



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 122 OF 2019

MAKOGONYA T. T. TIEGO.....APPLICANT

-VERSUS-

ONSANDO OSIEMO.....1ST RESPONDENT

PETER OKUNDI OGONJI.....2ND RESPONDENT

RULING

1) This ruling is the outcome of three applications dated 11.2.2019, 26.2.2019 and 15.5.2019. The aforesaid applications were heard together. Learned counsels appearing in the matter each filed written submissions.

2) The substantive matter in the dispute is the Originating Summons taken out by Mak'ogonya T. T. Tiego, the applicant herein, against Onsando Osiemo and Peter Okundi Ogonji, the 1st and 2nd respondents respectively. In the aforesaid Originating Summons, the applicant sought for *inter alia* the declaration that the partnership i.e Onsando Ogonji and Tiego Advocates stands dissolved with effect from 12th February 2018 and or in the alternative this court issues an order dissolving the aforesaid partnership.

3) The first application is the Chamber Summons dated 11th February 2019 in which the applicant sought for the following orders:

- 1. This application be certified urgent, service thereof be dispensed with and the same to be heard ex parte in the first instance.***
- 2. Pending the hearing and determination of this application and the proceedings herein, the respondents their servants, agents or employees to allow the applicant and his agents free and unfettered access to the firm's offices operated in the name of ONSANDO OGONJI & TIEGO ADVOCATES.***
- 3. Pending the hearing and determination of this application and suit, the respondents by themselves, their servants, agents or employees without let or hindrance or obstruction do allow the applicant and his agents to forthwith enter into the offices of the firm of ONSANDO OGONJI & TIEGO ADVOCATES for the purposes of and if they think fit to photocopy, print, download inspect and take possession of for the purpose of photocopying, printing and inspection of all petty cash vouchers, cheque books, cash receipts, books of accounts, all clients files, client's register and the management accounts relating to and including but not limited to the financial details of the said firm for the period January 2016 to 5th February 2019 and if they deem fit taking possession for purposes of photocopying the aforesaid items.***

("Anton Piller order)

- 4. Service of the above "Anton Piller Order" shall be on the respondents and if they are not present at the premises then shall be by way of service on such agent or employee of the firm of ONSANDO OGONJI & TIEGO ADVOCATES as shall appear to be incharge at the time.***
- 5. Pending the hearing and determination of this application and the cause, this honourable court be pleased to issue an order directing the respondents, their servants, agents or employees and particularly the Branch Manager Co-operative bank Co-op House branch to deliver to the applicant all the bank statements for the last two years for account No's 01136030963600, 01136030963601,, 01136030963602 and 02120030963600 held at Co-operative Bank Kenya Limited together with the bank statements from all the bank accounts being operated in the name of ONSANDO OGONJI & TIEGO ADVOCATES and the continued freezing and suspension of all operations on bank accounts.***

6. Pending the hearing and determination of these proceedings, the 2nd respondent be ordered to refund/furnish security for the sum of kshs.1,500,000 which he with the collusion of the 1st respondent forcefully withdrew and appropriated to himself from the

bank account of ONSANDO OGONJI & TIEGO ADVOCATES on or about 21.12.2018 despite the applicant's protestations.

7. Pending the hearing and determination of this application and this suit, the honourable court be pleased to issue an order that all files and particularly files relating other erstwhile client Francis Kahende, the certificates of titles, original transactional documents, grant of probate, will and all documents relating to THE ESTATE OF FRANCIS KAHENDE KIMANI and KIMANI NAGI; IEBC in respect of which the applicant is under duty to prepare the Bills of Costs from the High Court until the Supreme Court; Hon. Jakoyo Midiwo; all matters the applicant is personally handling; personal files, books, statues and reading materials of the applicant be released to the applicant forthwith.

8. Pending the hearing and determination of this application and the cause, the honourable court be pleased to issue an order barring the respondents of injunction barring the respondents, their servants, agents or employees from carting away the assets of the firm of ONSANDO OGONJI & TIEGO ADVOCATES including but not limited to all clients' files, hard drives, computers, laptops, books, cheque books, petty cash vouchers, payment requisitions, fee notes, cash receipts, deposit slips, all books of accounts, client register, management accounts or any other documents holding information regarding the operations of the firm.

9. This honourable court be pleased to issue an order directed to the OCS Central Police Station to provide two police officers to accompany the applicant and his representatives/agents when serving and implementing these orders in order to avoid breach or disturbance of the peace, obstruction, physical confrontation or potential violence when serving and implementing these orders.

10. This honourable court be pleased to issue an order directing the appointment of an independent auditor to investigate and make a report on the account of ONSANDO OGONJI & TIEGO ADVOCATES for the period January 2016 to 5th February 2019.

