



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.414 OF 2018

IN THE MATTER OF THE ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER CONTRAVENTION AND/OR APPREHENDED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLE 36(1) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

AND

IN THE MATTER OF THE SOCIETIES ACT, CHAPTER 108 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF THE SAFARICOM DEALERS ASSOCIATION

AND

IN THE MATTER OF ELECTION OF THE OFFICIALS AND IRREGULAR USURPING OF THE CONSTITUTION OF SAFARICOM DEALERS ASSOCIATION AND PROVISIONS OF THE SOCIETIES ACT, CAP 108 OF THE LAWS OF KENYA

BETWEEN

KENNEDY ORANGI ONDIEKI.....PETITIONER/RESPONDENT

AND

ESTHER MUCHEMI (CHAIRPERSON).....1ST RESPONDENT/APPLICANT

NAHASHON MACHARIA (SECRETARY)...2ND RESPONDENT/APPLICANT

SAFARICOM DEALERS ASSOCIATION)...3RD RESPONDENT/APPLICANT

RULING

Application dated 19/11/2018

1. Before me are two applications one dated 19th November 2018 seeking the following orders:-

a) A temporary injunction do issue restraining the 3rd Respondent whether by itself, its servants, employees and/or agents from holding and/or conducting the 3rd Respondent's election/Annual General Meeting slated on 24th November 2018 or on any other day pending the hearing and determination of this Application.

b) A Temporary injunction do issue restraining the 3rd Respondent whether by itself, its servants, employees and/or agents from holding and/or conducting the 3rd Respondent's elections/Annual General Meeting slated on 24th November 2018 or on any other

day pending the hearing and determination of this Petition.

c) An order of this Honourable Court do issue compelling the Respondents to supply the Petitioner and the entire 3rd Respondent's membership with statements of accounts and agenda for the Annual General Meeting 21 days prior to the said Annual General Meeting.

d) This Honourable Court be pleased to freeze, restrict and/or prohibit operations and/or transactions of the 3rd Respondent's Bank Accounts Numbers 0019079680016 & 0102077298700 held with Chase Bank, City Centre Branch, Nairobi and Standard Chartered Bank, Koinange Street Branch, Nairobi respectively or any other bank account that we might not be privy to and further prohibit usage of any of the 3rd Respondent's resources in a botched election pending the hearing and determination of this application.

e) The 3rd Respondent do stop, delay and/or postpone the said elections/Annual General Meeting and follow the due process.

f) All members be duly and properly notified in advance of the dates of the meeting/nominations and election processes including the dates and deadlines in accordance with the 3rd Respondent's Constitution and the Societies Act provisions.

g) An independent boy does prepare and conduct the members' voters register to be available for all members as arranged.

h) The costs of this application be borne by the 1st and 2nd Respondents.

i) Any other or further relief that this Honourable Court mat deem fit and just to grant.

2. The application is supported by affidavit of Kennedy Orangi Ondieki and on the grounds on the face of the application.

3. The application is opposed and the Respondents in doing so filed a Replying affidavit by Nahason Macharia sworn on 22nd November 2018.

4. The Respondents also filed a preliminary objection raising the following ground:-

1) *That pursuant to the provisions of the 3rd Respondents constitution this honourable court lacks jurisdiction to hear and determine this case.*

5. That on 22nd November 2018 the court granted temporary injunction to the effect that pending hearing and determination of the application *inter-partes* a temporary order do issue restraining the 3rd Respondent whether by itself, its servants, employees and/or from holding and/or conducting the 3rd Respondent's elections/Annual General meeting slated on 24th November 2018 or any other day. The court further issued an order to the effect that pending the hearing and determination of the application *inter-partes* an order be and is hereby issued compelling the Respondents to supply the petitioner and their entire 3rd Respondent's membership with statements of accounts and Agenda for the Annual General meeting 21 days prior the said Annual General meeting. The parties were further directed to file and exchange written submissions to the application before the hearing date.

