



No.26

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISIL.
CIVIL CASE NO 6 OF 2011

**MARGARET OKARI CHILDREN'S
FOUNDATIONPLAINTIFF**

VERSUS

MIKE WOOD1ST DEFENDANT

TOM MASENO.....2ND DEFENDANT

RULING

1. This case was commenced by way of a plaint dated 18th January, 2011 and filed in court on the same day. The plaintiff/applicant prays for judgment against the defendants jointly and severally in the following terms:-

- (i) Declaration that the defendants are neither authorized nor mandated to co-ordinate and/or manage the affairs of the plaintiff.**
- (ii) An order directing the 1st defendant to render and/or account in respect of the monies and/or funds donated by Margaret Okari Children's foundation Inc, USA.**
- (iii) An order of injunction restraining the defendants by themselves, agents, servants and/or anyone acting under the defendant's instructions from interfering with the affairs and management of the plaintiff, whatsoever**
- (iv) Costs of this suit be borne by the defendants**
- (v) Such further and/or other relief as the honourable court may deem fit and expedient so to grant.**

2.The plaintiff's claim against the defendants is as set out in paragraph 13 of the plaint in which the

plaintiff avers thus:-

“13. The plaintiff’s claim against the defendants jointly and/or severally is for declaration that the defendants are neither authorized nor mandated to co-ordinate and/or manage the affairs of the plaintiff. Besides, the plaintiffs also claim for an order directing the 1st defendant to render and/or tender account in respect of the monies and/or funds donated by Margaret Okari Children’s Foundation incl USA”.

3. Contemporaneously with the plaint, the plaintiff filed a Notice of Motion under **Order 40 Rules 1, 2, 4 and 10** of the **Civil Procedure Rules, 2010, sections 1A, 1B, 3A and 63 (e)** of the **Civil Procedure Act, Sections 6 and 7(i)** of the **Arbitration Act, 1995** and all enabling provisions of the law seeking both temporary and mandatory injunctive orders pending the hearing and determination of the suit herein. The plaintiff also prays that the orders so granted be enforced and/or implemented by O.C.S. Rongo Police Station. The plaintiff also wants costs of this application to be borne by the defendants/respondents.

4. The Verifying Affidavit to the plaint, the supporting and further supporting affidavit to the application are all sworn by one Timothy Wambunya, who described himself as the Chairman of the Board of the Plaintiff/Applicant herein. He also described the Plaintiff/Applicant as a Non-Governmental Organization specializing in the welfare of orphans and the less privileged.

5. The grounds to support the application are set out neatly and in extenso on the face of the application, the gist of which is that it is only the plaintiff who is authorized and/or mandated to run and/or manage the affairs of the plaintiff to the exclusion of all and sundry, and that in the circumstances of this case, it would be in the interests of justice and it is expedient to grant interim measures of protection in line with **section 7 (1)** of the **Arbitration Act, 1995**.

6. The application is also premised on the supporting Affidavit sworn by Timothy Wambunya on the 18th January, 2011. That affidavit reiterates the content of the grounds of the face of the application. The deponent avers that the defendants have unlawfully and/or illegally withheld funds due and/or donated in favour of the plaintiff/applicant whose mandate it is to cater for orphans and the less privileged children in society.

7. There are 2 further supporting affidavits sworn by Timothy Wambunya on 1st February, 2011 and by Kwamboka Okari on 4th February, 2011 respectively. These affidavits fortify the plaintiff’s first supporting affidavit in urging this court to grant the orders sought.

8. The application is opposed. In the first place there is the Notice of preliminary objection dated 25th January, 2011 and filed in court on the 26th January, 2011. The notice raises the following four grounds of objection namely that:-

- (a) **The Margaret Okari Children’s Foundation has not authorized the filing of this suit.**
- (b) **The Margaret Okari Children’s Foundation has not authorized Timothy Wambunya to swear any affidavit to support this suit.**
- (c) **There is no legal person by the name Tom Maseno**

(d) The honourable court lacks jurisdiction to handle this matter in respect of the second defendant.