11. Cost to the applicant.

4) The applicant filed an affidavit he swore in support of the summons. The respondents filed a replying and a supplementary affidavit of Peter Okundi Ogonji to oppose the summons. I have considered the grounds stated on the face of the application and the facts deposed in the affidavits filed in support and against the application. I have also taken into account the rival submissions. It is the averment of the applicant that he together with the respondents are partners in the law firm known as Onsando Ogonji and Tiego Advocates hereinafter referred to as **"the law firm"**.

5) The applicant averred that the respondents have in the absence of a valid partnership deed elected to frustrate him from discharging his obligations as a partner in charge of litigation hence subjecting him to liability on account of professional negligence. It is also stated by the applicant that since its inception the respondents have frustrated all attempts to hold any partnership meetings to discuss the management of the law firm.

6) It is also the submission of the applicant that the respondents have allocated and appropriated unto themselves monies of the law firm he solely earned yet they have not made any substantial financial contribution.

7) The applicant further stated that the respondents have taken personal loans without his knowledge and that they are withdrawing the law firm's funds in accounts held at Cooperative Bank Ltd to settle the aforesaid loans. The applicant also aver that the respondents have diverted moneys received as fees or refunds from clients to other sources. The respondents were further accused by the applicant of making unauthorized payments of ksh.1,500,000/= to the 2nd respondent as repayment towards borrowings in the sum of kshs.8,000,000/= whose particulars were never disclosed.

8) It is on the basis of the above reasons that the applicant beseeched this court to issue orders freezing the law firm's bank accounts held by Cooperative Bank. It is also alleged by the applicant that the respondents have been hostile to him and have even changed the locks to the office premises thus breaching his constitutional rights under Articles 27, 29, 30, 31, 33, 35, 40, 41 and 47 of the Constitution of Kenya, 2010.

9) The applicant also pointed out that the respondents are using his name and the goodwill he has worked hard for and earned over the last 24 years to generate income to themselves without his authority and to his detriment. It is further argued that it is no longer possible for the applicant to continue carrying business in the partnership with the respondents for the purposes for which it was intended as a law firm and has therefore served the respondents with a notice to have the law firm dissolved with effect from 12.2.2019. The applicant is of the submission that he should be furnished with audited accounts.

10) The respondents vehemently opposed the summons and stated that the Articles of the Partnership provides an arbitration clause hence this court lacks jurisdiction to entertain the same. The respondents made reference to Clause 25 of the Articles of Partnership dated 1st July 2006. The respondents urged this court to unfreeze the law firm's accounts held by Cooperative Bank Ltd claiming that the order freezing the account was not justified and that its pendency will render the law firm inoperational thus affecting other parties who are not parties to this suit.

11) The respondents also pointed out that the applicant has already registered his own law firm in the name of Tiego & Co. Advocates and has further taken and carted away from the law firm personal effects and some client's files he was handling. The respondents averred that contrary to the applicant's assertion, they have held several partnership meetings which are necessary for the effective management of the law firm. The respondents attached various emails sent by the law firm's accountant to the applicant as proof of meeting held.

12) It was also argued that none of the partners can solely take credit alone of securing legal work from various clients like K.M.T.C and I.E.B.C. It is also stated by the respondents that the applicant was paid a sum of ksh.3,500,000/= from the sum of ksh.7,560,000/= received

from K.M.T.C.

13) It was further averred that the applicant was not locked out of the partnership office but instead the applicant has never visited those offices after he opened his own law firm. The respondents dismissed the applicant's notice seeking to dissolve the partnership as being of no effect.

14) It is argued that the notice was purportedly issued pursuant to the repealed partnership Act (Cap 29) while the current Partnership Act (no. 16 of 2012) has no provision for such a notice.

15) The second application is the summons dated 26th February 2019 taken out by the respondents whereof they sought for inter alia

a) This application be certified urgent.

b) Pending the hearing and determination of this application and the hearing and determination of the Arbitral proceedings this honourable court be pleased to order that:

a. The bank accounts of the firm of Onsando Ogonji and Tiego Advocates at the Cooperative Bank of Kenya being accounts Nos: 01136030963600; 01136030963601; 01136030963602; 02120030963600 be opened/ unfrozen.

b. The said accounts be operated by Onsando Osiemo and Peter Okundi Ogonji to the exclusion of Makongoya T. T. Tiego.

c) Pending the hearing and determination of this application and the hearing and determination of the arbitral proceedings this honourable court be pleased to order that:

a. Makongonya T. T. Tiego, his agents and representatives be and hereby restrained from interfering in any way with in the smooth operations of the firm of Onsando Ogonji and Tiego Advocates.

d) That there be a stay of proceedings in this High Court Miscellaneous application no. 122 of 2019 pending hearing and determination of this application.

e) That the dispute between the parties herein be referred to arbitration as provided for under Clause 25 of the partnership deed for Onsando Ogonji and Tiego advocates dated 18th July 2006.

f) There be a stay of all proceedings herein pending reference of the dispute between the parties to arbitration, and pending the hearing and final determination thereof.

g) That the applicants be at liberty to apply for such further or other orders and/or directions as the honourable court may deem fit to grant in the circumstances.

h) Costs of this application be awarded to the applicants.

