**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 712 of 2005**

**WANG'UHU NG'ANG'A,**

**ACTING ORGANIZING SECRETARY, FORUM FOR THE RESTORATION OF**

**DEMOCRACY (FORD)**
**-ASILI…….....….……PLAINTIFF/APPLICANT**

**-VERSUS-**

1. **GEORGE NTHENGE) Sued as ACTING CHAIRMAN,**
2. **AUGUSTINE NJERU KATHANGU) SECRETARY-GENERAL and**
3. **ISAAK DAHIR)TREASURER respectively of the**
4. **THE FORUM FOR THE RESTORATION**

**RESTORATION OF DEMOCRACY OF DEMOCRACY (FORD)–**
**Asili…DEFENDANTS/RESPONDENTS**

**RULING**

**I. DELEGATES ELECTED IN 1992 HAVE LEFT THE PARTY, SO THERE ARE NO DELEGATES TO CONVENE ELECTION MEETING: APPLICANT'S CASE FOR INTERLOCUTORY INJUNCTION**

The applicant's application by Chamber summons dated and filed on *10th June, 2005* was brought under Order XXXIX, rule 2 of the Civil Procedure Rules. His prayers were as follows:

(i) that, the 2nd and 4th defendants, their servants or agents be restrained from holding a purported Annual Delegates Congress [ADC] or any other meeting of the 4th defendant's members or of any of its organs on 11th June, 2005 or any other date until the hearing and final disposal of the suit;

(ii) that, costs be provided for.

Three grounds were stated in support of the application:

(a) that, the 2nd defendant was treating the 4th defendant as personal property and had convened an ADC to take place on 11th June, 2005 and its agenda included elections as well as expulsion/suspension of members;

(b) that, the proposed meeting was contrary to the constitution of the 4th defendant as it had not been sanctioned or called by the 4th defendant's National Executive Committee [NEC], "nor has the plaintiff as organizing secretary of the 4th defendant been involved in organizing the [ADC meeting] as required by the said constitution."

(c) that, if the scheduled meeting of the ADC is held, the 2nd defendant will thereby be enabled to "achieve his desire of taking control of the fourth defendant to the detriment of the plaintiff and members of the fourth defendant which action is also unconstitutional, illegal and against the good order of society and the administration of law and justice."

The applicant has sworn an affidavit dated 10th June, 2005 in support of the application. He depones that the application accompanies a plaint of even date, and the claims in the plaint were in reference in the application itself.

It is deponed that under clause 8(c) of the constitution of the 4th defendant, the 4th defendant is enjoined to hold an ADC *once every year* at a place and date to be determined by the NEC; and the composition of the NEC is as follows:

(i) all existing officials elected at the ADC;

(ii) two members representing each province (provincial delegates);

(iii) the party's chief whip.

It is deponed that by clause 8(a) of the party's constitution, the ADC consists of members of the NEC and delegates as follows:

(i) all party members of Parliament;

(ii) twelve delegates elected by each branch;

(iii) twelve delegates elected by each sub-branch.

The deponent avers that under clause 6(g) of the party's constitution, it is the Organising Secretary who has the mandate to organise the ADC, acting *in liaison with* the Secretary-General.

The deponent avers that the NEC was last elected in the year *1992* at an ADC held at Hillcrest Secondary School, with ***Kenneth Matiba*** being elected Chairman; ***George Ntenge*** being elected Vice-Chairman; ***Martin Shikuku*** being elected Secretary-General; ***Abdilahi*** being elected Assistant Secretary-General; ***Haroun Lempaka*** being elected Treasurer; ***Elijah Mamboleo*** being elected Assistant Treasurer; ***Ahmed Salim Bamahriz*** being elected Organizing Secretary; and ***Wanguhu Ng'ang'a*** (the plaintiff) being elected Assistant Organizing Secretary. Provincial representatives were also elected, on that occasion. The plaintiff depones that "The chief whip was elected but the plaintiff is unable to remember his name."

