



**IN THE COURT OF APPEAL**

**AT KISUMU**

**CIVIL APPLICATION NO.NAI 41 OF 1986**

**(Coram:Kneller, Hancox & Nyarangi JJA)**

**BETWEEN**

**THERESA SHITAKHA.....APPLICANT**

**AND**

**1. MARY MWAMODO**

**2. DAMARIS AYODO**

**3. DOROTHY KILONZO**

**4. NGURU KANYUA AND**

**5. MARGARET MWANGOLA.....RESPONDENTS**

**(In an intended appeal from a judgment of the High Court at Nairobi, Mbaya J)**

**ORDER OF THE COURT**

Mrs Theresa Shitakha, the applicant, by an *ex parte* motion on notice filed on March 14 this year expressed to be brought under Rules 3 and 5(2) of the Court of Appeal Rules asked this court to restrain Mrs Mary Mwamodo, Mrs Damaris Ayodo, Mrs Dorothy Kilonzo, Mrs Nguru Kanyua and Mrs Margaret Mwangola, the respondents, their agents, servants and representatives from summoning, holding or organizing any meeting of the National Executive Committee or any other committee of the Maendeleo Ya Wanawake Organization (the organization) until the result of her appeal from the decision and order of the High Court in Nairobi (Mr Justice Mbaya) of March 11 1986 in Nairobi High Court Civil Suit 547 of 1986 is known, and to restrain the respondents (and their outriders, as it were) from summoning, holding or organizing the general meeting or any other branch meeting of the organization or any of its elections until it be known.

So this court was asked to bring the activities of the organization's administrative machinery to a halt until the appellant's appeal was determined.

The application was made on the day it was filed in Nairobi *ex parte* and allowed with the costs reserved.

The orders included that the motion, affidavit in support and ruling and order of the court should be

served and the matter re-listed in Kisumu for hearing *inter partes*.

Five days later in Kisumu, where the court was on circuit, the respondents filed an affidavit in reply to which the applicant was given leave to file and serve one in reply to it. We then adjourned the hearing until yesterday at 11.00 am for this to be done.

The appellant, in her affidavit, claims on oath she is the lawfully elected National Chairman of this organization since some date in 1984. It is an unpaid one, but it confers great status and mindful of this she has always carried out her duties honestly, faithfully and diligently. And yet, the respondents are bent on spoiling her name and removing her from office. They are chairmen of the organization's branch for the Coast Province (where she lives) one of the organisation's National Vice-Chairman, its Assistant Honorary Secretary and the other two National Vice-Chairmen, respectively.

The organization deals with the social interests of most of the women in Kenya especially in the rural areas.

The respondents' actions, continues the applicant, have handled the organization's affairs in an irregular way which may lead to social unrest. They have already split the organisation's National Executive Committee and members into two factions. They may, in the end, lose the organization 'colossal' sums of money and damage beyond repair the organization and its image.

What they have done so far, it is said, is to have converted, an unofficial gathering of the members of the National Executive Committee in the Conference Room on the 11th floor of the Re-insurance Plaza in Nairobi on February 12, 1986 into an official meeting in the Maendeleo Building in Nairobi and so manipulated it that they purported to pass resolutions suspending the applicant and the chief executive officer (Mrs Mulindi) from their offices and appointing the respondents as a caretaker committee under the acting chairmanship of the first respondent to examine the organisation's finances.

It is further contended on the applicant's behalf that this meeting and these resolutions were not in accordance with the organisation's constitution and because the applicant was given no notice of the resolutions and never given notice to show cause why she should not be suspended or invited to defend herself, the meeting was illegal and the resolutions null and void.

Over and above all this, the respondents told the press the applicant had been dismissed from her post because she was responsible for, among other things, the organisation's financial problems.

The applicant filed suit in the High Court in Nairobi on February 19, 1986 asking for declaratory orders against the respondents that that meeting was illegal and the resolutions were of no effect, together with general damages, injunctions to restrain them from usurping her office and publishing libels about her, and her costs.