16) The aforesaid summons is supported by the affidavit of Peter Okundi Ogonji. The applicant filed a replying affidavit he swore to oppose the application. It is the submission of the respondents that on 2/1/2019, the applicant unilaterally and without following the dispute resolution mechanism under the Articles of Partnership caused the law firm's bank accounts to be frozen.

17) It is argued that the decision to freeze the accounts is malicious and is intended to frustrate and ground the law firm's operations thus exposing the law firm to liabilities under the Advocates Act and from clients.

18) The respondents further argued that the applicant's action of freezing the law firm's accounts and opening his own legal practice amount to gross misconduct and betrayal of trust as a partner in the firm and are calculated to cause irreparable damage to the firm.

19) The applicant opposed the summons arguing that the Articles of Partnership does not provide for arbitration as the mode of dispute resolution mechanism therefore there is no valid reason to refer the dispute to arbitration. The applicant further pointed out that there is no existing and legally binding Partnership Deed since the alleged partnership deed dated 1st July 2006 lapsed in the year 2012.

20) The applicant also stated that in view of prayer 2 of the application and the replying affidavit they filed on 20/2/2019 the respondents have already taken a step in the proceedings and thus submitted to the jurisdiction of this court hence they cannot now invoke the provisions of the Arbitration Act to stay proceedings.

21) The applicant further averred that he wrote to the Cooperative Bank on 22.12.2018 requesting it to freeze the law firm's bank accounts to prevent the respondents unaccountable use of monies that he singlehandedly sourced.

22) The applicant also pointed out that despite the law firm's bank account having been frozen, the law firm continued doing business meaning that the respondents are operating alternative undisclosed bank accounts in the name of the law firm in other banks other than Cooperative Bank Ltd. This court was urged not to unfreeze the bank accounts to protect the funds from being accessed by the respondents

since the law firm stands dissolved and that those monies should only be accessed after a final audit exercise has been conducted.

23) The third and final application is motion dated 15.5.2019 taken out by the applicant in which he prayed for *inter alia*:

a) The matter be certified urgent and heard ex-parte in the first instance and on a priority basis.

b) The honourable court be pleased to issue an order of stay of the decision of the Hon. Lady Justice J. Kamau issued on 14th May 2019 setting aside the orders issued on 12th February 2019 and/or any action of the respondents relying on the said order made on 14th May 2019 pending the hearing and determination of this application.

c) The honourable court be pleased to order a stay of further proceedings and all consequential orders thereto pending the hearing and determination of this application.

d) The honourable court be pleased to issue an order of stay of the execution of the decision of Hon. Lady Justice J Kamau issued on 14th May 2019 setting aside the orders issued on 12th February 2019 and/or any action of the respondents relying on the order made on 14th May 2019 pending the hearing and determination of the intended appeal.

e) The honourable court be pleased to order a stay of proceedings and all consequential orders thereto pending the hearing and determination of the appeal.

f) Costs.

24) The motion is supported by the affidavit sworn by the applicant.

The respondents filed grounds of opposition to resist the motion stating that there is no basis for the stay orders being sought as prayed because no substantive order has been issued by the court against the applicant or at all. It was pointed out that the orders issued on 14.5.2019 did not create or vest any rights or deny any rights to the parties in the suit hence this matter cannot be said.

25) Having considered the arguments put forward by both sides over the three applications, it is clear in my mind that the substantive issue which needs to be determined first is whether this suit should be stayed and be referred to arbitration. I have already set out the argument put forward by protagonists over this issue. It is not in dispute that the applicant and the respondents executed Articles of Partnership dated 1.7.2008 to set up the law firm known as Onsando Ogonji and Tiego Advocates.

26) In Clause 1 of the Articles of Partnership, the parties agreed that they would continue in the trade business and practice of employment agents generally for a term of 6 years from 1st July 2006. In Clause 25 of the aforesaid agreement the partners stated that all disputes and differences if any, which shall arise between them shall be referred to and decided by two competent persons appointed by all partners or by an umpire chosen by the referees and that their decision shall be final.

27) The respondents have now urged this court to stay further proceedings in this matter and make an order referring the dispute to arbitration pursuant to the provisions of Section 6(1) of the Arbitration Act.