9. There is also a Replying Affidavit sworn by Mike Wood on the 24th January, 2011. He has sworn the affidavit in his capacity as Treasurer and acting Chairman of the MARGARET OKARI CHILDREN'S FOUNDATION INC USA a 501(c) (3) nonprofit California Corporation. He denies that he has interfered with the management and/or running of the plaintiff as alleged; that the plaintiff is not an international NGO and that in any event no authority has been given for the commencement of this suit by Timothy Wambunya who has acted in a high handed manner in running the school while he is on suspension.

10. The second Replying Affidavit, dated 26th January, 2011 is sworn by JAMES TONGI MASENO who claims that he is not the same person described as TOM MASENO, the 2nd defendant herein. He avers that he is the engine behind the project being undertaken by the plaintiff and is also the treasurer of the same. He denies allegations that he has grabbed the title deeds to the plaintiff's land and denies further that he has constituted himself a sole signatory to the accounts. He wants this application dismissed.

11. By consent of the parties, the application herein proceeded by way of written submissions. The plaintiff's submissions which are dated 10th February, 2011 were filed in court on the same day. During the hearing of the application, Mr. Oguttu of Oguttu-Mboya and Company Advocates summarized the submissions into 4 major grounds.

12. In the first ground counsel submitted that the dispute herein touches on the ownership and management of the applicant's institution. He submitted that the two combatants share one common denominator, namely the founder of both of them being Kwamboka Okari who has lived in the USA at one time but now lives in Kenya. That Margaret Okari, after whom the foundation was named is a sister of Kwamboka Okari. Counsel submitted that in this combat, the invitee has now taken over from the host contrary to **Article XXX** of the applicant's Constitution. It was submitted that this is a proper case for arbitration as provided under **Article XXX** of the plaintiff's **Constitution** which provides as follows:-

“Save where by this Constitution the decision of the board is made final if at any time hereafter any dispute difference or question shall arise between the founders, members, Trustee(if any) or other persons or their personal representatives or any of them respectively touching the construction meaning or effect of this Constitution or any cause or thing therein contained or the rights or liabilities of the said parties respectively or any of them under this constitution or otherwise howsoever in relation to the constitution or otherwise howsoever in relation by a single arbitrator appointed by agreement between the parties and in default of such agreement by the chairman for the time being of the Chartered institute of arbitrators (Kenya Branch) in accordance with and subject to the provisions of the Arbitration Act (Chapter 49) of the laws of Kenya or any statutory modification or re-enactment thereof for the time being in force.”

13. Counsel urged this court to refer this whole case to arbitration.

14. In the second ground, counsel argued that where there is an arbitration clause in the Constitutions as is the case herein, the dispute ought to be referred to arbitration in accordance with the relevant arbitration clause. He however submitted that in the meantime, and regardless of the arbitration clause, an aggrieved party can still seek relief from the courts pending the arbitral reference as provided under **section 7 (1)** of the **Arbitration Act, 1995**.

15. In the third ground, counsel contested the defendant's allegations that the 2nd defendant/respondent

has not been properly sued since the name of the said 2nd defendant/respondent is different from the name by which the defendant/respondent is known. Counsel submitted that even if there was such discrepancy, such discrepancy is a mere misnomer which is curable by way of amendment allowed under **Order 1 Rule 10(2)** of the **Civil Procedure Rules, 2010**.

16. Finally, counsel submitted that since the separate account now being operated by the defendants was opened without authority, it is meted that a mandatory injunction do issue because the defendants have stolen a march on the plaintiff/applicant by unilaterally and irregularly opening a different account without the authority of the plaintiff/applicant.

17. In response to the plaintiff's submissions the defendants filed their written submissions through their advocates M/s Enonda Makaloo Makori & Company advocates. The defendants contended that the American and Kenyan organizations are one and the same organization and therefore that there is neither invitee nor host. Counsel submitted that there was no application before this court seeking to determine ownership of the institution.

18. It was also contended on behalf of the defendants that the plaintiff/applicant had placed no evidence before the court to show that the trust established in 2004 exists and that in the circumstances the plaintiff's case has no basis.

19. As for the alleged separate account, counsel submitted that the said new account was not opened at the instance of the 1st defendant/respondent but at the instance of the American Foundation to whom the money in the said account belongs and which has the sole mandate of deciding how such money should be used. Counsel submitted that this court would be out overstepping its jurisdiction if it were to direct a donor on how to use its own moneys. Counsel also urged this court to find that the plaintiff/applicant has lost its chance to amend the pleadings so as to include the proper and correct names of the 2nd defendant/respondent.

