



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Civil Suit 251 of 2007**

**JOHN HARI GAKINYA.....PLAINTIFF**

**VERSUS**

**PAUL KIBUGI MUIITE.....1<sup>ST</sup> DEFENDANT**

**REGINA GATHONI (*sued as the officials of SAFINA PARTY*).....2<sup>ND</sup> DEFENDANT**

**ONESMUS KIMANI NGUNJIRI.....3<sup>RD</sup>  
DEFENDANT**

**RULING**

The plaintiff, John Hari Gakinya filed suit seeking, *inter alia*, a declaration by this court that the certificate of nomination purportedly issued to the 3<sup>rd</sup> defendant is illegal and invalid. The plaintiff further sought an order of perpetual injunction seeking to restrain the 3<sup>rd</sup> defendant from presenting a certificate of nomination from the Safina Party during the 2007 general election for Subukia constituency. Contemporaneous with filing the suit, the plaintiff filed an application under **Order XXXIX Rules 1, 2, 3 and 9** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** seeking, *inter alia*, an order of injunction to restrain the 3<sup>rd</sup> defendant by himself or his servants from presenting a certificate of nomination to the Electoral Commission of Kenya purportedly issued to him by Safina Party for the Subukia Constituency for the 2007 general elections.

The application was certified as urgent by this court and the plaintiff was directed to serve the defendants in this suit. The defendants were duly served. They entered appearance. The 3<sup>rd</sup> defendant filed an application under **Section 6(1)** of the **Arbitration Act** and **Rule 2** of the **Arbitration Rules** seeking an order of this court to stay the proceedings herein pending reference of the dispute involving the plaintiff and the defendants to arbitration as provided by Clause 17 of the Constitution of Safina party. The application is supported by the annexed affidavit of the third defendant. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a notice of preliminary objection by which they, *inter alia*, claim that the plaintiff had filed the present suit in contravention of the constitution of Safina party and therefore the plaintiff had no right to have audience in this court.

The plaintiff filed a replying affidavit in opposition to the application. In the said affidavit, the plaintiff deponed that the 3<sup>rd</sup> defendant was not a member of Safina party and therefore could not invoke the provisions of the Safina party constitution. He deponed that the 3<sup>rd</sup> defendant was a Narc- Kenya party chairman of Subukia constituency and was also the party's deputy national organizing secretary. He urged the court to dismiss the application.

At the hearing of the application, Mr. Simiyu, counsel for the 3<sup>rd</sup> defendant reiterated the contents of the application and the supporting affidavit. He submitted that Clause 17 of the Safina Party constitution provided that a dispute between the members of the party or the members themselves concerning party affairs or the management of the party should be referred to arbitration before being referred to court. Mr. Simiyu particularly emphasized the last sentence of Clause 17 of the said constitution which provides that

*“For avoidance of doubt no member shall institute any court proceedings unless the member has first invoked and exhausted the arbitration process provided herein.”*

He submitted that the plaintiff had not attempted to bring the arbitration machinery as contemplated by the constitution of the Safina party into play. He maintained that the plaintiff had not exhausted the arbitration machinery before filing the present suit in court. He submitted that the plaintiff had no audience before this court until he had exhausted the arbitration machinery provided for by the constitution of the Safina party. He urged the court to allow the application and stay the proceedings herein pending reference and resolution of the dispute by arbitration as provided for by Clause 17 of the Safina Party constitution. He insisted that the dispute regarding the nomination of party’s nominees as parliamentary candidates was a party affair which this court lacked jurisdiction at this stage to hear and determine. Mr. Simiyu referred this court to several decisions of the High Court and the Court of Appeal in support of his submission.

Mr. Mwaniki for the 1<sup>st</sup> and 2<sup>nd</sup> defendants associated himself with the sentiments expressed by Mr. Simiyu on behalf of the 3<sup>rd</sup> defendant. He reiterated that Clause 17 of the Safina party constitution provided an arbitration clause which made it mandatory for the dispute between a member and the party to be resolved by arbitration. He submitted that the suit filed by the plaintiff was premature because he had not exhausted the dispute resolution mechanism put in place by the constitution of the party. He reiterated that it was no excuse on the part of the plaintiff that the dispute was urgent for him to ignore the arbitration provisions of the Safina Party constitution. He urged the court to stay the proceedings pending reference of the dispute to arbitration.