28) The applicant is of the submission that there was no valid arbitration agreement between the parties since the Articles of Partnership did not provide for arbitration as the mode of determination of any disputes. The applicant was of the view that Clause 25 of the Articles of Partnership did not provide arbitration as a mode of dispute resolution mechanism. It is also said that the partnership lapsed at the end of six years.

29) There is no doubt that a dispute has arisen between the parties to the Articles of Partnership. The first issue which should be determined is whether the Articles of Partnership provides for arbitration as a mode of dispute resolution mechanism. At this stage, I think it is important to know the definition of arbitration. In **Black's Law Dictionary, 8th Edition**, the word arbitration is defined as follows: **"A method of dispute resolution involving one or more neutral third parties who are agreed to by disputing parties and whose decision is binding."**

30) A careful examination of Clause 25 of the Articles of Partnership will reveal that though the word 'arbitration' was not used as a mechanism of dispute resolution, the ingredients of arbitration appear to be present. One of the ingredients is the fact that the clause expressly states that a dispute that may arise shall be referred to two competent persons to be appointed by all parties or by an umpire.

31) The second ingredient is that the clause clearly states that the decision of these two people shall be final and conclusive.

32) Thirdly, that their decision should be in writing. I am convinced that Clause 25 of the Articles of Partnership provides for arbitration as a mode of dispute resolution mechanism.

33) Having come to the conclusion that there exists an arbitral clause, the other issue which has to be determined is whether or not the partnership lapsed at the end of six years. The applicant has clearly stated that the partnership lapsed at the end of six years. The respondents are of the view that the partnership continued to exist even after the lapse of six years. A critical analysis of Clause 1 of the aforesaid agreement will show that though the partners agreed to have the partnership last for 6 years, the agreement did not expressly state that the partnership would stand dissolved upon the expiry of that period.

34) It is also apparent that the partnership continued to operate under the terms of the Articles of Partnership even more than 7 years after the lapse of six years. It cannot therefore lie in the mouth of the applicant to say that the partnership stood dissolved. In my humble view, the partnership continued to exist and operate under the terms of the initial Articles of Partnership.

35) Section 35(5) of the Partnership Act (No. 16 of 2012) expressly states that fixed term partnerships continue under the terms of their partnership deed even after expiration of the term. The aforesaid provision provides in part as follows:

“..... a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.”

36) The third and final issue which need to be determined also is whether the respondents have taken steps that would make them lose the opportunity to seek for the matter to be referred for arbitration. I have already outlined the arguments of both sides over this issue.

37) The guidelines to be considered before issuing orders to staying proceedings and referring a dispute to arbitration were restated by the Court of Appeal in case of **Niazous (K) Ltd vs= China Road & Bridges Corporation (K) Ltd (2001) 2E.A 502 (CAK) interalia** as follows:

“All that an applicant for stay of proceedings under Section 6(1) of the Arbitration Act of 1995 is obliged to do is to bring his application promptly. The court will be obliged to consider the three things. Whether the applicant has taken any steps in the proceedings other than the steps allowed by the section; whether there is any legal impediments on the validity, operation or performance of the arbitration agreements and whether the suit indeed concerned a matter agreed to be referred to arbitration.”

38) There is no doubt in my mind that the respondents have in the earliest opportunity possible before entering appearance or filing a replying affidavit to the originating summons indicated their objection and intention to do so in their replying affidavit. There is no evidence to show that there is any legal impediments on the validity operation or performance of the arbitration clause or that the arbitral clause is void.

39) In my humble view, the dispute herein is that contemplated under Clause 25 of the Articles of Partnership. It therefore follows that in this case, the dispute should be referred to arbitration as agreed under the aforesaid clause. In order to facilitate that process to determine the dispute, it is necessary to stay further proceedings in this suit.

40) In the end, the application which commends itself to be determined is the Chamber Summons dated 26th February 2019. The appropriate orders which should be granted are prayers 5 and 6. The other prayers of the summons are refused. While the decisions on the applicant’s Chamber Summons dated 11.2.2019 and the respondents’ motion dated 15.5.2019 are deferred pending the outcome of the decision on arbitration.

41) For the avoidance of doubt, the following orders are issued

i. That the dispute between the parties herein is referred to arbitration under Clause 25 of the Articles of Partnership dated 1st July 2006.

ii. That there be a stay of proceedings in the Originating Summons and applications emanating therefrom pending reference of the dispute between the parties to arbitration, and pending the hearing and final determination.

iii. Costs of the application to abide the outcome of this suit.

Dated, signed and delivered at Nairobi this 25th day of September, 2019.

.....

J. K. SERGON

JUDGE

In the presence of:

.....**for the Appellant**

.....**for the Respondent**