



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CIVIL CASE NO. 2 OF 2020

ORGANIC 4 ORPHANS INTERNATIONAL.....PLAINTIFF/RESPONDENT

VERSES

THRIVE FOR GOOD FOUNDATION.....1ST DEFENDANT

DALE PATRICK BOLTON.....2ND DEFENDANT

LINDA BOLTON.....3RD DEFENDANT

STEVE PIPPIN.....4TH DEFENDANT

DAWSON MUDENYO.....5TH DEFENDANT

AMBROSE MOOTIAN MOOTIAN.....6TH DEFENDANT

ESTHER SIRET.....7TH DEFENDANT

SCOLA NDUKU MUNYAO t/a MUNYAO –KAYUGIRA & CO.

ADVOCATES.....8TH DEFENDANT

MORRIS MUTUA KIMULI T/A M. M. KIMULI & CO

ADVOCATES.....9TH DEFENDANT

OFFICER COMMANDING KITALE

POLICE STATION.....10TH DEFENDANT

RULING

1. There are two sets of the application placed before this court. The first application dated **11th August 2020** filed by the 1st to 9th Defendants. The other one is dated **6th October 2020** filed by the Plaintiff and seeking contempt orders against the defendants. The court will proceed to first determine the application by the said Defendants.

2. The background to this matter is long and winding. It has been litigated in several fora and rulings made. The parties are therefore not strangers and therefore this court does not intend to be such repetitive as the facts are within their knowledge. The application dated 11th August 2020 prays for the following orders’;

(a) this court be pleased to settle the terms of the order given vide its ruling of 5th August 2020 vis a vis what was extracted as issued on 7th August 2020 pursuant to the principal order made on the application dated 15th July 2020 particularly to confirm whether it was the courts intention to grant and confirm all the orders sought and prayed for on the application of 8th June 2020.

(b) the court does review and set aside the order extracted on the 7th August 2020 purportedly issued pursuant to the

principal order emanating from the ruling on the application dated 15th July 2020.

(c) this court does strike out this suit and vacate all interim orders made /issued in this matter on the ground that the suit is an abuse of the due process of court.

(d) the cost of this application be awarded to the defendants and be borne by Mr Boaz Oduor Ogollah, Douglas Kiniabei and their advocate m/s Kraido Majune of Kraido & co. advocates.

3. The application is supported by the sworn affidavit of **Ambrose Lemaiyan Mootian** sworn on the even date as well as the grounds on the face of the application.
4. The sum total of the above affidavit is a chronology of the relationships between the plaintiff and the defendants. The issue which has been raging is the ownership of the Plaintiff Company. The annexures to Mr Mootian application encompasses the registration of the organisation or the plaintiff as well as who are the legitimate founders.
5. The issues went from the High court, the Labour and Employment Court, the arbitration process and back to the Commercial Division of the High Court where the arbitration award was adopted and the decree of the court issued. It appears that the decision by Hon. Justice Majanja vide case no E828/2020 made a final decision on the founders and leadership of the Plaintiff organisation.
6. There has not been any challenge to the above decision and to that extent the same remained valid and it barred Mr Ogollah and Mr Kiniabei from dealing with the Plaintiff, its assets as well the general running of it and they were ordered to hand over its assets.
7. The Plaintiff through the above duo then filed this suit seeking orders of injunction against the defendants vide application dated 8th June 2020. The application also sought to bar the Defendants from utilising the Plaintiff's assets enumerated therein. These assets included the movable and immovable of the Plaintiff. The court granted the Plaintiff some orders.
8. However, on 15th July 2020 the Plaintiff filed a motion asking the court to set aside a consent between the law firms of Odhiambo & co advocates and Geoffrey Otieno & co advocates and the orders be reinstated. The Plaintiff had argued that the consent was fraudulent. The court allowed the said application and reinstated the application dated 8th June 2020.
9. The Defendant's application is that the Plaintiff decided to extract the order which added prayers which were not issued by the court at inter partes level and they were not served with the application dated 8th June 2020. As a result of the wrong extraction of the order the Plaintiff went and evicted the defendant from the Plaintiff's properties and its employees.
10. This court thereafter through this application ordered for the maintenance of the status quo pending the outcome of this application. The Applicants in a nutshell pray that with all the suits which are pending and those sorted out the Plaintiff should be protected from the assault of the said Mr Ogollah and Mr Kiniabei and those associated with.
11. The supplementary affidavit sworn on 17th August 2020 annexed several photos of the damage done by the said persons in collusion with some auctioneers. It is alleged that several assorted items including money were stolen during the illegal entry and break. Later the situation was restored after the temporary orders of this court.
12. By a replying affidavit dated 26th August 2020, Douglas Kiniabei Makokha who says that he was the chief executive officer of the Plaintiff organisation also gave the long history of the Plaintiff especially on the leadership wrangles. According to him the defendants are no longer the leaders of the plaintiff organisation. He attached annexures showing that the N.G.O Board no longer find the 2nd and 3rd Defendants leaders so to speak.
13. He accused Mr Mootian was in the pocket of the 2nd and 3rd Defendants and that they were hiding from the law enforcement agencies. He enumerated all the cases by the parties which either they have been concluded or are still pending whether civil or criminal.
14. The parties were then ordered to file written submissions which they did and the court has perused the same and for want of time does not intent to reproduce here.
15. This court finds that the issue between the parties was settled by Majanja J in the case no. E828 OF 2020. The parties herein were all subservient to the Plaintiff's constitution which indicated that in the event of any dispute the matter was referred to arbitration. That is what happened an issue not opposed by the parties. If Mr Ogollah and Kiniabei did not participate as is indicated in the Mootian affidavits, then they have themselves to blame.
16. In the decree they were ordered to surrender all the assets of the Plaintiff in their custody and ordered to pay costs of Kshs. 2,069,725.
17. In light of the above decree what was the reason for them to have brought this suit on behalf of the plaintiff yet they had been essentially stopped from acting for the Plaintiff? The plaint filed on 8th June 2020 does not in any way mention the above case. In effect the Plaintiff did not disclose to the court that it had another matter which adverse orders were given against them.
18. This court concludes that had the court been notified it would not have issued any orders especially ex -parte before hearing the Defendants. The orders issued on the 5th August 2020 set aside the consent dated 30th June 2020.

