



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NUMBER 239 OF 2016

EILEAN KENDAGOR. 1ST PLAINTIFF
SUREYA ROLBE. 2ND PLAINTIFF
HON. BEATRICE KONES. 3RD PLAINTIFF
MARY ODHIAMBO. 4TH PLAINTIFF
PHYLISS POLONG. 5TH PLAINTIFF

VERSUS

RAHAB MWIKALI MUIHU. 1ST DEFENDANT
ELIZABETH MAYIEKA. 2ND DEFENDANT

AND

MAENDELEO YA WANAWAKE ORGANIZATION..... INTERESTED PARTY

R U L I N G

The application before the court for determination is the Notice of Motion dated the 9th September, 2016 brought under Order 40 Rules 1, 2 and 3 and Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the law.

The Applicant has sought the following orders: -

1. That this application be certified urgent, be heard ex-parte and service of the same be dispensed with in the first instance.
2. That the Defendants/Respondents, their agents, servants and/or any other person acting on their behalf be and are hereby temporarily restrained from calling, organizing, coordinating, chairing, convening and/or holding any meeting for the interested party pending the inter-parte hearing of this application.
3. That the Defendants/Respondents do temporarily step-aside pending the inter-parte hearing of this application.

4. That the Defendants/Respondents, agents, servants and/or any other persons acting on their behalf be and are hereby restrained from calling, organizing, coordinating, chairing, convening and/or holding any meeting for the interested party pending the hearing and determination of this suit.
5. That the Defendants/Respondents do step-aside and handover their offices to their Deputies pending the hearing and determination of this suit.
6. That any other and/or further orders do issue as may be deemed fit and just by this honourable court in the premises.
7. That costs of this application be provided for.

It is premised on the grounds set out on the body of the same and it's supported by the affidavit of Hon. Beatrice Kones sworn on the 9th September, 2016.

In the supporting affidavit, the deponent herein who is the 3rd Plaintiff and the 3rd National Vice-chairperson of the Interested Party avers that there have been numerous complaints by the members and the Applicants in the way the Respondents are mismanaging the Interested Party.

She depones that the members and officials of the interested party have held various meetings to try and salvage the organization from total collapse to the Chagrin of the 1st and 2nd Respondents who have been carrying away crucial documents to get rid of evidence.

She further avers that in one of the meetings in which the ministry of public service youth and Gender affairs, was involved, it was agreed that there should be a comprehensive forensic audit of the affairs of the organization to establish the mismanagement and financial loss. It is her contention that, it is not possible to carry out the forensic audit while the Respondents remain in office as they are interfering with the process.

She further avers that contrary to the principles of transparency and accountability enshrined in both the Constitutions of Kenya 2010 and that of the interested party, the 1st Respondent has been making decisions and has been acting on behalf of the organization without relevant consultations. That the 1st Respondent has flouted the laid-down Tender Systems and has made payments unilaterally, as a result it is injurious for the Respondents to continue holding office as they will further fleece the interested party's accounts to the detriment of the larger nationwide membership of the interested party.

In opposition to the application, the Respondents filed a replying affidavit on 21st September, 2016 sworn by Elizabeth Mayieka the 2nd Respondent herein, she is the secretary to the interested party.

In her affidavit, she depones that considering the nature of the dispute herein, the court is not the proper forum for determination of the dispute as the constitution of the interested party lays down the procedure to be followed which is by referring the same to arbitration. Further and without prejudice, she avers that the affairs of the interested party have been conducted as per the constitution. She contends that the complaints by the Plaintiffs/Applicants have not been specified and that in filing this suit, the correct channels of redress have not been followed. She has denied having carried away any document belonging to the interested party.

She avers that there have been meetings involving the Ministry of Public Service, Youth and Gender affairs aimed at reviving the interested party but to enforce any decision arrived at, the decision making organs set out by the Constitution of the interested party have to be involved.

According to her, any forensic Audit to be carried out has to be done following the laid down rules in the Constitution of the interested party and it's only after such a decision is made, that the presence or absence of the Respondents can be determined. That the constitution of the interested party clearly spells

out how office holders are elected and as such, this is the wrong forum to challenge legitimate office bearers.

