



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, AZANGALALA & SICHALE, JJ.A.)

CIVIL APPLICATION NO. NAI 108 OF 2015 (UR 86/2015)

BETWEEN

DAVID KELI KIILU

BROWN ONDEGO

ISAAC NJOGU

NELSON N. OGOMBO.....APPLICANTS

(Sued as Trustees of the Agricultural Society of Kenya)

AND

HALIMA SHAIYA.....RESPONDENT

(An application seeking for an Order of stay under Rule 5(2) of the Court of Appeal Rules, 2010 pending the filing, hearing and determination of an intended appeal against the Ruling and/or Order of the High Court of Kenya at Nairobi (Lady Justice Aburili) dated 23rd March, 2015

in

H.C.C.C. No.161 OF 2014)

RULING OF THE COURT

This is an application brought under **sections 3A and 3B** of the **Appellate Jurisdiction Act** and **Rule 5(2) (b)** of the **Court of Appeal Rules** for an order that the execution of the Ruling of the High Court delivered on 23rd March, 2015 together with the orders arising therefrom be stayed pending the determination of the intended appeal.

By the ruling referred to, the High Court granted to the respondent against the four applicants herein two interlocutory orders, firstly, a mandatory injunction compelling the four applicants to restore the respondent herein to the office of Chairperson of Agricultural Society of Kenya (society) Nairobi Branch and also to gain access to her office without any obstruction until the suit filed by the respondent is heard and determined, and secondly, a temporary injunction prohibiting or lifting the respondent’s suspension

from office of Chairperson, Nairobi Branch until the suit is heard and determined.

The applicants intend to appeal against the ruling and have filed a notice of appeal.

As the application shows, the four applicants are trustees of the society. The society has a constitution and by article 12(a) thereof the society has twelve trustees nominated by council of the society and appointed by annual general meeting of the society.

The object of the society is to encourage and assist in the promotion of agriculture, trade, industry, tourism and industries related thereto. An application for membership of society is made to the branch of the society in which an applicant ordinarily resides or carries on business, and the branch upon the consideration of the application, may either admit an applicant as a member or reject the application. However, upon admission as a member, the branch is required to inform the national office which would in turn cause the name of the member to be entered into the Register of Members. A member is required to pay annual subscription and is entitled to attend, participate and vote in the annual general meetings and special general meetings.

The council of the society is the supreme body. The council consists of specified number of members drawn from the specified regional branches including the Nairobi branch.

The National Staff and Finance Committee is responsible for the day to day running of the society and its members include the chairman of Nairobi branch alternated by a branch chairman as may be determined by the national staff and finance committee from time to time. The minutes of the national staff and finance committee are laid before the national executive committee for deliberations. The national executive committee of the council, whose members include officers of the society and all chairmen of branches, receives and deliberates on proposals and recommendations of the staff and finance committee and by resolution makes recommendations to the council.

By article 37(e) of the constitution the council has power to discipline, suspend, expel a member of a branch, council members, committee members or any member of the society who disregards council directives or whose actions are repugnant to the well being of the society. The council has made the Disciplinary and Appeal Rules pursuant to article 53 of the constitution. By the rules, the council has delegated the disciplinary process to the national staff and finance committee and to the executive committee whose decision is required to be placed before the next council meeting for ratification. The council has power to expel members while the national executive committee has power to suspend a member for a period of up to five years. The rules require that before any disciplinary action is taken, a member should be notified of the intention of the council to consider the complaint and of the allegations or inquiry and the nature thereof, and further that the member shall be invited to attend in person and give evidence or information. The rules also provide for an appeal process and stipulate that the internal dispute resolution process mechanism should be exhausted before resort to courts.

The branches of the society have also administrative structures which include branch committees, chairperson and annual general meeting. The branch chairperson is elected by the annual general meeting of the branch among members elected to sit in the council for a term of five years from the date of assumption of office.

The respondent was duly elected Chairperson of Nairobi Branch for a term of five years commencing from February 2011 which term would expire in February 2016.