20. The parties also filed their authorities to support their respective positions. The court has considered the authorities and is greatly indebted to counsel for their diligence ad industry.

21. I have now considered the pleadings, including the various affidavits and annexures thereto. I have also considered the submissions and the law.

22. The first issue brought up by the defendant/respondent is that the plaintiff's suit ought to be struck out for misdescription of the 2nd Defendant/Respondent and also for failing to take redemptive action pursuant to **Order 8 Rule 3 (3)** of the **Civil Procedure Rules**. It was held in the case of **DT Dobie and Company(Kenya) v-s Muchina(1982) KLR 1** that the courts should aim at sustaining rather than dismissing suits. Further, the Civil Procedure Rules 2010 and the Constitution of Kenya under **Article 159(2)**, courts and tribunals shall be guided by, *inter alia*, the principle that "justice shall be administered without undue regard to procedural technicalities". In any event, the courts have unlimited discretion to make orders for amendment of pleadings at any stage of the proceedings before judgment. All other things being equal the court is of the view that this ground would not be a basis for striking out the plaint at this stage.

23. The other issue that has arisen for determination is whether the plaintiff is properly before this court. The plaintiff/applicant has addressed this issue under item (f) or 6 of its submissions, while the defendants/respondents have addressed it under item (b). The plaintiff's case is that all the requisite documents have been sworn and/or executed by the chairman of the plaintiff's board with the authority and/or mandate of the plaintiff/applicant. Counsel submitted that the chairman of the plaintiff can only act through the board, and that he has done so.

24. On their part, counsel for the defendants contended that the plaintiff has not exhibited any minutes of a Board meeting of the plaintiff at which authority was given for the filing of this suit. It was further submitted that there has not been exhibited a copy of any authority given to Timothy Wambunya asking or authorizing him to swear an affidavit on behalf of the plaintiff. Reliance was placed on **NAIROBI (MILIMANI COMMERCIAL COURTS) HCCC NO. 524 OF 2004 – AFFORDABLE HOMES AFRICA LIMITED VS IAN HENDERSON AND 2 OTHERS.** The issue of authority to institute the suit in that case arose, and Njagi J., in dealing with that issue stated, *inter alia*, that:-

“The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company the company is not before the court at all. For that reason, the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocate for the plaintiff.

As an artificial person, however, a company can only take decisions through the agency of its organs which are primarily the Board of directors or the general meeting of its shareholders. One of these should therefore authorize the use of the company's name in litigation....”

25. Counsel for the defendants submitted that being a non governmental organization, the plaintiff can only make decisions through its board and not through individuals. On the basis of the above, counsel asked this court to strike out the plaintiff's case

26. I do agree with the law as stated by Njagi J. in the Affordable Homes Limited Case (above). This is the legal position since the days of **Salomon –vs- Salomon & Co, Ltd. [1895-9] 33, HL.** In the case of **Coffee Growers Limited vs- Sebaduka & Another (1970) EA 147,** it was held, *inter alia* that:

“When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or board of directors' meeting and recorded in the minutes.....”.

27. In the instant case, there is no evidence of a resolution or resolutions having been passed by the plaintiff either at a Board or General meeting. In the circumstances, this suit cannot stand. The plaintiff is effectively not in court at all and no amount of sympathy, either by the court or other persons interested in the welfare of the plaintiff can salvage this case. The court therefore finds that Timothy Wambunya had no authority to institute this suit or to swear the verifying affidavit to the plaint. The said Timothy Wambunya did not also have the authority to swear the supporting and Further Supporting Affidavit in support of the Notice of Motion dated 18th January, 2011.

28. Having reached the conclusion that the plaintiff is not before this court, I see no value in proceeding to consider the other substantive issues which were framed by the parties herein. Such an exercise in my humble view would be for academic purposes only. It would also be an unnecessary drain on scarce judicial time.

29. In the premises, the whole of the plaintiff's case, including the Notice of Motion dated 18th January,

2011 be and are hereby struck out with costs. Such costs shall be borne by Timothy Wambunya.

29. It is so ordered.

Dated and delivered at Kisii this 25th day of February, 2011.

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Oguttu (present for Plaintiff/Applicant

Mr. Minda for Makori (present) for Defendants/Respondents

Mr. Bibu (present) Court Clerk