The interested party filed a replying affidavit on 21st September, 2016. The said affidavit was sworn on the 19th September, 2016 by one Jane Sabuni who is the elected County Chairperson of the interested party Kajiado County. In her affidavit, she admits that the National Executive Council which is the supreme administrative organ of the interested party is aware of the conflict among the National Officials who are the applicants and the Respondents which has been a growing concern of the wider membership and the country at large.

That as a result of this conflict, the government has, through the NGO Co-ordination Board and the Ministry of Youth and Gender Affairs intervened and called for a meeting between the Applicants and the Respondents to try and settle the matter once and for all. One such meeting was held on the 17th August, 2016 and resolutions passed thereat were meant to settle the matter effectively and conclusively. The resolutions of the said meeting were as follows: -

- a) A formation of a joint task force with the Ministry to identify and settle matters affecting the organization.
- b) Conduct a forensic audit on the organization accounts for the past four (4) years.
- c) Review of the Organization's Constitution as it has gaps.
- d) Develop and complete the organizations strategic plan.
- e) Call for the Annual General Meeting to ratify the report of the Task Force.

It is further deponed that the 2nd Defendant/Respondent called for a special National Executive Council meeting scheduled for 12th September, 2016 to discuss the above resolutions which meeting could not take place on the said date as it was declared a public holiday but it was held the following day in the presence of the Principal Secretary of the Ministry of Youth and Gender Affairs during which eight (8) Members were selected based on regional representation to represent the interested party in the Task Force.

That it was during that meeting that the Respondents were informed of the application herein. The deponent avers that the Plaintiffs/Applicants are not sincere in their intentions as they were in attendance in the meeting whose aim was to set an agenda towards conflict resolution. According to her, the application is made with the intention of preventing any solution and the same does not offer any alternative towards resolution of the issues affecting interested party. Further to the above, she avers that the constitution of interested party lays down the procedure for handling complaints and the Plaintiffs being National Officials and members of the National Executive Council have the right to write to National Executive Council and raise their concerns which they failed to do. It is further contended that the Plaintiffs/applicants being National Officials who are elected by members on regional basis and who represent their regions, have an opportunity to share their concerns with their regional Chairpersons so that those concerns can be addressed at meetings but in this case, none of the Chairpersons was informed of any grievances by the Applicants which means they could be pursuing a personal agenda.

She further avers that the application is premature as the Applicants have not exhausted internal mechanisms laid down in the interested party's constitution and that they have not satisfied the conditions for the grant of orders prayed for having not sufficiently established any exceptional circumstances.

The Plaintiffs/Applicants filed a supplementary affidavit on the 26th September, 2016 sworn by the 3rd Plaintiff Hon. Beatrice Kones on the 26th September, 2016 which was meant to respond to new issues raised in the two replying affidavits. An objection was raised by the counsel for the Respondents who contended that the same raised new issues that had not been raised in the replying affidavits.

It is clear that the purpose of the supplementary affidavit is to respond to any issues that may be raised in the replying affidavits and not to introduce new matters. This court will therefore limit itself to the relevant portions of the same.

The deponent (3rd Applicant) has averred that several meetings have been held with the Respondents, and resolutions made but the Respondents have frustrated the implementation of those resolutions and that the Applicants have come to court after their every effort has been thwarted and frustrated by the Respondents.

It is further deponed that the Respondents have flouted the Constitution of the Interested Party by convening the National Executive Council meeting without regard to Article 14 of the Interested Party's constitution and alive to the issues bedeviling the interested party and the need for forensic audit and investigation which cannot be done while they remain in office.

That the Respondents have further flouted the Constitution of the interested party by spending large sums of money without the approval of the National Steering Committee.

It is averred that the deponent to the Interested Party's replying affidavit does not have capacity and authority to swear the same on its behalf and the same is speculative and based on hearsay.

That the National Executive Committee meeting of the 12th September, 2016 was unprocedural and contrary to the resolutions passed in the NGO co-ordination Board Meeting of the 3rd August, 2016 during which it was resolved that there should be no further meetings until the conflict is resolved. It is contended that the Applicants are the whistle blowers and watchdogs of the interested party and that the deponent to the replying affidavit of the interested party, one Jane Sabuni does not have accurate information of the happenings at the Head Office and her decision has been influenced by information from the Respondents. That paragraph 11 of the interested party's affidavit is pure falsehood as the convening of the National Executive Council meeting was unprocedural and improper and hence the resolutions are null and void and not binding on the interested party.