The deponent deposes that the persons thus elected in 1992 have mostly *abandoned* the party, "to join other political parties while yet others quit the said party owing to persistent internal wrangles while others died." So depleted is the managing team, there only remain: ***George Nthenge*** as Acting Chairman; ***Wanguhu Ng'ang'a*** (plaintiff) as Acting Organizing Secretary, and the 2nd defendant as

Acting Secretary-General. It is averred that the officials named as the plaintiff, 1st, 2nd and 3rd defendants were appointed to replace the original officials in an acting capacity and were registered as such by the Registrar of Societies. It is deponed that the NEC at the moment comprises the ***plaintiff, 1st defendant, 2nd defendant, 3rd defendant*** and one ***Mr. Dahir*** (who is a provincial representative).

The plaintiff depones that the 2nd defendant, after he became the Acting Secretary-General of the 4th defendant, "transferred the party office to his own office and has been running or treating the said party like a personal outfit." The 2nd defendant, it is deponed, "has even attempted to register his own hand-picked officials."

It is deponed that by a letter of 16th April, 2005 the 2nd defendant "purported to inform and invite all members of the fourth defendant to a fake [ADC] of the fourth defendant to be held on 11th June, 2005 at KWS Club, Nairobi"; and the agenda for the said Congress included "elections and expulsion/suspension of members."

The deponent avers that the scheduled meeting of the ADC is unlawful — because it has not been convened by the NEC as required by the constitution of the 4th defendant; and he, the plaintiff as Acting Organizing Secretary is the one with authority to call such a meeting; and the scheduled meeting is to include ordinary members who "are not supposed to attend the [ADC],:" and since the party (4th defendant) has not held elections since 1992 nor, since then, held an ADC "it is not capable of having delegates as defined by clause 8(a) of the party's constitution. This is because the said delegates have more or less ceased to exist; there is no contact with them [and] their allegiance to the fourth defendant or even their existence is in doubt."

The deponent avers: "…if the second and fourth defendants are not restrained from holding the said meeting by an order of this Honourable Court, the second defendant will achieve his desire of taking over or hijacking unconstitutionally [the] fourth defendant to the detriment of the plaintiff [as]…member of the fourth defendant…"

**II. PLAINTIFF CARRIED NO RESPONSIBILITY FOR ELECTIONS, MADE NO CONTRIBUTION, ABANDONED PARTY, WILL SUFFER NO LOSS: RESPONDENTS' RESPONSE**

To the plaintiff's depositions, the 2nd defendant swore and filed a replying affidavit on 22nd June ,2005. He avers that he is the Secretary-General of the party known as Forum for the Restoration of Democracy (FORD) – Asili. He exhibits that Party's Constitution (annex ANK 1), and cites rule 7 thereof, which provides that the decision-making organs of the party are: (i) the Annual Delegates Congress (ADC) and (ii) the National Executive Committee (NEC); and by rule 8(b) the ADC is stated to be the highest authority of the party. By rule 8(a)(i), (ii) and (iii) it is provided that ordinary members of the party may qualify to attend the ADC.

The deponent denies the averment by the plaintiff that it is the responsibility of the Organizing Secretary to convene the ADC, as by rule 6(g) the Organizing Secretary's role is only *supervision* of the conduct of the ADC once it has already been convened. Rule 6(c), it was averred, provides that the Secretary-General shall be responsible for all party affairs and for the secretariat, under the direction of the National Executive Committee; and it shall be the duty of the Secretary-General to ensure that meetings of the NEC and the ADC take place.

The 2nd defendant averred that since the 1992 elections of the party, there have been certain developments:

(a) ***Mr. Kenneth Njindo Matiba*** left the party to found another party – Saba-Saba Asili which is duly registered.

(b) ***Mr. Kenneth Njindo Matiba*** was succeeded in an acting capacity by ***Mr. George Nthenge*** who was in office until *11th June, 2005* when he opted not to defend his position.