At the same time she filed a summons in chambers asking for interlocutory injunctions in the same form.

The summons of February 19, 1986 came before the High Court duty judge on February 25, 1986 for mention and he then fixed it to be heard *inter partes* on March 5, 1986. Mr Kariuki, for the respondents, assured Mr Khamati, for the applicant, that the National Council would not meet until March 15, 1986 and it was not known if the National Council would endorse the suspension of the applicant by the National Executive Committee.

Mr Khamati, however, filed another application, another *ex parte* one, on February 27, asking for similar orders that were in the prayers of the *ex parte* application of February 19 due to be heard *inter partes* on March 5, 1986. Torgbor J dealt with this second one *ex parte* the same day and his *ex parte* orders thereon led to the respondents not being allowed to organise any sort of meeting of the entire organization.

The first summons came before Mbaya J on March 5 for hearing *inter partes* and he indicated that the orders of Torgbor J (due to last until March 13) in the second summons would stand (and be extended) or

fall according to the orders he made.

And on March 11, two days before March 13, which is when Torgbor J 's *ex parte* orders were due to expire, he dismissed the applicant's summons of February 19, her first application, with costs. Whether or not the *ex parte* orders of Torgbor J were erased on March 11 or petered out on March 13, the applicant was in this court on March 14 with another *ex parte* application, as we have recounted.

Returning to Mbaya J's ruling, for a moment, however, we read that months before the first application the press had reported there were allegations that the organization was being mismanaged and its finances misappropriated. This led the Minister for Culture and Social Services to appoint his own committee to look into these reports. This committee reported that the allegations were substantiated, and the applicant and Mrs Mulindi were to blame.

The Minister sent a copy of its report to the applicant on January 17 and she sent him a reply denying she was at fault. She sent copies to the members of the National Executive Committee.

At the meeting of the National Executive Committee in the Maendeleo Building the applicant had to stand down from the chair and after deliberation there was unanimous agreement by the rest of the National Executive Committee that the applicant and Mrs Mulindi together and separately had cases to answer. The learned judge set out the relevant portions of the Committee's minute 3 of 1986 specifying some of the applicant's alleged iniquities in the discharge of her high office.

After some discussion the rest of the National Executive Committee resolved the applicant and Mrs Mulindi should be suspended. They gave the first respondent a mandate to act in her place as the National Chairman until the organization had held its general election, which was overdue. The suspension, it was noted, still had to be ratified by the National Council.

Mbaya J found (on the affidavits he read and submissions he heard) that no notice of the National Executive Committee's meeting was sent out to anyone. The Minister did not call it. Mrs Wandeka the head of Women's Bureau in his Ministry attended the meeting but took no part in it.

Once the National Executive Committee met, however, it could suspend the applicant under the organisation's article 7(a). And that is what it did when all its members were present. The resolution was passed *nomine contradicente*. She had read the report by the committee that investigated the allegations in the press, she had replied to it, she copied it to the members of the National Executive Committee and they read it. At the meeting she was given the opportunity to defend herself. So the formation of the caretaker committee (or task force) was perfectly proper.

Accordingly, Mbaya J found the applicant's complaints untenable and, as we have said, he dismissed her first application with costs.

The applicant in her affidavit in support of the motion before this court, alleges that, in addition to reaching quite the wrong result, Mbaya J denied her a fair hearing because her advocate, Mr Khamati, was refused an adjournment to study the respondent's replying affidavit and grounds of objection filed and served half an hour before the hearing began before Mbaya J and thereafter, despite Mr Khamati's protests, Mbaya J permitted the respondent's advocate to refer to that affidavit and those grounds. Furthermore, the applicant asserts, because the learned judge advised Mr Kariuki to apply informally to have leave to refer to them the judge was biased against the applicant throughout the proceedings. This was reinforced by the fact that Mbaya J did not permit the applicant's second (later) application to be set down for hearing *inter partes* and, instead, discharged Torgbor J's interlocutory injunctions before time, and thus acted as an appellate court from Torgbor J's decision.

