



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL CASE NO 1859 OF 1990**

**GITAO & 5 OTHERS .....PLAINTIFF**

**VERSUS**

**KENYA NATIONAL CHAMBER**

**OF COMMERCE & INDUSTRY..... DEFENDANT**

**RULING**

The plaintiffs were members of the defendant Chamber of Commerce and Industry, which I shall henceforth call the Chamber, and which is a company limited by guarantee and having no capital. The main objective of the Chamber can be summed up as being that of promoting and enhancing the commercial industrial and allied interests and activities of members in Kenya and elsewhere. The members of the Chamber pay an entrance and annual subscription fees and upon the dissolution of the Chamber, their liability is limited to 50/-. The income and assets of the Chamber are to be devoted solely for the implementation of its objectives and none of its income may be paid out to its members by way of dividends or profit. Upon its dissolution, any assets in excess of the liabilities of this nonprofit making Chamber shall not be distributed amongst its members but shall be given to some other nonprofit making similar institution or to a charity. Such in brief is the nature and character of the Chamber.

There are Articles of Association of the Chamber which, *inter alia*, make provisions concerning membership of the Chamber, the termination of such membership and an appeal from a decision terminating membership to the Extraordinary General Meeting of the Chamber. The Articles also establish a Governing Council to run the affairs of the Chamber and to terminate by a majority decision the membership of a member of the Chamber. The plaintiffs who were not only members of the Chamber but also of the Governing Council, claim in their plaint that they were unlawfully expelled from the Chamber by its Governing Council at its meeting held on 16.2.90 for the following reasons namely, that the termination of their membership was not a specific item of the agenda for that meeting, that the plaintiffs had thus not been given any advance warning of what was in store for them so that they could come prepared to meet any charges that may be brought against them, and that the plaintiffs in breach of the rules of natural justice were condemned unheard. The plaintiffs therefore sought the following reliefs: a declaration that the resolution of the Governing Council terminating their membership of the Chamber is null and void; an injunction restraining the Chamber from acting on the resolution of the Governing Council, and their reinstatement as members of the Chamber. In the alternative, the plaintiffs sought damages for their unlawful expulsion.

The plaintiffs have now by their Chamber Summons filed on 12.4.90 sought the following interlocutory orders namely that the Chamber be restrained from acting on the resolution of the Governing Council to

expel the plaintiffs from the Chamber and that the Chamber be restrained from preventing the plaintiffs from participating in the affairs of the defendant including its Annual General Meeting. In support of this application is the affidavit of the first plaintiff, David M Gitao. The facts deponed therein are essentially as averred in the plaint. In the Chamber's replying affidavit it is contended that the Governing Council had the right to terminate the membership of the plaintiffs and did so in pursuance of clause 9 of the Articles of Memorandum of the Chamber and that under clause 12 of the Articles, the plaintiffs could if they were aggrieved by the decision of the Governing Council expelling them from the Chamber, appeal to the Extraordinary General Meeting of the Chamber.

Clause 9 and 12 of the Articles are as follows:

"9. The Governing Council may terminate the membership of any member who by his conduct renders himself unfit in the opinion of a majority of the Governing Council to remain a member of the Chamber.

12. A member whose membership has been terminated or suspended shall have the right to appeal at an Extraordinary General Meeting which shall determine the matter without further recourse. A member wishing to appeal shall lodge his application with the Chief Executive in writing within thirty days of the date of the written notice suspending or terminating the membership....."

Though the Articles make provision relating to the procedure of the General Meetings there seem to be none relating to the procedure to be followed by the Governing Council at its meetings and it would seem therefore that it can discuss whatever it wishes even if it is not an item on its circulated agenda. The next point is that a member of the Chamber should be taken as having agreed to be bound by the Articles of the Chamber including Article 12. But in interlocutory proceedings such as the present application, I am not prepared to say that the plaintiffs are therefore precluded from challenging the lawfulness of the decision of the Governing Council. Guidance as to the attitude that a court should take in such a case was probably described by Law Ag P as he then was, in the East African Court of Appeal case of *Patel and Others v Dhanji and Others* [1973] EA 301. He said, admittedly in respect of clubs or analogous association for social or religious purposes that:

"The courts will entertain suits by members claiming to have been irregularly or improperly expelled, and will interfere if the rules providing for expulsion have not been strictly observed, or if the principles of natural justice have been violated. The foundation for this jurisdiction is the right of property vested in the member of which he is unjustly deprived by the unlawful expulsion"

It seems to me therefore that an important factor which will make the courts interfere is the existence of a right of property vested in the member. The plaintiffs do not seem to have any right of property vested in the non profit making Chamber. The Memorandum of Association of the Chamber does not seem to allow for this. On High Court case of *James Keffa Wagara and Rumba Kinuthia v John Anguka and Gitahi* Civil Suit No 724 of 1988, I had extended the application of the judgment of the East African Court of Appeal case of *Patel* to the internal affairs of a political party like KANU right or wrong, but I think that the principles enunciated in the *Patel* case can be extended to a non profit making association like the Chamber where no vested right of property of a member is involved. I cannot at this stage say.

I must now revert to the rules that guide the granting of injunctions. The first is that if the plaintiffs have shown on a balance of probabilities that they have a *prima facie* case with a probability of success and that they will suffer irreparable injury that cannot be compensated for by the award of damages, the injunctions they seek should be granted. The second rule is that if the court has doubts about compliance with the first rule, then it must decide on the balance of convenience. Whilst I am not too certain whether the plaintiff has shown that they have a *prima facie* case with a probability of success, I am far more uncertain whether on the affidavit evidence the plaintiffs will suffer injury which cannot be compensated for by the award of damages.

This being so, I must consider the balance of convenience. It is common ground that the termination of the membership of the plaintiffs in the Chamber was as required, supported by the majority of the members of the Governing Council. To grant the injunctions sought would, having regard to the fact that

the plaintiffs are also members of the Governing Council, be likely to have the effect of undermining the decisions and adversely affect the decision making process of the Governing Council which is charged with the management of the affairs of the Chamber. This in turn could affect the smooth running of the Chamber, the implementation of its activities and the achievement of its objectives. On the other hand the plaintiffs may still seek redress from the Extraordinary General Meeting of the Council without giving rise to the possibility of jeopardizing the management and functioning of the Chamber and constituting this court contrary to the Articles, as an appellate forum to hear an appeal from the decision of the Governing Council concerning termination of membership of the Chamber. In my view it would be on a balance of convenience far better in the interests of the Chamber for the injunctions applied for to be refused. In the result therefore, the prayers sought in the plaintiff's Chamber Summons filed on 12.4.90 are hereby dismissed with costs for the defendant.

Dated and Delivered at Nairobi this 7<sup>th</sup> Day of May, 1990

**A.M. AKIWUMI**

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**JUDGE**