



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 382 of 2006

HON. M.M. GALGALO

Jael MBOGO

CAPT. CHARLES MASINDE

PETER ORINDA..... PLAINTIFFS

VERSUS

HON. MUSIKARI KOMBO..... 1ST DEFENDANT

HON. JOHN K. MUNYES..... 2ND DEFENDANT

RULING

This Ruling is made in the Defendant/Applicant's application dated 26th April 2006 brought under Orders XXXIX Rule 4, XLIV Rules 1 and 2 and L Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. In it, the Applicants seek orders for the review and setting aside of the orders of this Court made on 25th April 2006 and for costs to be in the cause. They also pray that pending the hearing and determination of the application the said orders be stayed.

For the avoidance of doubt and to clear the apparent confusion in the minds of the Applicants and their Counsel as regards the specific orders made, I find it necessary to reproduce the said orders in point form as follows.

- 1. The Respondent's (present applicant) Notice of Motion dated 24th April 2006 to be heard on 9th May 2006.**
- 2. For the sake of peace and in order to enhance the spirit of amicably in any arbitral process to follow I grant temporary orders in terms of prayers 3 and 4 of the Application dated 12th April 2006 for 14 days.**

The effect of the said orders was to stay the application dated 12th April 2006 brought by the current Respondents pending the hearing and determination of the Applicants' Notice of Motion, which was filed on the morning of 25th April 2006 praying that the same be heard on priority basis and that all proceedings as had been filed by the Respondents herein be stayed and that the dispute between the

parties be referred to arbitration. The said application was not brought under Certificate of Urgency under Vacation Rules as had been the Respondents' application. Counsel appearing for the Applicants had just been appointed and had not filed any papers in the application dated 12th April 2006. That notwithstanding this Court graciously granted him audience in view of the nature of the application filed and allowed him to submit on behalf of his client. The record clearly shows that Mr. Njoroge Wachira for the Respondent (present Applicant) addressed the Court first and submitted as follows:

“I have just filed a Notice of Motion dated 25th April 2006 invoking Section 6 of the Arbitration Act 1995 and also the FORD KENYA Constitution Article 21. Our application should therefore be heard first. I ask that the proceedings herein be stayed and parties be ordered to go for arbitration.”

Mrs. Muriithi for the Applicant therein (present Respondent) replied as follows:

“Our application is urgent and ought to be heard as a matter of priority. The application filed today has no date. We would wish for temporary orders.”

The grounds on which the present application is brought are that

- 1. There is an error apparent on the face of the record as the orders issued are directed against the acting Chairman which office is non-existent in the Constitution of FORD KENYA.**
- 2. That the said orders were issued without jurisdiction and without proper hearing.**
- 3. There is no basis for granting the said interim orders and without proper hearing.**
- 4. The said orders were granted in breach of the rules of natural justice.**
- 5. The Applicants herein are greatly aggrieved by the said orders as they are highly prejudicial to the entire elected leadership and management of FORD KENYA and will paralyze party's operations and create unnecessary confusion, crisis and tension within the party which did not exist.**

In his submissions, Counsel for the Applicants in the present application, Mr. Eugene Wamalwa told the Court that since prayers 3 and 4 of the application of 12th April 2006 were directed at the acting Chairman and acting National Chairman, then the orders obtained by the Respondents ought not to have been granted because the 1st Defendant/Applicant is the Chairman and not “acting Chairman” of FORD KENYA. It is for this reason that the Applicants say there is an error apparent on the face of the record. The suit, as is clear from the pleadings is against the Hon. MUSIKARI KOMBO THE CHAIRMAN (FORD-KENYA) and HON. JOHN MUNYES SECRETARY GENERAL (FORD KENYA). There is no doubt that the two appeared in the suit under these heads. On enquiring why the 1st Defendant had accepted an inappropriately drawn order the Court was told that the orders challenged herein had neither been extracted nor served. That being the case then the said ground is unfounded and the challenge to the Court order on that basis premature. The issue of whether the 1st Defendant was validly elected as the Chairman or National Chairman of FORD KENYA is one of merit which can only be validly ventilated at the substantive hearing. I consider the same immaterial for the present purposes and the ground raising the same not a suitable ground to support the application presently before me.