6. The Petitioner/Applicant filed submissions to the application dated 19/11/2018 on 17/12/2018.

7. The Respondents filed their submissions in response as regards the Petitioner's/Applicant's submissions on 4th April 2019.

Application dated 29/03/2019

8. The second application dated 29/03/2019 by the Respondents seek the following orders:-

a) That this Honourable Court do grant an order to set aside and discharge the orders granted on 23rd November, 2018 issued against the Respondents/Applicants, pending the hearing and determination of this application.

b) That this Honourable Court do grant an order to set aside and discharge the orders granted on 23rd November, 2018 issued against the Respondents/Applicants, pending the hearing and determination of this petition.

9. The application is based on the grounds on the face of the application and supported by the affidavit of Nahashon Macharia sworn on 29th March 2019.

10. The petitioner filed grounds of objection to the Notice of Motion dated 29/3/2019.

Analysis and Determination

11. I have very carefully considered the two applications, affidavits of support, grounds of opposition, rival submissions and from the above the issues for determination are as follows:-

a) Whether the Applicant has established a prima facie case with probability of success?

b) Whether the applicant stands to suffer irreparable damage as a result of the Respondents conduct?

c) Whether the balance of convenience weighs in favour of the Applicant?

d) Whether Respondents has satisfied conditions to warrant setting aside or discharging the orders granted on 23rd November 2018?

A) Whether the Applicant has established a prima facie case with probability of success?

12. The petitioner contends that at all material time he together with the 1st and 2nd Respondents were and are members and elected Board members of the 3rd Respondent. That the elections for various positions in the 3rd Respondent were scheduled to take place on 24th November 2018 but there emerged massive irregularities allegedly orchestrated by the 1st and 2nd Respondents for ulterior motive. It is urged the motive was to usurp the right of members of the Association to participate in the voting process as envisaged in the societies Act.

13. The petitioner urges the Respondents have not yet supplied the petitioner and the 3rd Respondent's membership with statements of accounts and agenda for the Annual General meeting yet this is supposed to be provided 21 days prior to the said Annual General meeting. That without the court's intervention the Respondents are likely to proceed with the said elections/Annual General meeting without following the due process.

14. It is asserted that notwithstanding both oral and written complaints by members pointing out glaring irregularities; the 1st and 2nd Respondents have ignored the concerns raised and instead proceeded with the devious scheme which is based on a manipulated nomination process designed to yield certain pre-determined out comes with the Respondents being direct beneficiaries and hold elections without following the due process. It is alleged the process sought to be adopted by the Respondents is in violations of the Association's constitution.

15. The petitioner urges that the Respondents are bound to spend and/or squander the 3rd Respondent's resources and funds in its Bank Account Number 0019079686016 and 0102077298700 held with Chase Bank, City Centre Branch, Nairobi and Standard Bank, Koinange Street Branch, Nairobi respectively or any other bank account. It is contended that no prejudice will visit upon the Respondents if the application is allowed but the Petitioner and the 3rd Respondents membership stand to suffer great prejudice if the Respondents are left to proceed with Annual General meeting and elections as planned.

16. The Respondents admit the Annual General meeting and electors for elective positions in the 3rd Respondent were scheduled for 24th November 2018 as per annexure ("NM-1") a copy of 21 days' notice in the Daily Nation Newspaper on 1st November 2018. That the 3rd Respondent issued 21 days' Notice of the Annual General meeting in good time hence it is urged the Annual General meeting was valid.

17. It is contended that the 3rd Respondent issued all its members including the Petitioner/Applicant with statements of accounts for Association 8 days in advance of Annual General meeting as per annexure ("NM-2") a copy of email dated 16th November 2014 forwarded to members and Annexure thereto and marked ("NM-3") a copy of the statement of accounts.

