



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 209 OF 2015

JOHN MUTISYA MAWEU

FAITH NZIVA KITHELE.....PLAINTIFFS

-VERSUS-

MUSIC COPYRIGHT SOCIETY OF KENYA LIMITED

LAZARUS MULI MUOKI

REGISTRAR OF COMPANIES.....DEFENDANTS

RULING

INTRODUCTION

1. The Application before the Court is the Plaintiffs' Notice of Motion dated **29th April 2015** and filed on **30th April 2015**. It is expressed to be brought under the provisions of **Section 3A** of the **Civil Procedure Act** and **Order 40 Rules 1, 2 & 3** of the **Civil Procedure Rules**. The Application sought for the following orders;-

1. *Spent*
2. *Spent*
3. ***THAT a temporary injunction be and is hereby issued restraining the Defendants, their agents, employees and or servants and or anybody acting on their behalf from swearing into office and or effecting the registration by the 3rd Defendant of the 2nd Defendant as the 1st Defendant's Eastern Region director and Governing Council member until the hearing and determination of this suit hereof.***
4. ***THAT costs of this application be provided.***

THE PLAINTIFFS' CASE

2. The application is based on the grounds set out therein and is supported by the Affidavit of JAMES MUTISYA MAWEU, the 1st Plaintiff herein and sworn on 29th April 2015.

3. The facts leading to the application are that on 21st April, 2015 and pursuant to a Notice of a meeting

dated 8th April, 2015, the 1st Defendant held its elections for directors who form part of its Governing Council under Article 32 (b) of its Memorandum & Articles of Association dated 5th July, 2012. The Plaintiffs aver that the elections were conducted in all regions namely Nairobi, Coast, Western, Eastern, Central, Rift Valley and Nyanza. They further aver that they duly vied for the position of directorship of the 1st Defendant in the Eastern region on 21st April, 2015.

4. The Plaintiffs aver that the mandatory qualifications under Rule (m) of the 1st Defendant's Rules and regulations are that a candidate must be of high professional integrity, conduct and suitability to be a regional director. It is their assertion that they qualified and met the criteria for selection as Eastern region director. It is however their contention that the 2nd Defendant did not meet the aforesaid criteria by virtue of jumping bail in Court proceedings in Criminal Case No. 1857 of 2009.

5. It is further the Plaintiffs' contention that the elections held on 21st April, 2015 for a regional director in the Eastern region were marred with various irregularities. Among the irregularities were that the 1st and 3rd Defendant's failed to ensure compliance with the mandatory qualifications of a candidate for the position of regional director and that they also failed to ensure that the elections were not marred with violence. In addition, the 2nd Defendant committed acts of bribery and that the Defendants helped strangers to vote and aided them to escape from the venue. It is therefore the Plaintiffs' case that the Defendants failed to ensure free and fair elections.

6. The Plaintiffs aver that on 28th April, 2015 they lodged a complaint through an email addressed to the 1st Defendant objecting to the elections of the 2nd Defendant. However, the 1st Defendant's company secretary confirmed that she had received similar complaints and advised the Plaintiffs to take legal action.

7. The Plaintiffs filed this application on 30th April 2015, the same day on which the 1st Defendant was apparently to hold an Annual General Meeting. It was their assertion that in the said meeting it was expected that the elections of the regional directors would be endorsed. According to the Plaintiffs, it appears that this was not the correct procedure. It was their assertion that taking oath of office and registration of the new directors could only be effected after 6 days of approval in the 1st Defendant's Annual General Meeting. I believe the foregoing circumstances are what prompted the Plaintiffs to file the current application seeking for interim orders to bar the swearing into office of the 2nd Defendant as the Eastern region director. The Plaintiffs together with the application also filed a Plaint seeking among other orders that the 1st Defendant's elections of Eastern region be nullified and conducted afresh.

THE DEFENDANTS' CASE

8. In opposition to the application, the 1st and 2nd Defendants filed a Notice of Preliminary Objection dated 18th May 2015 on even date. The said Defendants object to the present application on the ground that this Honourable Court lacks jurisdiction to entertain this suit by virtue of Article 78 of the Memorandum and Articles of Association of the 1st Defendant and section 10 of the Arbitration Act.

LEGAL ANALYSIS

9. I have considered the application, the affidavit in support thereto as well as the preliminary objection as raised by the 1st and 2nd Defendants. Having done so, I take the following view of the matter.