It is not correct as stated in ground No. 2 of the application that the orders challenged herein were made without jurisdiction. I adopt the position taken by my learned sister Justice Joyce Aluoch in MISC. CIVIL APPLICATION NO. 1356 OF 1995 HON. MICHAEL C.S. KIJANA WAMALWA & OTHERS – vs- HON. AMOLO RAILA ODINGA & OTHERS that an agreement to go for arbitration is not a bar to the institution of Court proceedings in view of Section 6(1) of the Arbitration Act. Indeed if that were the case then the Applicants would not be asking the Court to hear them on their application for stay. The invocation of Section 6(1) of the Arbitration Act as well as Article 21 of the Litigants' Constitution does

not oust the jurisdiction of this Court. My stating in my Ruling of 25th April 2006 that the issue raised by the Applicant was one affecting the jurisdiction of this Court must not be construed as having been an ouster of my jurisdiction to grant the orders sought or making any other appropriate orders in the circumstances of the case. It is in exercise of that jurisdiction I ordered that the Applicant's application of 24th April 2006 to be heard prior to the one of 12th April 2006. Do the Applicants herein have any quarrel with that portion of the order? Apparently not, which clearly shows that their request for a stay, review and/or setting aside is fanned by their desire to have their cake and eat it at the same time. The issue of jurisdiction in an application as was before me is dependent upon the discretion to stay proceedings filed in Court and to refer the same to arbitration, or to refuse such stay and order that proceedings go on in Court as filed. The granting of stay is not automatic as Counsel for the Applicants have led their clients to believe. The principles upon which the Court will exercise its discretion in that regard were clearly laid down for our Courts by the Court of Appeal in ESMAILJI -vs- MISTRY SHAMJI LALJI & CO. [1984] KLR 150. I do not wish to go into the same at this stage since the same relate to an application for stay of proceedings. The authority is only cited to emphasize the point that the hands of the Court are not tied by the invocation of the arbitration clause since the Court has the discretion to stay proceedings and refer the matter to arbitration or not. As stay is not automatic, then the Court has jurisdiction to entertain proceedings filed until such a time as the Court itself will order them stayed and leave the parties to pursue arbitration. It is at that point that the issues raised on the Niazsons case (Applicant's authority) would arise.

Counsel appearing for the Applicants on 25th April 2006 appears to be driven by a desire to impress his clients on his attendances on that date. He deliberately forgets that this Court accommodated him when he had not filed any papers in reply to the application before the Court. Whilst it is true that after hearing both Counsels as earlier recorded and ordering that parties return at 11.30 a.m. and again at 2.30 p.m. due to a voluminous list for the day, it became clear, from studying the applications by both parties and considering the earlier submissions made by Counsel, on either side, that in the circumstances of the case and nature of the dispute before me it was not necessary to hear the application dated 12th April 2006, having determined that the application dated 24th April 2006, ought to be heard first. The same had no date and had not been brought under Vacation Rules and could not therefore be heard then. Mr. Wachira knew and Mr. Wamalwa also, knows or ought to have known, that in those circumstances Counsel could not have submitted on his application or tender the authorities in support as deponed in paragraph 8 and 9 of Mr. Wachira's affidavit of 26th April 2006. Instead of ordering that the Applicants approach the registry for a hearing date, I ordered that their application of 24th April 2006 be heard on 9th May 2006. That being the case it is obvious that the advocate appearing before me on 25th April 2006 has misadvised his clients and caused the 1st Defendant/Applicant to swear a false affidavit based on the untruth that he was condemned by this Court unheard. Indeed, Counsel for the 1st Applicant did make submissions before the Court to which the other side replied. The order challenged clearly says so. That being the case it is quite clear from the record that ground No's 2 and 4 of the present application and the averments in the Supporting affidavits herein that the orders sought to be stayed, reviewed and/or set aside were made without a hearing and contrary to the principles of natural justice are false. I am compelled at this point to find that Mr. Wachira has perjured himself in paragraphs 3, 7 and 10 of his affidavit of 26th April 2006 perhaps having forgotten that perjury, though a misdemeanour is a serious offence relating to the administration of justice punishable by a custodial sentence of seven years. In addition to perjuring himself, Mr. Wachira has suborned Mr. Musikari Kombo to commit the same offence as is evident from paragraphs 8 and 10 of his affidavit sworn on 25th April 2006. I will return to the issue of perjury at the end of this Ruling.