18. It is Respondents response that the 3rd Respondent had in its original constitution, the Annual General meeting be held once every three years (see annexure ("NM-4") a copy of the previous constitution of the 3rd Respondent. That the 3rd Respondent hereto Annual General meeting was held on 8th August 2015 (see Annexure (NM-5") a copy of the minutes of the 3rd Respondent's Annual General meeting held at the Leico Regency.

19. It is Respondents contention that the 3rd Respondent thereafter realized that its constitution was not in line with the Society Act of Kenya and called a Special General Meeting on 15th February 2018, to amend the constitution. (see Annexure "NM-6") a copy of the minutes of the 3rd Respondent's special General meeting held at the Hilton Hotel; which meeting the petitioner is alleged to have actively participated following which the petition was filed challenging the Respondent's action. It is also urged the members realized their constitution had also not been ratified by members nor had it been registered with the Registrar of Societies hence the need for special General meeting to amend the constitution and have the same filed with the registrar.

20. The Respondents made payments to have the Amended constitution approved by the Registrar (see ("NM-7") a copy of receipt issued by the Registrar on 23rd August 2018. That the 3rd Respondent have since, amended its constitution to be in line with the Societies Act which provides that Annual General meeting be held at least once a year. (see "NM-8").

21. It is asserted by the Respondents that they have procured the services of the IEBC to oversee and officiate the elections (see Annexure ("NM-9, NM-10, NM-11 and NM-12") copies of letters to IEBC requesting for assistance; copy of the budget for 3rd Respondent elections from IEBC; the minutes of a meeting held between the 3rd Respondent and officials from IEBC and a cheque payment addressed to IEBC being part payment of the election process respectively.

22. It is contended that the 3rd Respondent will suffer financial losses if the Annual General meeting will be stopped, delayed and/or postponed; due to the fact that payment have been made to several institutions including IEBC and Laico Regency Hotel (see Annexure ("NM-13") and ("NM-14") copy of cheque from the 3rd Respondent to Laico Regency being payment and a receipt from Nation Media Group for payment made for 21 days' notice respectively.

23. It is Respondents argument that the 3rd Respondent will be prejudiced and suffer losses if the court proceeds to freeze, restrict and/or prohibit operation and/or transactions of the 3rd Respondent's bank Account mentioned by the petitioner.

24. It is clear from the 3rd Respondent Amended constitution under the General meetings clause, sub-class (c) that any member wishing to stop a scheduled meeting must give the Association 14 days' notice with not less than one third support from members of the association, which the petitioner did not comply with. It is further urged the constitution provides that all differences arising between the associations on one hand and any of its members, every difference shall be referred to an arbitrator to make a decision.

25. It is the Respondents position that to date they have not received from the petitioner any oral or written complaints from either member in regard to the planning of the General meeting.

26. The petitioner allegation is that the Annual General meeting called by the Respondents was in breach of the Societies Act. He alleges no 21 days' notice was issued together with Agenda. The Respondents have demonstrated that a 21 days' notice was issued and published in the Daily Nation of 1/11/2018 setting Annual General meeting for 24/11/2018. That further the 3rd Respondent issued all its members including the petitioner with statements of accounts for association 8 days in advance of the Annual General meeting. That the Respondents acted in accordance with the Association constitution. It has also been established that it is the petitioner who has not complied with the constitution by failing to give 14 days' notice with not less than one third support of members of the association to stop a scheduled Annual General meeting. Further the constitution provides for internal dispute resolution mechanism to the effect that all differences arising between the associations on one hand and any of its members shall be referred to an arbitrator to make a decision. In this matter the petitioner has difference with the association and instead of referring the matter to the arbitration proceeded to file this suit.

27. In view of the above the petitioner has failed to demonstrate a prima facie case with probability of success.

B) Whether the applicant stands to suffer irreparable damage as a result of the Respondents conduct?

