



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NUMBER 161 OF 2015

JOHN WAFULA MUKWANA. 1ST PLAINTIFF/APPLICANT

EDWIN OMONDI AOKO. 1ST PLAINTIFF/APPLICANT

VERSUS

MUSIC COPYRIGHT SOCIETY OF KENYA. 1ST DEFENDANT/RESPONDENT

THE REGISTRAR OF SOCIETIES. 2ND DEFENDANT/RESPONDENT

HENRY MUNGAI NJENGA. 3RD DEFENDANT/RESPONDENT

RULING

1. This is a ruling on Prayer No. 2 on the motion dated 23rd April, 2015. The same seeks an order restraining the 1st and 2nd Respondent from adopting and publishing the results of the 1st Defendant's Governing Council elections for the Nairobi Region.

2. The counsels for the 1st Defendant and the Plaintiff have addressed me on their client's respective cases in relation to that prayer. The facts are that on 8th April, 2015, the 1st Defendant published a Notice in the Daily Nation of that day for an Annual General Meeting to be held on 30th April, 2015 at Embu. The time for that Annual General Meeting was not disclosed in that Notice. Agenda No. 6 is for that meeting was given as: -

“6. To confirm directors who will have been duly elected on 21st April, 2014.”

3. The elections for the 1st Defendant's Nairobi Region Governing Council was held on 21st April, 2015 at Nyayo Stadium whereby, Albert Gacheru and Henry M Njenga, the 3rd Defendant were returned by the representatives of the 1st Defendant as duly elected. The Plaintiffs have in their suit raised two objections to the said returns. Firstly, that one of those returned as elected, the 3rd Defendant was not properly nominated and secondly, that there was infiltration of the elections by outsiders i.e. persons not eligible to either vote or vie.

4. The Plaintiffs complain that one Nellias Wanjiru Wamuyu was not eligible to nominate the 3rd Defendant in that, she was not a member registered in the Nairobi region of the 1st Defendant. They have produced the register of members for the 1st Defendant's Nairobi region as “JWN 006”. Further, the Plaintiff's have complained that one Jared Getanda, a member from Nyanza region was not eligible to participate in those elections yet he was allowed by the 1st Defendant to vie for directorship.

5. In the Replying Affidavit sworn by the CEO of the 1st Defendant, it is contented that the application is malicious, it is meant to stall the Annual General Meeting; that the elections were conducted in the most transparent manner and that the said Nellias Wamuyu was inadvertently indicated as being a registered voter from Central Region instead of Nairobi. Her application for registration was exhibited as “MMO1” and it was deponed that all complaints raised regarding the election were duly responded to.

6. Article 33 (3) of the 1st Defendant’s Articles of Association provides the qualification for Council Members for which they said Albert Gacheru and Henry Njenga were elected. It provides: -

“e) any member vying to represent a region in the Governing Council must have been registered as a member in that particular Region for a continuous consecutive period of not less than six (6) months prior to the date of the notice declaring the sit vacant”.

7. Clause (e) of the 1st Defendants Election Rules provides:-

“e) A nominee must be supported by ten (10) members who shall

include one who proposes and another who seconds, all of whom should have been members eligible to vote in a poll in the society.”

8. I have looked at the Register of members for the Nairobi Region produced as “JWN 006”. The name as well as member Number 1266 is missing. The said Nellias Wamuyu who is indicated as being member 1266 is not appearing in that register. The 1st Defendant has not denied that the register produced in court is the correct one. Indeed, the register shows that some numbers and names of members are missing therefrom. The question that arises is whether that is deliberate or by oversight.

9. The other issue is that while the 1st Defendant had an opportunity to respond it did not produce an accurate register showing that the alleged Nellias Wamuyu is a member of the 1st Defendant for Nairobi. A statement in the Replying Affidavit in my view cannot unseat what is clearly on record in JWN 006. The question that arises is, can Henry Mungai legally be said to have been properly nominated and subsequently elected? I entertain doubt.

10. The second issue is that of Jared Getanda. It has not been denied that he is a member of Nyanza region. The court was not told that a member who is from a different region can vie for directorship in another region. That would clearly violate Article 33(3) of the Articles of the 1st Defendant. At least those to my mind are clear violations of the electoral law of the 1st Defendant. Are they sufficient to warrant the grant of the orders sought?

11. I am aware that I am only considering the matter pending inter parties hearing of the rest of the prayers in the motion. Issues of elections in this country are very immotive. A lot of monies are expended in organizing and carrying out elections. What amount of irregularities should qualify to allow a nullification of an election of such a body as the 1st Defendant? That as an issue that the trial court will have to grapple with.

12. What I should answer here is whether there has been established sufficient cause to restrain the publishing of the elections of the Nairobi Region that was carried out on 21st April, 2015. In my view, a culture of transparency, honesty, fairness and absolute verifiability in the conduct of elections need to be imposed in the conduct of elections in this country?

13. To allow grave irregularities in elections to stand will to court disaster. Parties may deliberately engage in irregularities well knowing that a blind eye will be turned on them. That will not augur well for a democracy such as ours. I believe that serious questions of irregularities have been established in the application herein. They need to be investigated before the two who were purportedly elected can be confirmed in the Annual General Meeting of 30th April, 2015. To allow the confirmation of the elections

and then seek to set it aside at a later date as suggested by the 1st Defendant, in my view, would be to encourage impunity. That would not do. A case for grant of temporary orders has been made.

14. Accordingly, I make the following orders: -

1) Pending the hearing of the motion dated 23rd April, 2015. inter parties, the 1st and 2nd Defendants are hereby restrained whether by themselves their officers, servants or agents from adopting and or publishing the results of the Music Copyright Society's Governing Council elections for Nairobi Region held on 21st April, 2015 either during the Annual General Meeting of 30th April, 2015 or at any other forum.

2) The application be served upon the 3rd Defendant within 10 days for hearing inter partes within 30 days on a date to be fixed at the registry. It is so ordered.

Dated, signed and delivered at Nairobi this 29th day of April, 2015.

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A MABEYA

JUDGE