The respondent's reply in their affidavit is, in brief, that the applicant is not the chairman of the organization because on February 12 1986 the National Executive Committee suspended her. No one wants to 'spoil her name' or has done so yet. She no longer enjoys, however, the confidence of that committee or the organization's members as a consequence of the Minister's committee report. The

respondents have filed a defence to the suit in which the relevant allegations in the applicant's plaint are denied. The appellant challenged the decision of the National Executive Committee, in effect, by her applications for these temporary injunctions but failed to persuade the High Court she had any right to do so. The applicant's second application, an *ex parte* one filed in the knowledge that Mr Kariuki had assured her advocate no meeting of the National Council (to confirm or set aside the National Executive committee's suspension) would take place before March 15, by which time the first application would have been heard and determined, was dishonest and unfair. They denied that the applicant's reputation would be damaged if her application was not granted by this court at the end of this hearing. The truth was, they maintained, the meeting of the National Executive Committee was constitutional, the applicant had notice of it and she was heard in reply to the allegations in the Minister's Committee's report. There was no application by Mr Khamati before Mbaya J for an adjournment and he did not challenge their right to file and serve their replying affidavit or grounds of objection. The suspension of the applicant the ratification of it by the National Council might be a good omen for the organisation's future and would not lead to any financial loss or damage its image. There was no objection to Torgbor J's *ex parte* injunctions being dealt with at the same time as the first summons was debated and the High Court could extend or discharge its interlocutory injunctions at any time after hearing the parties.

Thus the opposing contentions may be summarized as follows: The applicant contends that the meeting of February 12 was convened with indecent haste and not in accordance with the constitution of the Maendeleo ya Wanawake Organisation, and in particular in contravention of the second paragraph of (c) of article 7 thereof, for the purpose of suspending the applicant and Mrs Mulindi, on allegations which had emerged as a result of the probe committee appointed by the Minister of Culture and Social Services, and replacing her with someone else, indicating that a decision on the allegations had already been reached in advance of that meeting. She further contends that at the meeting itself the Head of the Women's Bureau, of the Ministry, took part in the decision which was in any event taken in her absence (she having left the room) and that the intended meeting of the National Council of the organization fixed for March 15, 1986 was for the purpose of ratifying the decision already taken. In other words to rubber stamp that which had been irregularly and, indeed, illegally, done.

The respondents' contentions on the other hand, are that the probe committee had found that there was evidence of certain irregularities, including misappropriation of funds and mismanagement of the organization that the meeting of the National Executive Committee of February 12 was properly convened, and that one of its purposes was to suspend the applicant from her position as National Chairman pending proper investigations into the allegations including giving her own explanation in answer to them. They contend further that the intended meeting of the National Council arranged for March 15 would, had it not been restrained by the court's order of the preceding day, have afforded her the opportunities of explanation and the right to be heard in accordance with accepted principles. In other words, condensing matters still further, and leaving aside for the moment the contentious matter of that which occurred before Mbaya J on the application for adjournment said to have been made by Mr Khamati on March 5 the parties are at variance as to the stages at which the organization's actions regarding Mrs Shitakha were taken. On the one hand, it is said she had been suspended on the basis that the allegations had been proved and was immediately sought to be replaced and on the other that she was suspended with a view to full and proper investigation of both sides' submission and evidence on the allegations.

The foregoing represents the submissions of Mr Khamati on behalf of the applicant on the one hand and of Mr G B M Kariuki on behalf of the respondents on the other. They are, of course, based on the material, which is becoming voluminous, already on the court file, which is more relevant (as were most of the authorities cited to us, certainly by Mr Khamati) to the issues in the main action before the High Court, which was commenced by the applicant on February 19 this year.