“to pave way for the hearing of the suit on the merits”.

19. This court does not find that the court allowed the orders it had given ex-parte on 9th June 2020 as the Plaintiff’s interpreted. Prayer 5 of the order dated 7th August 2020 as extracted by the Plaintiff was not true. In any case a strict reading of the ruling was to have the parties litigate over the application dated 8th June 2020.

20. Having concluded so, the application dated 6th October 2020 is not meritorious at all. This is for the simple reason that the application is premised on the wrong interpretation of the order of this court dated 7th August 2020. Secondly and more importantly, the Applicants failed to notify the court that the court at Milimani had already made a decision concerning them and had even been ordered to pay costs.

21. The application for contempt is mischievous in my view. The property they purport to own belonged to the Plaintiff. There was no order requiring them to evict the Defendants, their employees and their servants. In other words, the order they interpret was an ex-parte one which at least ordered that they be handed over the Plaintiff’s assets. The order does not say that they should break into the premises or use any force as they did.

22. As a matter of fact, the order does not mandate the police, nor the auctioneers to assist them execute the orders. It is ludicrous as rightly submitted by the defendants that they would break into the premises yet they have been in occupation.

23. The Defendants in view of the many suits filed by the Plaintiff through Mr. Ogollah and Kiniabei should be declared vexatious litigants and that this suit should be dismissed and or struck out. This court for now declines that invitation for the reasons that there may be other issues that the parties may be interested to litigate for instance the question of the properties allegedly destroyed as well as some money taken by the two when the safe was broken. This in my view needs further interrogation.

CONCLUSION

24. For the above reasons, the application dated 11th August 2020 is meritorious. The orders issued by this court dated 7th August 2020 as well as 9th August 2020 or any other order made herein against the Plaintiff or in favour of the Plaintiff are hereby reviewed and set aside.

25. The application for contempt dated 6th October 2020 is not merited for the reasons advanced above. The Applicant has not come to court with clean hands. They failed to disclose that they were no longer officials of the NGO, the Plaintiff, as found by the suits in Nairobi, mention above. In effect they should not purport to hold themselves as the Plaintiff’s officials.

26. The Plaintiff’s chattels, namely Motor Vehicles Reg. No KCF 914P as well as all the movable and immovable assets including all legal documents should be handed over to the defendants on behalf of the Plaintiff forthwith.

27. The following, Boaz Oduor Ogollah, and Douglas Kiniabei Makokha, their representatives and agents are hereby restrained from dealing with the Plaintiff in any way and any assets they may be holding should be released to the Plaintiff forthwith.

28. The Officer in charge Kitale police station, other than overseeing the implementation of this order should release the Motor Vehicle Reg. No KCF 914P or any other assets in his custody to the Plaintiff.

29. The Defendants shall have the costs of this application to be borne by the said Boaz Oduor Ogollah and Douglas Kiniabei Makokha personally jointly and severally.

Dated, Signed and Delivered at Kitale this 28th day of October 2020.

H. K. CHEMITEI

JUDGE

28/10/2020