10. On 3rd June, 2015 Counsel for the 1st and 2nd Defendants submitted orally on their preliminary objection dated 18th May 2015 and filed on even date. The objection challenged the jurisdiction of this Court to hear and determine the present application. Counsel submitted that the Plaintiffs were members of the 1st Defendant and as such were bound with the rules of that society under its Memorandum and Articles of Association. He submitted that there was an arbitration clause at Article 78 which bound all the members. In that case he submitted that the arbitration clause was applicable in the current situation

where a dispute had arisen with respect to the elections conducted under the said Memorandum and Articles of Association. It was therefore Counsel's submission that this Court had no jurisdiction to hear the present suit and the same ought to be referred to arbitration.

11. In response to the 1st and 2nd Defendants' submissions, Counsel for the Plaintiffs submitted that this Court had the jurisdiction to determine the current suit. It was his submission that the 1st Defendant was governed by the Companies Act which gave this Court exclusive powers and jurisdiction to grant the orders sought in the present application. He however did not refer the Court to the specific section of the companies Act. It was further his submission that there was no arbitration agreement binding the parties to arbitrate. It was also his submission that the 3rd Defendant, against whom the Plaintiffs were seeking the main orders, was not a member of the 1st Defendant. It was further Counsel's submission that under Section 7 (2) of the Arbitration Act, any party could come to Court for interim measures of protection pending arbitration.

12. In response, Counsel for the 1st and 2nd Defendants reiterated his position that this suit was to be referred to arbitration. In referring to the Plaintiff, he submitted that the prayers therein were issues arising under the Memorandum and Articles of Association and were therefore arbitrable.

13. This Court has perused Article 78 of the 1st Defendant's Articles of Association which states as follows:-

***“where differences arise between the society on one hand and any of the members, their executors, administrators or assigns on the one hand touching the true intent or construction, or the incidents or consequences of these Articles, or the statutes, or touching anything then or thereafter done, executed omitted, or suffered in pursuance of these articles, or of the statutes, or touching any breach or alleged breach of these articles, or any claim on account of any such breach or alleged breach or otherwise relating to the premises, or to these articles or to any statutes affecting the society or to any of the affairs of the society, every such decision shall be referred to the decision of an arbitrator, to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference.*”**

It is clear from the elaborate arbitration clause above that any differences between the 1st Defendant society and its members arising under its Memorandum and Articles of association shall be resolved by way of arbitration. The prayers sought for by the Plaintiffs in their Plaintiff dated **29th April 2015** and filed on **30th April 2015** arise out of the elections conducted by the 1st Defendant and conducted under its Memorandum and Articles of association. Therefore any grievances by the Plaintiffs concerning the said elections should be referred to arbitration as provided for under the Arbitration clause above. In the circumstances, this Court has no jurisdiction to hear the present suit and the same ought to be referred to arbitration.

14. However, before I uphold the 1st and 2nd Defendants' preliminary objection I will briefly address the Plaintiffs' present application for interim orders. The Plaintiffs sought for interim orders to prevent the swearing in and registration of the 2nd Defendant as the Eastern region director pending the hearing and determination of this suit. It has already been established that this Court has no jurisdiction to determine this matter by virtue of the fact that the parties herein are bound by the arbitration clause in the document governing their relations. That notwithstanding, this Court is of the view that for the efficient disposal of this application it is only just and fair to grant the Plaintiffs interim orders pending arbitration in order to maintain the status quo. That is, to ensure that the 2nd Defendant is not sworn in and registered as the Eastern region director pending the reference of the dispute herein to arbitration. Under section 7 of the Arbitration Act, this Court has the power to intervene in this matter pending arbitration by granting interim measures of protection.

DISPOSITION

15. In view of the foregoing, the upshot of this Court's ruling is that the 1st and 2nd Defendants' Preliminary Objection dated 18th May 2015 and filed on even date is hereby upheld. The Plaintiffs' Notice of Motion dated **29th April 2015** and filed on **30th April 2015** is dismissed. However, pending the reference of this matter to arbitration, the Plaintiffs have been granted interim orders preventing the 1st Defendant from swearing the 2nd Defendant into office and or effecting the registration of the said 2nd Defendant by the 3rd Defendant as the 1st Defendant's Eastern Region director and Governing Council member.

16. The costs of this application shall abide the outcome of the intended arbitration proceedings.

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Odhiambo holding brief for Kurauka for Plaintiffs

Mr. Maloba for Defendants

Teresia – Court Clerk