In her plaint she set out the facts, most of which have already been related by us, the offices held by the parties to the main action, and seeks declarations that the alleged conversion by the respondent defendants of the 'gathering' of February 12, 1986 into a meeting of the National Executive Committee was illegal, that the purported resolution by them suspending the applicant from office as Chairman was null and void and that the respondents have no authority to act as a task force. Further that the first respondent has no

authority or right to act as National Chairman of the organisation. She claims damages and perpetual injunctions *inter alia*, restraining the respondents from continuing to usurp the applicant's office and functions to keep her out of her office.

We have not yet seen the defence which is said to have been filed, but there have been two applications for temporary injunctions in the High Court, one of which was bitterly fought, and both of which to some extent in their terms go outside the perpetual or permanent injunctions sought in the plaint, and, of course, the present application before this court, which is of its nature interlocutory, seeking injunctions pending the determination of the appeal which has been lodged against the decision of Mbaya J on the first interlocutory application made in the High Court.

We stress the nature of these successive interlocutory applications, because in their enthusiasm for the merits or demerits of the main case, counsel have tended to lose sight of the principles by which both this court and the High Court have for years been guided in deciding whether or not to grant a temporary injunction. These principles were firmly stated by Spry VP in *Giella v Cassman Brown & Co Ltd* [1973] EA 358 at 360. They are:

‘First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

It is true that towards the end of his submissions Mr Khamatia adverted more to these principles, and that Mr Kariuki put *Giella v Cassman Brown* forward as one of the authorities on which he relied. Nevertheless counsel remained preoccupied throughout their submissions with the facts bearing on the action itself rather than with the principles governing temporary injunctions.

The distinction between the two is well illustrated by *Leary v National Union of Vehicle Builders* [1971] Ch 34, in which it was alleged that the plaintiff had, in breach of the principles of natural justice, been excluded from his office of area organizer as a result of certain illegal decisions taken by other members of the Union. The interlocutory injunctions claimed were not dissimilar in substance from those sought in the instant case. Megarry J, as he then was, had a good deal to say about the principles of natural justice at pp 48 and 49 of the report, (as he did in another case, cited to us *John v Rees* [1969] 2 WLR 1294) but he nevertheless went on to hold at p 57:

“In these circumstances, where does the balance of convenience lie? The union urges that there will be much embarrassment if the plaintiff is in effect restored to office. Some of that embarrassment is, I think, due to causes on which the union cannot properly rely. Mr Pain accepts that he can place no reliance on any embarrassment due to any possible feelings of guilt within the union in having wronged the plaintiff. Further an affidavit by the general secretary speaks of the decision to exclude the plaintiff, and ends by saying, “I verily believe that most members and officials are of the opinion that the plaintiff ought to have accepted the decision of the National Executive Committee and of the appeal council”. I cannot think that embarrassment felt because the plaintiff refused to accept what I have held to be at least *prima facie* an insupportable decision ought to be put in the seals against him; to protest at injustice is not morally wrong.”

Then at p 58, he comes back to the question of hardship and of the balance of convenience, and says:

“Even so, I think that there remains considerable cause for legitimate concern by the union on the score of embarrassment. Indeed, this must be implicit in many cases in which there is any question of what in effect is akin to the specific performance of a contract of service. For myself, I should be very slow to make any such order on motion, though in a clear and compelling case there is no doubt jurisdiction to do so. I do not think that this a case of that sort. A union must of necessity depend in large measure on the loyalty and