On 7th April, 2014, the Weekly Citizen published an investigative article headed “**corruption at Agricultural Society of Kenya out of hand**”. On 16th April 2014 a special executive committee of the council was convened which resolved that the national staff and finance committee do, inter alia, carry out an inquiry to establish the persons behind the adverse publicity, make recommendations and report its findings to a special executive committee. By a letter dated 22nd April 2014, the respondent was invited together with all 15 members of Nairobi branch to attend the national staff and finance committee meeting on 25th April 2014 to “**share knowledge and views on**” the matter of adverse media publication.

The minutes of the meeting of 25th April 2014 have not been annexed to the application. However, the report of the national staff and finance committee to the executive committee dated 15th May 2014 shows, *inter alia*, that the national staff and finance committee held three meetings; on 25th April, 2014, 8th and 9th May, 2014 and ultimately recommended the expulsion of the respondent.

By a letter dated 15th May 2014, signed by the Chief Executive Officer of the Society, the society wrote to the respondent as follows:

“RE: SUSPENSION

Following your appearance on 25th April 2014 before the national staff and finance committee investigating into adverse publicity against the society, the national executive committee has on 15th

May 2014, found you culpable and in violation of Society Article 37(e) (actions repugnant to the well being of the society) of society’s constitution. Subsequently, the national executive committee on behalf of the council has suspended you from the society for a period of five years.

....”

On 4th June 2014, the respondent filed a suit in the High Court challenging the suspension and sought a declaration that suspension from her office as chairperson of Nairobi branch was unlawful for various reasons, permanent injunction and mandatory injunction. She also filed an interlocutory application for injunction prohibiting the Registrar of Societies (5th respondent) from accepting or acting upon a return based on the letter of suspension and mandatory injunction compelling the 1st to 4th applicants to restore her to her office of chairperson of society’s Nairobi branch. The application was supported by her affidavit and documents, the respondent contending, in essence, that, no charges were levelled against her; the meeting of 25th April 2014 was not a disciplinary meeting and that her suspension was in flagrant breach of all basic principles of natural justice and article 37(e) of the society’s constitution.

The society filed a replying affidavit sworn by **Batram Muthoka**, the Chief Executive Officer of the society contending, in essence, that the respondent was given a fair opportunity to explain herself at the inquiry held on 25th April 2014, that the respondent deliberately absented herself from the meeting of 15th May 2014 which received the report, that the national executive committee resolved to suspend the respondent instead of expelling her and that the respondent filed the suit before exhausting the appeal process.

The High Court considered the application in an exhaustive ruling. It found that the respondent had established a *prima facie* case with a high probability of success, that the respondent’s case was unusually strong warranting the grant of interlocutory mandatory injunction. More specifically, the High Court made findings in essence, that;

- (i) It was not established that the respondent was responsible for divulging the adverse information or publication of the offending article.
- (ii) The proceedings could not qualify to be disciplinary proceedings as there was no specific charge levelled against the respondent requiring her to respond and as there was no verdict but only a report.
- (iii) The unsigned report dated 15th May 2014 cannot be considered to be a minute capable of being confirmed and adopted in a subsequent meeting.
- (iv) There was no evidence or minutes indicating that the report was submitted to the national executive committee or verdict of the council suspending the respondent from membership of the

society.

The application for stay of execution of the ruling and orders of the High Court is supported by the affidavit of **Batram Muthoka** and the annexed documents. He deposes, amongst other things, that the applicants have strong grounds of appeal with high chances of success, that the drastic order of mandatory injunction which had the effect of determining the whole suit cannot issue without hearing the suit on the merits and that if the order is not granted, the intended appeal would be rendered nugatory as two persons occupying one office of chairperson of society's Nairobi branch will cripple the daily operations of the society. The proposed grounds of appeal are contained in the draft memorandum of appeal.

The respondent in her replying affidavit deposes *inter alia*, that the appeal has no chance of success as it is based on the jurisdiction of the High Court to grant interlocutory mandatory injunction, that the position of a chairperson of society's

Nairobi branch is elective and non executive and does not involve day to day running of the activities of the branch, that despite service of the court order the society has purported to replace her as chairperson of society's Nairobi branch to ensure that it cannot comply with the court orders.

The power of the Court to grant the orders sought is discretionary. For the Court to exercise its discretion in favour of the applicants, they are required to demonstrate that the intended appeal is arguable and, that, if the orders sought are not granted the appeal, if successful, would be rendered nugatory.