(c) ***Mr. Martin Shikuku*** who had been elected Secretary-General in 1995 was dismissed by the party on 20th December, 2001 and was replaced by the 2nd defendant, ***Augustine Njeru Kathangu*** in an acting capacity until *11th June, 2005* when he was elected as the substantive occupant of that office.

(d) ***Mr. Abdulahi Adan*** the Assistant Secretary-General defected to another party (KANU) in 1993.

(e) ***Mr. Haroun Lempaka*** the Treasurer who had been elected in 1992 defected to KANU in 1996.

(f) ***Mr. Elijah Mamboleo*** who was Assistant Treasurer "vanished from the party in 1996" and has not taken any interest in the party's activities.

(g) ***Mr. Ahmed Salim Bamahriz*** who had been elected the National Organizing Secretary defected to another party (NDP) in 1996, whereupon the NEC met and appointed the applicant, ***Mr. Wanguhu Ng'ang'a*** to take up the vacant position in an acting capacity; but his term expired in 2001.

(h) In 2002 the applicant defected to another party (NARC) and the party FORD-Asili resisted his attempts to bring it into the NARC coalition. The applicant remained in NARC and has been carrying out NARC activities as Deputy Chairman of the NARC Council. On 29th July 2002 the plaintiff wrote an open circular letter (annex ANK 5) in which he announced:

"Ford-Asili has joined a Political Alliance with other progressive and pro-people political parties…",

and he sent greetings: "We greet you in the name of [NARC]"

By virtue of being in NARC, the plaintiff became a NARC Councillor, and wrote a letter to the Acting Secretary General on 25th February, 2004 as follows:

"I wish to inform you in case you do not know that I am the recognised head of Ford-Asili in NARC and therefore responsible for appointments or removal from NARC Council people representing Ford-Asili in the Council [of which] I am the elected Deputy Chairman."

The 2nd defendant as Acting Secretary-General of Ford-Asili, on 17th February, 2004 wrote (annex ANK 6) to the Chairman of the NARC Council withdrawing the party from the NARC Council. The letter stated:

"*That, when [Ford-Asili] appointed five representatives to the Council of the then NAK in 2002 the understanding was and still is that any major decisions that may affect the party in any way would be discussed at [the] Party National Executive Committee…before the same is fully adopted by the party.*"

Later the 2nd defendant wrote a letter (dated 1st February, 2005) to the Chairperson of NARC:

"Be advised that FORD-Asili withdrew from every NARC *organ on 17th February, 2004 through a letter written to the then Chairperson of NARC Council and copied to all the FORD-Asili representatives.*"

The 2nd defendant deponed that FORD-Asili is "not a member of NARC or any other political alliance [or] coalition."

The 2nd defendant depones that the Assistant Registrar of Societies (annex. ANK 7) had on 16th February, 2004 written to him, as the Acting Secretary General, requesting him to *arrange, organize and ensure elections for the party are held:* "…I am…instructing the Acting Secretary-General, who was elected on 20th December, 2001 to convene an Annual Delegates Conference… at which the party will

hold elections."

The plaintiff depones that the majority of the NEC members elected in 1992 have either *defected* from the party or died. Some members of NEC have also left the party because of *"persistent internal wrangles*."

It is deponed that the term of office of the plaintiff had expired in 2001 — and so he ceased to be Organizing Secretary or NEC officially and he left the party in 2001.

The 2nd defendant avers that he has not treated the Ford-Asili Party as his personal property, but instead it is the plaintiff who, though having "abandoned the party for NARC," has persistently brought wrangles into the Party; he "has on several occasions made out letters in his own letterheads using his own office, physical and postal address [passing them off as] those of the party." The deponent depones that the applicant "has acted in the most questionable and dubious manner by collecting funds from party members after carrying out media advertisements…[on] party activities, [but] has never accounted for the said funds." It is deponed that the plaintiff has for his own purposes created and used letterheads in the name of the Party which "do not bear the registered office of the party, the party colours and symbol."