reliability of its officers in what is plainly often a difficult and controversial field of human activity. The union in this case is attempting to remedy defects of administration in the Luton area which the plaintiff, says the union, had done nothing to put right. He was under the control of the NEC and had to work with other officers of the union; and things have been said on each side which cannot make the resumption of the former relationship an easy one. This is not a case like *Shanks v Plumbing Trades Union* (15 November 1967, unreported) in which there has been mere non-disclosure. Furthermore, Mr Turner-Samuels has failed to convince me that, in view of the payments being made and the undertaking offered, the plaintiff will suffer any real hardship from his exclusion from office continuing until the trial, at all events if the payments continue until then. In short the balance of convenience seems to me to be in favour of refusing the injunction. I do not think that it would be right to force the plaintiff on to the union until the matter is finally resolved one way or the other. At the trial it will be possible to explore more fully the status of the plaintiff, and in particular whether the characteristics of his office as an area organizer leave him, despite the process of election which brought him to that office, substantially in the position of a servant, and so able to claim only damages for wrongful dismissal, or whether instead he is on the other side of the line and holds an office or status to which the court will secure his restoration by injunction or otherwise. On the facts as they stand before me on motion I will say only that I am not satisfied that this is a case of an interlocutory injunction.

Mr Khamati submitted that the facts in *De Souza v Tanga Town Council* [1961] EA 377 were in some respects similar to those in this case because the Tanga Town council's Finance Committee was not empowered to dismiss an employee, the Finance Committee did not conduct its inquiry in a judicial manner, embarrassed De Souza by not letting him know the precise case against him or give him a fair opportunity to contradict prejudicial statements. At this point we note that that appeal was concerned with orders of certiorari and mandamus and that the High Court of Tanganyika had necessarily made findings of fact on all these and other related matters with which the Court of Appeal for Eastern Africa could also deal.

Here, of course, we cannot on all the contradictory and inconsistent material laid before us, and without having heard the parties or their witnesses, make any findings on the status of the applicant or of the respondents, the validity or otherwise of the meeting of the National Executive Committee on February 12 the minutes of that meeting, the presence of the patron, an assistant to one member, two officials of the Ministry at it, or the presence or absence of the applicant, nor can we tell what opportunity, if any, she had of knowing the case against her, and whether or not she had a fair chance to contradict prejudicial statements, the effect of the resolutions and so forth.

When it comes to the matter of hardship and the balance of convenience, however, we are of the view at this stage that the organization may have to remedy some defects in its administration and restore some order to its finances, and it would not be right (with particular reference to *Leary's case (supra)*) to appear to force the applicant on the organization until we have heard the appeal, and or even, perhaps not until the trial has been concluded. It may be of great importance to the applicant that she remains at the helm of the organization now in the lead up to the meeting of the National Council, the elections at every level within the organization and during the debates on the Ministry's Committee's report. But we are of the belief that to smother until further order the organisation's administration or part of it would be out of proportion to the alleged wrongs the applicant has endured. The balance of convenience tips in favor of discharging the *ex parte* injunctions we sent forth on March 14.

The organization, we are assured by Mr Kariuki, though allowing temporarily in a welter of financial troubles, could afford to pay the applicant reasonable damages if found liable to do so. And we have heard of its building in Nairobi which could probably be attached in execution if necessary. There has been no suggestion the respondents could not meet them. The applicant has not, it seems, so far been expelled from the National Executive Committee and is still a life member of the organization and may, if her advocate's optimism is well founded, be restored to the chair by the National Council when it meets. If not, and she succeeds in her suit against the respondents, damages, in our view, would be an adequate

remedy for any wrong she may be able to prove at the trial she has suffered.

We were invited by Mr Khamati to restrict the range and width of the injunctions if we blenched at extending the *ex parte* ones we sent forth but we resist the offer to try to sift the life and well being of one part of the organization from any other.

We conclude by saying that on the facts, as they seem to be before us on this motion, we are not satisfied that this is a case for these interlocutory injunctions to be extended. We now raise them and dismiss the motion with costs (save for the costs of today because the respondents were not represented).

Orders accordingly.

**Dated and Delivered in Kisumu this 22nd day of March 1986.**

**A.A.KNELLER**

.....

**JUDGE OF APPEAL**

**A.R.W.HANCOX**

.....

**JUDGE OF APPEAL**

**J.O.NYARANGI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**