28. The petitioner urges that he stands to suffer irreparable damage as a result of the Respondents conduct. The petitioner has not shown that the Respondent acted contrary to the Societies Act. It is on the other hand the petitioner who has acted contrary to the Societies Act and this has prejudiced the Respondents as demonstrated by the Respondents. The Respondents have been denied the opportunity to hold its Annual General meeting as per its constitution. It has suffered financial losses following stoppage of its Annual meeting. The applicant has not shown how it stands to suffer damages as a result of a constitutionally set Annual General meeting of the association when it has failed to stop the Annual General meeting in accordance with the Association constitution. I find that the petitioner shall not stand to suffer any irreparable damage as a result of the Respondents conduct.

C) Whether the balance of convenience weighs in favour of the Applicant?

29. In view of the provisions of the Association constitution and the time set for Scheduling Annual meeting having lapsed I find that the balance of convenience tilts in favour of the Respondents. It therefore follows the orders sought by the petitioner cannot be granted.

D) Whether Respondents has satisfied conditions to warrant setting aside or discharging the orders granted on 23rd November 2018?

30. The court on 22/11/2018 granted an ex-parte order to the effect that pending the hearing and determination of the application dated 29/11/2018 a temporary injunction do issue restraining the 3rd Respondent whether by itself, its servants, employees, and/or agents from holding and/or conducting the 3rd Respondent's Annual General meeting slated on 24th November 2018 or on any other day. The court further issued an order compelling the Respondents to supply the petitioner and entire 3rd Respondent's membership with statements of accounts and agenda for the Annual General meeting 21 days prior to the said Annual General meeting.

31. The Respondents in seeking to set aside the ex-parte injunction orders contend that the orders were issued notwithstanding that the Respondents had issued a 21 days' notice to the members of the 3rd Respondent in the Daily Nation of 1/11/2018 for the Annual General meeting scheduled for 24/11/2018, setting out the Agenda of the AGM; that the Respondents also sent out email, the statement of accounts to the members of the Association before the slated AGM as provided for in the Societies Act. That the petitioner failed to disclose that he had received the email.

32. The Respondents argue that the petitioner filed a similar suit being Hc Pet. No. 45 of 2015 Mombasa, which respondents were not aware till on 8/3/2019 when they were served with Notice to show cause by the court and it took place on 6/3/2019. It is contended by the Respondents that this suit is pursuing the matter for frivolous and vexatious reasons, without sufficient proof of any anomaly or offence to the constitution. It is further urged the petitioner is hindering the other members of the Association from carrying out the AGM with the order still standing and preventing them from enjoying their constitutional rights.

33. I have considered the Respondents and Petitioners rival positions and I am of the view that the order sought to be set aside or discharged was made without the Respondents side position being considered. The Respondents in my view have demonstrated the petitioner did not disclose relevant material facts to the court, which would have enabled the court to consider the position as regards the petitioner's application before the orders could have been made. The petitioner did not disclose that it had received notice, statement of accounts and email to the court. He did not further disclose that he had filed similar suit before the High court at Mombasa.

34. Further to the above the petitioner failed to comply with clear provisions of the Association's constitution as regards giving 14 days' notice with not less than one third support from members of the Association stopping scheduled meeting and further referring the dispute to arbitration before filing the petition before the court.

35. In view of the above I find the Respondents have demonstrated that the orders granted on 23rd November 2018 issued against the Respondents pending this application ought to be set aside and discharged accordingly, for reason of non-disclosure of relevant material facts, failure to comply with the Association constitution and failure to refer the matter to an arbitration before filing of the suit before this court.

36. The upshot is that I proceed to make the following orders as regards the two applications:-

a) Application dated 19th November 2018 by the petitioner is without merit and is dismissed.

b) Application dated 29th March 2019 is meritorious and is accordingly allowed in the following terms:-

1) The orders issued on 23rd November 2018 against the Respondents/Applicants pending hearing and determination of the application inter-partes are hereby set aside and discharged.

2) The costs of the two applications are awarded to the Respondents against the petitioner.

Dated, signed and delivered at Nairobi this 29th day of April, 2020.

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J .A. MAKAU

JUDGE