As regards the merits of the intended appeal, the heart of the dispute was whether or not the respondent was suspended as chairperson of society's Nairobi branch in accordance with a fair disciplinary procedure.

Referring to the proposed grounds of appeal, the applicants' advocates have submitted that the learned judge failed to make a determination whether or not the respondent had established a *prima facie* case with a probability of success. It is also contended by the applicants that the learned judge erred in fact and in law by reinstating the respondent as chairperson yet she was suspended as a member for a period of five years.

We recognized from the outset that we are not dealing with the appeal. It is clear from the ruling of the High Court that the learned judge made a specific finding that the respondent has established a *prima facie* case with a high probability of success and gave ten grounds for that finding.

The society's disciplinary and appeal rules specifically provide for service of a notice before any disciplinary action is taken. The rules also stipulate the information that the notice should contain, and further, that the member should be invited to attend to give evidence. The notice dated 22nd April 2014 merely invited the respondent to attend the committee meeting of 25th April 2014 to share knowledge and views in the matter of adverse media publication. The minutes of the meeting of 16th April 2014 *prima facie* shows that the national staff and finance committee was mandated to conduct an inquiry. Indeed, **Mr. Bratam Muthoka** deposed in paragraph 11 of the replying affidavit to the application in the High Court sworn on 17th July 2014 that the inquiry of the committee focused on the entire 15 members of the Nairobi branch committee and 4 members of the staff of the society.

The respondent claimed that there were no disciplinary proceedings ever conducted against her. The vital minutes of the national staff and finance committee meeting of 25th April 2014 which inquired into the matter and allegedly recommended the expulsion of the respondent were not produced by the applicants in the High Court and has not been produced before us. In the absence of such minutes, which would have showed what transpired at the meeting, the applicant's claim that the respondent was subjected to a fair disciplinary process, remained *prima facie* unsubstantiated. Moreover, the suspension of the respondent could not *prima facie* be in accordance with the society's constitution and would be sterile unless the recommendations of the national staff and finance committee had been laid before the national executive committee for deliberation and recommendations made by the national executive committee and

ultimately ratified by the council. There was no evidence in the High Court that the recommendations for respondent's expulsion had gone through that process. The letter dated 15th May 2014 communicating the suspension to the respondent referred to the decision of the national executive committee made on the same day. The applicants however did not produce any minutes to verify that the national executive committee indeed met and deliberated on the recommendations, made the resolution and further referred the matter to the council for ratification.

In the absence of the minutes of the meeting of the national staff and finance committee of 25th April 2014, and in the absence of minutes showing recommendations of the national executive committee and the further minutes showing the ratification of the decision by the council, we are not satisfied that the intended appeal, is, in substance, arguable.

The applicants contend that if the order is not granted the day to day operations of the Nairobi branch would be grounded by the leadership rivalry. The applicants have introduced new evidence by the certificate of urgency that the special meeting of the national staff and finance committee appointed one **Minne Njagi** as acting Nairobi branch chairperson with effect from 19th May 2014 to serve for the remaining term. Although Batram Muthoka swore the replying affidavit filed in the High Court on 17th July 2014 after the alleged appointment of a replacement, he did not disclose the new evidence to the High Court. Had he done so, the learned judge would have pronounced on the validity of such appointment. It is too late to raise the issue.

The subject matter of the dispute is the removal of the respondent from her elective office and membership in the voluntary members' society. If the respondent was not suspended she would have served as a chairperson of Nairobi branch until February 2016. If the application is granted the effect would be to legalize the suspension of the respondent when the High Court has found that the respondent's case is unusually strong and clear.

Furthermore, if the appeal is ultimately filed, it is not likely to be heard and determined before the expiry of the respondent's term which has been interrupted. The result is that if the appeal is ultimately dismissed the respondent will have suffered irreversible injustice. On the other hand, the replacement of the respondent can be undone. The applicants cannot be allowed to stultify the decision of the court or hamstring the exercise of the discretion of the Court by presenting self induced *fait accompli*.

For those reasons, the application has no merit and is dismissed with costs to the respondent.

DATED and DELIVERED at Nairobi this 17th day of July, 2015.

E. M. GITHINJI

.....

JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

*I certify that this is a
true copy of the original*

DEPUTY REGISTRAR