



**IN THE COURT OF APPEAL  
AT NAIROBI  
CORAM: OMOLO, TUNOI & SHAH, J.J.A  
CIVIL APPLICATION NO. NAI. 268 OF 2001 (147/2001 UR)**

**BETWEEN**

**DR. JOHN KEKOVOLE .....1ST APPLICANT**

**GODWIN MZENGE .....2ND APPLICANT**

**IRENE WAMBIA .....3RD APPLICANT**

**AND**

**JONATHAN WABALA .....RESPONDENT**

**(An application for stay of execution pending the hearing  
and determination of an Appeal from the Ruling and  
Order of the High Court of Kenya at Kisumu (Birech,  
Commissioner of Assize) delivered on 31st July, 2001**

**in**

**H.C.C.C. NO. 128 OF 2001)**

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**REASONS FOR THE RULING OF THE COURT**

On 17th day of September, 2001 we made the following orders:

*"Upon hearing both the counsel for the applicants and counsel for the respondent, we grant a stay of the order of the High Court of Kenya at Kisumu made on 31st July, 2001 in its Civil Case No. 128 of 2001 pending the hearing and determination of the intended appeal. We also grant a stay of any further proceedings in the said suit pending the hearing and determination of the intended appeal. We will give our reasons on 9th November, 2001 at 9.30 A.M. Costs will be in the intended appeal".*

We now give our reasons for the said order. The three applicants **Dr. John Kekovole, Godwin Ngege and Irene Wambia** are allegedly the Chairman, Executive Director and General Secretary/Treasurer of the Family Planning Association of Kenya (the Association) which association is a Non- Governmental Organization registered under section 10 of the Non-Governmental Organizations Co-ordination Act of Kenya, Act No. 19 of 1990 (the Act). On the 24th day of April, 2001 the respondent (the plaintiff in the suit) filed a suit against the three applicants (defendants in the suit). The respondent, in the suit, stated that the three were being sued in their official capacities as "specified hereinafter". No such 'specification' was given. However, in the second paragraph of the plaint it is stated that they were sued in theirS  
iomfuflitcainaelo ucsalpya cwiittihe st.he filing of the suit the respondent moved the superior court under

a certificate of urgency by an application brought under Order 39 rule 2 of the **Civil Procedure Rules** and Section 3A of the **Civil Procedure Act** whereby he sought, inter alia, the following prayers:

***"(b) Pending the hearing and determination of the plaintiff's suit, a temporary injunction do issue restraining the Respondents from convening the National Executive Committee Meetings and Annual Delegates Conference of the Family Planning Association of Kenya, from conducting elections of the Association, from carrying on with any business of the association where the plaintiff's participation is permitted or necessary to the exclusion of the plaintiff."***

The said prayer as sought is curiously worded. It sought to restrain the Association from convening the National Executive Meetings and Annual Delegates' Conference of the Association and from conducting elections of the Association or from carrying on the business of the Association unless the respondent was participating therein when such participation was warranted or permitted.

The grounds upon which the respondent sought such a wide restraining order were as follows:

*"(1) The applicants had proceeded to nullify his election as Branch Chairman of the Association's Busia branch as the Regional Chairman of the Western Region.*

*"(2) The applicants had clandestinely and without the participation of the respondent called a meeting of the National Executive Committee of the F.P.A.K. on 26th April, 2001 without inviting the respondent to participate therein thereby denying the electors his representation thereat.*

*"(3) The applicants have scheduled the Association's National Delegate's Conference for 27th April, 2001 without inviting the respondent thus denying the electors his representation thereat.*

*"(4) The applicants were acting in a blatant contravention of the Association's constitution and were employing illegal regulations in the conduct of the Association's affairs."*

The superior court (Commissioner of Assize P.K. Birech Esq.) granted an ex-parte interim order on 24th April, 2001. We were so informed from the Bar. There is no record before us of the interim order but we have no reason to think that such order was not made. We would point out that the making of such far-reaching orders on an interim basis must not be encouraged. The respondent managed to stop the meetings of the Association scheduled for 26th April, 2001 and 27th April, 2001 thereby almost bringing its business to a halt. We would also point out that as far as practicable such orders ought not to be made unless the other side has had the opportunity of being heard.

Be that as it may, there was an issue before the learned Commissioner which needed careful analysis. Was the association sued? If so how was it sued? Was it sued as a society or was it sued as an entity capable of being sued pursuant to the provision in section 12(3) of the Act which reads:

***"(3) A registered Non -Governmental Organization shall by virtue of such registration be a body corporate capable in its name of -***

***(b) suing and being sued;***

***(c)-***

***(d)- "***

Mr. Muigai who appeared with Mr. Waiyaki for the applicants complained that the applicants could not understand what injunction they were supposed to obey. As we see it, it is certainly arguable as to whether the applicants were properly sued, or whether the Association was properly sued.

It is also arguable if the Association at its meeting on 29th April, 2000 adopted the Code of Conduct for Volunteers for the Association. Article 6.4 of the said Code provides:

"6.4.No spouse or immediate member of family of a policy - maker or committee member shall be appointed to full -time employment within the Association. (Immediate member of family means husband or wife, son or daughter, including legally adopted children)."

The respondent based his argument against his removal from office

on the allegation that the Code of Conduct for Volunteers had not been approved and implemented because it had not been discussed. The bone of contention was the fact that the respondent's daughter was employed by the Association. The applicants say that the said Code was reviewed and adopted by the Association at its Annual Delegates' Conference held on 29th April, 2000 vide minute No. 13 of 2000. An issue like that cannot be decided on affidavits alone unless clearly admitted.

The stand taken by the applicants in the superior court on the issue of conflict of interest, urged Mr. Muigai, could have been misunderstood.

Mr. Muigai urged further that his clients' strongest point was that the elections by which the respondent began holding the two positions were irregular and that the Association had reasons to impeach the elections. This obviously will be an issue for the court hearing the intended appeal. Another issue that was canvassed was: what would be the effect if the respondent had to wait in the sidelines until the hearing and determination of the suit in the High Court? The answer is that he will not suffer any pecuniary damage. On the other hand would it be proper to paralyse the functions of the Association to accommodate one person? It is arguable that the balance of convenience clearly tilted in favour of the Association.

Will the success in the intended appeal be rendered nugatory if we were not to grant a stay of the order made on 31st July 2001 by the learned Commissioner of Assize? We think not. In that event he will revert to holding his positions as:-

1. Busia Branch Chairman of the Association and

2. Delegate from the former Western Area Committee and as such a member of the regional Committee of the Association.

The fact of his being kept out of the two positions will not affect him financially in any way and as pointed out earlier it is arguable that the balance of convenience lies in favour of the Association. As an important Association it ought to function normally for the general good of Kenyans.

Having given the above reasons we need not consider other issues. What we have said so far is sufficient to show that the injunctive order of the superior court made on 31st July, 2001 be stayed pending the hearing and determination of the intended appeal.

**Dated and delivered at Nairobi this 9th day November, of 2001.**

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**A.B. SHAH**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**