



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 239 OF 2016

- 1. EILEAN KENDAGOR.....1ST PLAINTIFF**
- 2. SUREYA ROBLE.....2ND PLAINTIFF**
- 3. HON. BEATRICE KONES.....3RD PLAINTIFF**
- 4. MARY ODHIAMBO.....4TH PLAINTIFF**
- 5. PHYLLIS POLONG.....5TH PLAINTIFF**

VERSUS

- 1. RAHAB MWIKALI MUIHU**
- 2. ELIZABETH MAYIEKA.....DEFENDANTS**

AND

MAENDELEO YA WANAWAKE ORGANISATION.....INTERESTED PARTY

RULING

Before this court, are two motions and a preliminary objection. The motions are dated 3rd February, 2017 and 17th March, 2017 while the preliminary objection is dated 22nd February, 2017.

The motion dated 3rd February, 2017 seeks an order of arrest and imprisonment of the respondents for being in contempt of court orders issued on 31st October, 2016. The motion is supported by the affidavit of Hon. Beatrice Kones. She avers that the respondents have locked the interested party’s finance office and dismissed the finance staff, to block the carrying out of the forensic audit as ordered by this court; that the respondents have denied the applicants’ forensic auditor Clyde and associates, finance records for conducting a forensic audit; that the respondents have been making massive withdrawals of funds from interested party’s bank accounts without authorization by the national steering committee and the involvement of the national treasurer; that the respondents have frustrated the payments of salaries and operational costs of interested party by locking up cheque books and vouchers in the finance office; that the respondents have illegally and unlawfully proceeded to convene national steering committee meetings and passed resolutions, contrary to the court order and directions; that the respondents have acted with impunity and in total disregard of the dignity and authority of this court.

In response to the motion, the defendants filed grounds of opposition dated 22nd February, 2017. The

grounds were that the application offends the express and mandatory provisions of section 5 of the Judicature Act, chapter 8 Laws of Kenya; that no leave has been sought and or obtained by the plaintiffs and as such the application is improperly before the court; that no court order has been disobeyed by the defendants and it is indeed the plaintiffs who have flagrantly disobeyed court orders and interfered with the smooth running of the interested party and that the application has the main objective of circumventing the ongoing forensic audit as ordered by this court.

In her replying affidavit sworn by Jane Saruni on 6/3/2017, She contended that as the supreme organ of the organization, NEC needed to meet to appreciate the contents of the ruling and make relevant decisions to assist achievement of the intent of the court order but due to the closure of the bank accounts, they were not able to meet. That the court allowed the plaintiffs to engage an auditor of their choice, in their individual capacities and therefore, cannot enter into a contract on behalf of the interested party without consultation of NEC and so the contract with Clyde and associates is illegal from the onset.

That the auditor appeared at the premises without any formal introduction and conducted himself in a crude and arrogant manner and had to be turned away pending formal introduction. That the finance office staff were suspended on disciplinary grounds on 13th September, 2016 at a NEC meeting where the members noted insubordination and rude behavior by the finance manager, to the members of the interested party and NEC members too when he would take off with meeting allowance and refuse to communicate to the office the reasons for his behavior and to this end, it was the NEC that suspended the finance staff and locked the finance office pending a disciplinary meeting.

She contended that the meeting was not to block the auditor and dismiss the finance staff as alleged but rather it was held with a view to interpreting the court ruling and confirm previous minutes. She stated that they wrote to the plaintiffs' advocates to engage the auditor but to date there has been no reply and this case was filed on the same date a reminder was sent showing that the plaintiffs were never interested in engaging the auditor. That the court ruled that the affairs of the interested party should continue smoothly and without any interruptions, which is the case at the moment, save for the moment when the 4th plaintiff illegally closed the account. That the organization has enjoyed relative peace such that the members of NEC could finally meet on 12th January, 2017 to endorse the auditor and handle other pending matters facing the organization and that the allegations of unauthorized withdrawals are not true since the organization is following the signing mandate approved by the NEC and that the alleged withdrawals are for ongoing programs.

She further deponed that as a result of the meeting, the organization formally wrote to the NGOs Co-ordination board on the resolution and they wrote to the bank managers on how the accounts will be operated, with the chairlady as a mandatory signatory. That the plaintiffs intend to destabilize the management of the interested party by constantly creating incidents and malicious sideshows to ensure there is consistent confusion in the organization. That there have been reports to the Director of Public Prosecution, misleading statements at the Directorate of Criminal Investigations and numerous gutter press releases that only serve to malign the organization. That this dispute is an internal affair that can be solved permanently at the AGM where members will make appropriate recommendations as part of their right as members with the final authority on affairs of the interested party.