Parties made oral submissions and on his part, counsel for the Applicants submitted that the Applicants moved to court after several attempts were made to resolve the issues that are affecting the interested party to no avail. That several meetings have been held which have been constituted by the parties herein and the Ministry of Public Service and Gender Affairs, and the Non-Governmental Organization Board where several issues were raised including allegations of embezzlement of funds, taking away of documents to conceal evidence and failure to account for the monies that belong to the interested party.

The Applicants avers that the constitution that guides the interested party has not been ratified and that has affected its running. That the issue of bank signatories has also been pending in that the mandatory signatory has been removed and the Respondents are now signatories. He referred to the meeting that took place on the 3rd June, 2016 between the NGO Board, the National Steering Committee and the parties before the court during which it was agreed that a forensic audit should be done for the interested party for both the structure and the accounts. The interested party was to advertise and pay an auditor while the NGO Board would choose the auditor.

On the part of the Respondents, it was submitted that under Article 15 of the interested party's constitution, the National Chairman should chair all National Steering Committee meetings and in her absence she will delegate to one of her Vice-Chairs on rotational basis. She shall also act as the Secretary to the steering committee. That none of the Respondents attended the alleged meetings and it is not clear how the meetings were convened yet the chair did not delegate to anybody and therefore, the meetings are questionable. He submitted that if the orders sought are granted, the interested party, shall grind to a halt. It was further submitted that Article 21(12) of the interested party's constitution sets out disciplinary committee and the Applicants ought to have exhausted the internal mechanisms spelt out under Article 42 of the Constitution, which provides that any dispute shall be referred for arbitration.

On his part, the counsel for the interested party submitted that the meeting held on the 26th July, 2016 was neither properly called nor convened. He averred that the resolutions passed in that meeting were quite profound on the membership and some of the resolutions can only be passed in an Annual General Meeting and not at the National Steering Council Meeting. He told the court that he had not seen the minutes before and only saw them in court when he was served with the supplementary affidavit.

It was his submission that the constitution is the guiding organ of the interested party and it establishes a mechanism for dispute resolution. He told the court that the disciplinary committee does not have any complaint by the Applicants and for that reason, the application is premature. According to him, the National Executive Council (NEC) is willing to call an annual General Meeting where all the issues will be discussed and voted for by the members.

He confirmed that there have been many meetings between the ministry and the NGO Council and that a joint task force has been constituted to conduct a forensic audit to cover the period going back to 2013 to-date which is aimed at addressing the issue of financial impropriety. That the same task force is also mandated to conduct a constitution review of the yet to be ratified constitution so that the interested party can have a valid constitution. The task force is also mandated to complete the strategic plan for the interested party that will guide for future plans.

After hearing all the parties, this court has carefully and meticulously considered the application, the affidavits and the submissions by the learned counsels. The orders sought by the Applicants in the application herein are injunctive in nature. The Applicants and the Respondents are all officials of the interested party. The Applicants filed the application herein claiming that the Respondents have mismanaged the interested party. They have also accused the Respondents of embezzlement of funds and corruption. They have also alleged lack of transparency and accountability on the part of the Respondents.

It has been admitted by all the parties to this suit that there are problems afflicting the interested party and indeed, the parties were in the process of addressing the same before the suit herein filed. The Applicants however, alleges that the Respondents have been frustrating the process of resolution of the issues.

The parties are also in agreement that the constitution of the interested party has not been ratified and there is an urgent need to have the same ratified and also to strengthen its structures.

The interested party is a national organization with membership across the whole republic and if the court grants the orders that are sought by the Applicants it may result in paralyzing the operations of the interested party which would not be in its interest or that of the members and especially that ordinary member commonly referred to as the “Wanjiku”, and in any event, the procedure for the appointment and removal of the officials is laid down in the interested party’s Constitution.

In the premises and in the interest of justice and pursuant to Section 3A of the Civil Procedure Act and Article 159(2) (d) of the Constitution of Kenya, 2010, the court deems it fit to make the following orders: -

- a) A comprehensive forensic audit of the interested party’s accounts for the past five (5) years be conducted.***
- b) The parties herein to agree on an 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.***

Dated, signed and delivered at Nairobi this 31st day of October, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... ***For the Plaintiffs***

..... ***For the Defendants***

..... ***for the interested party.***