIA, BOAZ MAKOMERE, MOHAMED ALADINA AND P. J. SHAH (SUING AS NATIONAL OFFICIALS OF THE KENYA INTERNATIONAL FREIGHT & WAREHOUSING ASSOCIATION (hereinafter KIFWA), be granted leave to apply for an order of *certiorari*, to remove into this court for quashing the decision of the Registrar of Societies to register KIFWA Nairobi and Mombasa Branches.

2. **THAT the grant of such leave do operate as a stay of the said registration until the filing and hearing of the substantive motion hereinafter.**

3. **THAT the costs of this application be costs in the cause.”**

The Court (Githua, J) granted leave as prayed and directed that the said leave would operate as stay.

On 7th February, 2012, the ex-parte applicants filed the substantive notice of motion. The matter came up for mention on several occasions and on 13th November, 2013 Mr. P. K. Kamau who is on record for the ex-parte applicants informed the Court that there was a consent dated 2nd October, 2013 and he asked the Court to adopt the same. The consent order was indeed adopted by the Court on 19th November, 2013. The consent is in the following terms:

“1. THAT the branches registered by the Respondents remain so registered as autonomous entities.

2. THAT all office bearers on record forthwith do vacate office and elections be held within 60 days from the date hereof.

3. THAT pending the anticipated elections, the affairs of the KIFWA (the association) be run by a board of trustees.

4. THAT each party bears its own costs.”

The consent was signed by the advocate for the ex-parte applicants and the advocate for the Attorney General.

I have already indicated that apart from the proposed interested parties, there were already other interested parties on board. One of the proposed interested parties Mr. Boaz Makomere is also one of the ex-parte applicants. This may be explained by the fact that he was an official of KIPWA at the time this cause was filed and remained an official when the proposed interested parties were registered on 15th October, 2012.

It is also noted that a suit involving some of the parties was filed at Mombasa High Court vide **Civil Case No. 342 of 2008**. In that case Jogra Freight Forwarders is suing on its own and on behalf of other members of Kenya International Freight and Warehousing Association (KIFWA), Mombasa Chapter. The defendants are Gerald Kagumo, William Amole and Peter Mambembe who are sued as the national officials of Kenya International Freight and Warehousing Association (KIFWA). There is no evidence that the said matter has been concluded. From the material filed in Court it appears that the cause of action in that suit is the same with the one in this matter.

After carefully perusing the Court file, it emerges that the consent was entered without involvement of the interested parties and in particular Peter Mambembe who had filed a replying affidavit on 30th July, 2012 opposing the application. Without the approval of this particular interested party, there is no legitimate consent.

Secondly the consent as crafted sought to achieve that which had not been asked for. I have already reproduced the application for leave and it is quite clear that the ex-parte applicants only sought leave to apply for an order of certiorari to quash the decision of the Respondent to register the Nairobi and Mombasa branches. There was no prayer relating to elections. The ex-parte applicants, however, sneaked into the consent order the issue of elections.

Thirdly, the consent order as drafted would affect the interests of persons who are not parties to these proceedings. The consent meant elections were to be held for offices whose occupants had not been made parties to these proceedings. The consent was a coup on the part of the ex-parte applicants and this

was an abuse of the court process.

Fourthly, the ex-parte applicants approached this Court as officials of KIFWA. They have not disputed the fact that apart from Boaz Makomere they were all replaced by the proposed interested parties on 15th October, 2012. They therefore had no capacity to represent the Association at the time of the signing of the consent. Their claim that the proposed interested parties were in office illegally does not hold any water as they did not produce a Court order or a decision by the Respondent to confirm that the proposed interested parties are indeed in office illegally.

The ex-parte applicants claim that Boaz Makomere was a party to the consent and only withdrew after discovering that his position would be affected as the consent included holding elections. Mr. William Ojonyo attached several letters to his replying affidavit in support of this argument.

One of the letters is the one dated 5th November, 2012 addressed to P.K. Kamau and Advocates by Boaz Makomere in his capacity as the national chairman. In that letter, he informed the advocate that the Association had held branch elections witnessed by the officials of the Respondent on 10th and 12th October, 2012 in Mombasa and Nairobi respectively. He further informed the advocate that a certificate to confirm the new office bearers had been issued.

He concluded his letter by stating:

“In view of the foregoing, we would be happy if the case JR 33 of 2012 can be settled by way of consent on condition that the newly elected branch officials, now on record, shall be registered forthwith as the legitimate office bearers.”

From the said letter, it is clear that the consent that was in the mind of the national chairman did not include the holding of elections.

From the points I have highlighted above, it is clear that the consent order adopted by this Court on 19th November, 2013 was fraudulent. A consent order obtained by fraud or misrepresentation can be set aside-see **FLORA WASIKE v DESTIMO WAMBOKO [1982-1988] 1 KAR 625**.

A consent order may also be upset where the same has been obtained without involving all the parties including any person who is likely to be affected by the order-see the decision of this Court in **REPUBLIC v COUNTY COUNCIL OF NAROK & 2 OTHERS EX-PARTE WILDLIFE LODGES LIMITED [2013] eKLR**.

The proposed interested parties have demonstrated that the consent in question is one for setting aside and their application is allowed. Orders will issue as follows:

1. The proposed interested parties are hereby enjoined to these proceedings as the second set of interested parties. They are granted leave to file their papers within 21 days from the date of this ruling.
2. The consent order recorded between the ex-parte applicants and the Respondent vide letter dated 26th September, 2013 and adopted by the Court on 19th November, 2013 is hereby set aside.
3. Costs will be in the cause.

In the second application, which was filed by one Samson Njoroge in his capacity as the chairman of the Board of Trustees for KIFWA, the main prayer is for an order **“that the time prescribed by this Honourable Court for the holding of elections by its order herein of 19th November 2013 be and is hereby extended for a period of sixty (60) days.”**

The application is supported by the grounds on its face and an affidavit sworn by Samson Njoroge on 6th February, 2014. Through the said affidavit, the Applicant informed the Court that after the said consent order was recorded, his board in an attempt to take control of KIFWA faced resistance from the then

incumbent office holders and particularly Boaz Makomere who was the national chairman. It was only at the end of 2013 that they managed to take control of KIFWA. The Applicant therefore seeks an extension of the time for holding elections.

The application was opposed through the replying affidavit of Boaz Makomere sworn on 20th May, 2014. Boaz Makomere averred that the application is incompetent as the Applicant is a stranger to these proceedings. It is his case that there is no registered Board of Trustees, capable of running the affairs of the Association, and the order which the application seeks to extend is therefore not implementable.

I have considered the said application and the same cannot succeed for two reasons. The first reason is that the consent order which is the subject of the application has been set aside.

Secondly, the Applicant Mr Samson Njoroge is not a party to these proceedings. He did not seek to be enjoined to the cause before filing the application in question. The application therefore fails. The same is dismissed with no order as to costs.

Dated, signed and delivered at Nairobi this 14th day of November, 2014

W. KORIR,

JUDGE OF THE HIGH COURT