The plaintiffs filed a supplementary affidavit in rebuttal. It was contended that the plaintiffs were unable to agree on a single auditor with the respondents, and they proceeded to engage services of their own independent auditor as per the court ruling to carry out forensic audit. Anything else as alleged by the 2nd respondent amounts to side shows. That the plaintiffs' auditor visited the interested party's offices for introduction on 30th November, 2016 and the date stated of 30th September, 2016 is an error and should be ignored. That the defendants were never interested in conducting a forensic audit and have created all manner of road blocks including the dismissal of finance staff, carrying away finance records and locking the finance office. That the defendants have been operating the interested party's bank accounts without involving the 4th plaintiff, contrary to the provisions of the organization's constitution. That the cheques issued to the plaintiffs by the defendants were only for part payment of allowances owed to national steering committee members and some secretariat staff meant to cover up the massive unauthorized

withdrawals.

It was stated that the defendants have raided the coffers of the interested party and milked them dry, they have blocked the appointed property managers Lloyd Masika from managing Maendeleo House, a Property belonging to the interested party as they are pocketing the rent being paid by tenants. That the defendants also misled this court that they had contracted the services of the Auditor General to carry out forensic audit of the interested party while they knew that it was not true and they frustrated the plaintiffs' auditor, locked the finance office and dismissed the finance staff so as not to unearth the looting that is going on at the interested party's offices. It was contended that Jane Saruni had no authority to swear the replying affidavit or sign pleadings on behalf of the interested party and her replying affidavit sworn on 7th March, 2017 should be expunged from the court record together with the annexures thereto. It was contended that the said replying affidavit displays a lot of ignorance from the deponent who is a county chair of Kajiado County and does not know that it is the National Steering Committee (NSC) of the interested party of which the plaintiffs are majority members, which provide guidance to the Secretariat, make recommendations to the National Executive Council (NEC) and advise the NEC on resolution to be made.

It was stated that it was not within the functions of the National Executive Council to discipline the Secretariat Staff and it is the 1st Defendant who convened some NEC members to rubber stamp illegal decision as the plaintiffs have the majority in the National Steering Committee and could not allow such illegality to prevail. That the finance manager made a report to the Central Police Station after his offices were vandalized and locks changed by the Defendants to block the forensic audit. She stated that the defendants have been quite reckless in dealing with the interested party's finances where they engaged in a spending spree during the month of December, bribing some members of the National Executive Council including Jane Saruni so as to endorse their illegal activities including kicking out the plaintiffs and the finance staff.

The motion dated 17th March, 2017 was filed by the interested party seeking orders that; the court deems it fit to extend time within which to comply with the orders of 31st October, 2016; that the interested party be allowed to appoint a private auditor to complete the pending forensic audit report; that the court do order the interested party to call for an Annual General Meeting to ratify the duly amended constitution, strategic plan 2017-2022 and the forensic audit report. The application is supported by the affidavit of Jane Saruni. The motion is based on the grounds that the completion and filing of the forensic audit report has been delayed by factors beyond the interested party's control; that it is in the interest of the interested party that the forensic report be procured and filed in court; that the interested party is desirous of having its constitution, strategic plan and the forensic audit report completed; that it is not clear when the officers from the auditor general's office will resume carrying out the forensic audit; that it is prudent that the amended constitution, strategic plan and the findings of the forensic audit report be ratified by the supreme decision making organ of the interested party; that it is also in the best interest of the interested party that its supreme decision making organ does convene and deliberate the pressing issues at hand.

A further affidavit by Susan Owino to the motion was filed on 28th March, 2017. She stated that at the National Executive Council of the interested party held on 13th September, 2016 a decision was taken to form a taskforce composed of members of the interested party and persons seconded from the Government. The members then elected her as the chair of the taskforce with the mandate to coordinate the same from the offices of the interested party. That the taskforce was launched on 7th October, 2016 after they had been given their appointment letter. The committee went ahead in examining the accounts of the interested party and all other relevant documents hoping that the auditors from the office of the Auditor General would join them but none reported. That the committee proceeded on Christmas recess and has never reconvened to date for reasons only known to the Principal Secretary. That she is aware the other subcommittees resumed work in February and are ready to submit draft reports.