Mr. Karanja for the plaintiff opposed the application. He submitted that this court had jurisdiction to hear this matter and grant the temporary order sought pending reference to arbitration. He submitted that **Section 7 of the Arbitration Act** granted this court jurisdiction to grant temporary orders pending reference to arbitration. He maintained that the jurisdiction of this court could not be ousted to the extent contemplated by Clause 17 of the Safina Party constitution. He submitted that the party had illegally issued a certificate of nomination to the 3<sup>rd</sup> defendant who was not a member of the party. He reiterated that the 1<sup>st</sup> and 2<sup>nd</sup> defendants could not seek to invoke the arbitration clause in the constitution of the Safina Party in a situation where it had acted unlawfully by issuing a certificate of nomination to a non-member of the party. He submitted that the plaintiff was justifiably aggrieved because he had been nominated by the Safina Party to be its candidate in Subukia Constituency and in accordance with Clause 13 (3) of the Safina party constitution, the nomination of the plaintiff was final and could not be challenged. He maintained that this court had jurisdiction to determine the issues in dispute particularly when the officials of the party were themselves in breach of the constitution. He urged this court to dismiss the application.

I have carefully considered the rival submissions made by counsels to the parties to this suit. I have read the decided cases referred to this court by the parties to this application. I have also read the pleadings filed by the parties in support of their respective positions in this application. The issue for determination by this court is whether the 3<sup>rd</sup> defendant has established a case to enable this court grant his application to stay the proceedings herein pending reference of the dispute to arbitration as contemplated by Clause 17 of the constitution of the Safina party. **Section 6(1) of the Arbitration Act 1995** provides that;

*“A court before which proceedings are brought in a matter which is a subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to*

*arbitration unless it finds –*

- (a) *that the arbitration agreement is null and void, inoperative or incapable of being performed; or*
- (b) *that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”*

It is clear from the foregoing that where there is an arbitration clause, the court has no option but to stay the proceedings pending reference of such dispute to arbitration. The section is worded in mandatory terms. The court has no discretion other than to refer the matter to arbitration once it is established that there exists an arbitration clause. In the present application, the 3<sup>rd</sup> defendant argued that this suit ought to be stayed pending the resolution of the dispute between the parties herein by an arbitrator as provided by Clause 17 of the Safina party constitution. The said clause reads as follows;

*“ARBITRATION*

*Any dispute concerning the interpretation of this constitution or any disputes involving members of the party or between the party and its members or any disputes concerning any matters relating to party affairs or the management of the party shall be adjudicated upon through arbitration. The parties concerned appoint a single arbitrator from the panel of arbitrators established by the National Executive Council. Should the parties to dispute fail to agree on the single arbitrator, the management committee shall appoint the arbitrator from the panel of arbitrators. For avoidance of doubt, no member shall institute any court proceedings unless the member first invoked and exhausted the arbitration process provided herein.”*

Is Clause 17 of the Safina party an arbitration agreement as contemplated by **Section 6(1)** of the **Arbitration Act**? To constitute a legally recognisable agreement, the arbitration clause must provide for a fair and just system of dispute resolution. The said arbitration clause must provide for the appointment of arbitrators and the resolutions of dispute where the rules of natural justice would be scrupulously followed. Clause 17 of the Safina party is deficient in this respect. In the event there is a dispute between a member and the management of the party, the management of the party would nominate an arbitrator to determine the dispute between itself and the member. Clause 17 provides that only arbitrators who have been empanelled by the National Executive Council can arbitrate or disputes between itself and its members. This clause is clearly in breach of the rules of natural justice that mandates an arbitrator to be independent of the disputing parties. If the provision of Clause 17 of the Safina party were to be invoked by the plaintiff in this case, he would have no chance of having a fair hearing. This is because the officials of the Safina party would be both the accused and judges of their own cause. Clause 17 of the Safina party constitution is therefore not an arbitration agreement as contemplated by **Section 6(1) of the Arbitration Act**. The said clause is null and void in so far as it purports to give powers to the officials of the party to appoint arbitrators in a dispute involving itself and an aggrieved member. Unlike the arbitration clause of the constitution of the Narc-Kenya party in Nakuru HCCC No.154 of 2007 Daniel Waithaka Mwangi vs Narc-Kenya & others (unreported) which provided that the parties to the dispute would appoint any three arbitrators to determine the dispute or invoke the provisions of the arbitration Act of Kenya, Clause 17 of the Safina party is deficient in material respects and is not an arbitration agreement in accordance with **Section 6(1) (a)** of the **Arbitration Act**.

The application by the 3<sup>rd</sup> defendant cannot therefore be allowed because there is no valid arbitration clause in the Safina party constitution which can make this court stay the proceedings herein pending reference to arbitration. Further, the plaintiff has established that the 3<sup>rd</sup> defendant is not a member of the Safina party since he is a recognised official of the Narc-Kenya party. Even if this court were to find that there existed a valid arbitration clause in the Safina party’s constitution, the 3<sup>rd</sup> defendant cannot invoke the said arbitration clause in the Safina party constitution since he is not a member of the Safina party.

For the above reasons, the application by the 3<sup>rd</sup> defendant is hereby dismissed. This court declines to stay proceedings herein. The plaintiff shall proceed with this application.

**DATED at NAKURU this 22<sup>nd</sup> day of November 2007**

**L. KIMARU**

**JUDGE**