I now turn to ground 3 which states that there was no basis for granting the interim orders in the absence of evidence and circumstances justifying the same. The order of this Court speaks for itself as to the basis upon which it was made. Courts of law the world over and in Kenya in particular are not so naïve as to be unaware of the heat and agitation which generally ensues from matters political becoming so contentious that they end up in Court. More often than not the sparks that lead to Court action ignite into flames as soon as the party first in Court obtains orders, as was clearly demonstrated by the multitude that descended on the Court at the hearing of this application on 27th April 2006. Counsel for the

Applicant did himself submit as follows

“The effects (of the order) have been far reaching and have serious political implications across the country (as is) evidenced by the numbers which have come to Court today to witness these proceedings.”

With due respect there is dishonesty on the part of Counsel for the Applicant to submit in regard to Ground 5 of the application that there was no threat to peace or tension to warrant the issuance of the orders but that the orders themselves have had the effect of causing confusion and tension which did not exist hitherto. What was common knowledge and a matter for which this Court was entitled to take judicial notice is proved by the Applicants’ own exhibit “MNK 1” annexed to the Supporting affidavit which clearly states that the elections from which this dispute arises were conducted under the watchful eyes of 200 police officers provided by the O.C.P.D. Kilimani. It is common knowledge that whenever swords are drawn within the leadership of political parties in Kenya, the ripple effect is acrimony, tension and physical violence between the supporters of the divided camps. Applicants have not demonstrated the prejudice and great grievance caused by the orders challenged herein even though they claim that the same have effect of paralyzing the subject party’s operations. Ground No. 5 is therefore not proven.

I now turn to the reasons for staying execution of the interim orders of 27th April 2006 pending this Ruling. In explaining how the staying of my orders would prejudice the Respondents, Mrs. Muriithi submitted that:

“The continued issuing of membership cards bearing the 1st Applicants portrait would be unfair competition to individuals wishing to contest for the post.”

That not being the reason why the orders were issued in the first place and considering that this Court had not been called upon to make such a determination at this stage, it became clear to me that the Respondents too had their own agenda apart from the legality of the party’s Chairman’s tenure and performance of related functions, and which agenda is not for this Court to push forth. For that reason the Stay of Execution of those orders shall remain in force pending the hearing of the Applicants’ Notice of Motion as ordered.

Except as considered hereinabove, the bulk of submissions regarding the Constitution of the party as relates to the election of party officials and their functions are issues of merit to be considered at the hearing of the application for stay of proceedings. The same applies as regards other authorities submitted but not considered in this Ruling.

Taking the above into account I must state that the Applicants have not persuaded me of the existence of sufficient grounds for review under Order XLIV Rules 1 and 2 which only empowers the Court to do so for reasons of

- 1) **Discovery of new and important matter or evidence which was not within the Applicant’s knowledge and could not be produced at the time the order was made;**
- 2) **Clerical or arithmetical mistake or error apparent on the face of the record**
- 3) **Any other sufficient reason.**

I am unable, therefore, to discharge, vary or set aside my orders of 25th April 2006 on the grounds set out in the Notice of Motion of 26th April 2006, which in light of my findings herein appears not to have been brought in good faith and perhaps calculated to depict the Court in bad light. The same having been grounded on untruths and distortion of facts cannot be allowed.

As regards the perjury committed herein, I find that Mr. Kombo, having been misled by his advocates to swear to wrong facts may be excused. However, Mr. Wachira, being an officer of the Court ought to

be held accountable for the perjury. I hereby recommend that the Attorney General proceeds to take appropriate action in that regard.

For reasons stated in this Ruling the application by Notice of Motion dated 26th April 2006 is hereby dismissed with costs to the Respondents. Hearing of the Notice of Motion dated 24th April 2006 to proceed on 9th May 2006 as previously ordered before any Judge in the Civil Division. Stay of execution of interim orders extended until the hearing date.

Dated and delivered at Nairobi this 3rd day of May, 2006.

M.G. Mugo

Judge

In the presence of:

M/s Adan, Wamalwa, Wachira & Makoha for the Applicants

Mrs. Wachira and Mr. Akolo for the Respondents