The 2nd defendant filed a further affidavit on 28th March, 2017 wherein she reiterated her averments in the affidavit of 7th March, 2017. She further stated that it remained unclear why the forensic audit was stopped but what is crystal clear is that the plaintiffs are no longer interested in the same for reasons only

known to them. That she has received letters from the various counties where the members of the interested party are worried at the turn of events and provide a permanent solution to the problems which is a court sanctioned annual general meeting as prayed for in the application and that it shall be prudent that the court allows the interested party to appoint a private auditor to complete the forensic audit.

The plaintiffs filed grounds of opposition dated 28th March, 2017 to the motion dated 17th March, 2017 as follows; that the application lacks merit, it is frivolous, vexatious and an abuse of the court process and should be expunged from the court record; that the application is in bad faith and not in the best interest of the interested party but meant to circumvent the contempt of court proceedings and cover up for the contemnors; than to salvage the interested party, the contemnors theatrics should come to an end and that the dignity and authority of this court should be upheld at all times and that the contemnors cannot purport to seek for any orders from this court when they have not purged the contempt.

In response to the replying affidavit by the 3rd applicant dated 17th March, 2017, Jane Saruni stated that NEC as the supreme organ of the interested party and the National Steering Committee have been unable to meet and give guidance or directions due to serious differences among its members, who in turn refuse to convene the NEC so as to maintain the vicious cycle of dispute.

I have considered both motions. Counsel for the defendants in his submissions abandoned the preliminary objection.

In the ruling dated 31st October, 2016, this court made the following orders:

- a)** A comprehensive forensic audit of the interested party's account for the past five (5) years be conducted.
- b)** The parties herein to agree on a common auditor to carry out the audit and if they cannot agree, each party to appoint its own.
- c)** The auditor/s report/s to be filed in court within 60 days from today.
- d)** The matter shall be mentioned on 30th November, 2016 to confirm the progress with regard to the auditor's report and for further directions.

What this court has been able to gather from the submissions by the parties is that they could not agree on a common auditor. On their part, the plaintiffs aver that they appointed Clyde & Co. Auditors but the Respondents refused them access to the finance office and the relevant documents to enable them commence the work. On the other hand, the Respondents have blamed the plaintiffs for failing to cooperate and for extraneous factors like the dismissal of the finance officer. It is noted that the orders by this Honourable court were given on the 31/10/2016. The applicant appointed the firm of Clyde & Associates vide a contract assignment dated 23rd November, 2016 but the Respondents could not give them access to the finance officer.

According to the evidence on record, the finance officer was dismissed on 14/1/2017. Parties have annexed correspondences between their advocates for the period in between and have blamed each other's acts of omission and/or commission. I appreciate the fact that the time lost between the appointment of an auditor by the plaintiffs and the dismissal of the finance officer, is quite some time and a lot could have happened had the auditor been allowed access. I am also alive to the fact that the affairs of the interested party are run by the main decision making organ which is the NEC and therefore, there could have been difficulties when it comes to decision making regarding the appointment of the auditor on their part.

The third party has also raised a very fundamental issue of the validity of the contract assignment entered into between Maendeleo ya wanawake organization and Clyde and associates. They have contended that the interested party did not authorize the said contract as the same was entered into between the plaintiffs

and Clyde and that the interested party was not involved. In my view, the interested party has a valid point and this court cannot shut its eyes to that fact. This would therefore mean that the appointment of Clyde and associates was void ab initio as long as it was based on the said contract.

Be that as it may, I find that this court cannot find the Respondents guilty of contempt of court in those circumstances. I therefore find that the application dated 3/2/2017 has no merits and it is hereby dismissed with costs.

With regard to the application dated the 17th March, 2017, I find that it is in the interest of all the parties to this suit that time within which to carry out an audit is extended.

In the premises, I allow the application in the following terms

- a) Time within which to comply with the orders made on 31/10/2016 is hereby extended for a further period of 90 days from the date of this ruling.
- b) The interested party is hereby allowed to appoint a private Auditor to complete the pending forensic audit report.
- c) The audit fees for the Auditors for both parties to be met by the interested party.
- d) Costs for both applications shall be in the cause.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **19th** Day of **October**, 2017.

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L. NJUGUNA

JUDGE

In the Presence of

..... for the Plaintiff

.....for the Defendant