The 2nd defendant deposes that the Party's ADC was successfully conducted on *11th June, 2005* after all requirements for the holding of such a meeting were met. It is deponed that the applicant had all along been aware of the existence of the letter from the Registrar of Societies which directed the Secretary-General to hold the ADC.

It is averred that prior to holding the Party's ADC on 11th June, 2005 an *ad hoc* reconciliatory process had been conducted, and *persons interested*, or having a complaint had been invited to air their grievances — the purpose being to solve any conflicts or wrangles that may have existed; but the applicant refused to participate in the process.

The deponent annexed the list of the delegates who attended the ADC meeting of 11th June, 2005 which comprised: Kasarani Constituency (7 delegates); Embakasi (5); Langata (5); Butere (6); Malava (5); Gem (1); Ugenya (1); Githunguri (6); Kiambaa (6); Gichugu (7); Kirinyaga District Branch (11); Lari Sub-branch (3); Juja (3); Runyenjes Sub-branch (12); Embu District Branch (10); Tharaka (6); Manyata Sub-branch (12); Meru South (12); Kipkelion (7); Makueni (2); Makueni District/Branch (3); Wundayi (1); Ol Kalou (6); West Mugirango (7).

The deponent avers that he has been a faithful and loyal member of the Party from the inception. By contrast, the applicant when he was Organising Secretary, "has not demonstrated what efforts he made to keep the party activities alive," whereas under the Constitution one of his activities was recruitment.

At the said elections of 11th June, 2005 the following persons were elected: ***Jane Elizabeth Ogwapit*** (Chairperson); ***Peter Mangula Omuyindi*** (Vice-Chairperson); ***Augustine Njeru Kathangu*** (Secretary-General); ***Catherine Nyamato*** (Deputy Secretary-General); ***Geoffrey Peter Muindi*** (Treasurer); ***Elizabeth Waleghwa*** (Assistant Treasurer); ***David King Kibunja*** (Organizing Secretary); ***Joseph Kirui*** (Assistant Organizing Secretary); ***Beatrice Gathoni Kamau*** (Women's League); ***Jane Florence Njiru*** (Youth Congress). Provincial representatives were also elected at the same ADC.

The deponent avers that the orders made by the Court on 10th June, 2003 were only served upon him, on behalf of the Party, on *14th June, 2005.*

The 2nd defendant averred that the applicant had not given an undertaking for damages, and had not shown what irreparable damage he would suffer if the order sought were not granted. He deposed that the party has incurred heavy costs for the holding of the ADC on 11th June, 2005 to which the applicant has made no contribution.

The 2nd defendant deposed that the applicant, when he served the plaint which provides the framework for his application, failed to serve also a summons to enter appearance and that, in the circumstances, the respondents are unable under the rules of procedure to enter appearance or file a defence.

## III. I NEVER DEFECTED FROM FORD-ASILI PARTY AND I AM STILL THE ACTING ORGANIZING SECRETARY: APPLICANT'S FURTHER DEPOSITIONS

The plaintiff, in a further affidavit, deposes that "the duty of organizing…meetings of the National Executive Committee and Annual Delegates Congress is not supposed to be discharged by the Secretary-General solely but *in conjunction* with the Organizing Secretary in accordance with section 6(g) of the Party Constitution."

The plaintiff avers that he never defected from Ford-Asili Party to NARC Party — because membership of NARC is corporate, through affiliate parties "of which the fourth defendant is one."

He deposes that the 2nd defendant's letter as Secretary-General, of 17th February, 2005 which announced Ford-Asili's withdrawal from the NARC coalition, was written by the 2nd defendant "unilaterally and to-date the said party remains a member of NARC…" He depones that he, the plaintiff, has "never left FORD-ASILI as alleged by the second defendant and I am still its Organizing Secretary as per records of the Registrar of Societies."

The plaintiff averred that "it is not true that I have brought wrangles to the party." He denies having collected funds from party members, or sending out letters on party affairs using his own letter-heads as claimed on the defence side.

Of the mode of serving restraining Court orders on Saturday 11th June, 2005 the deponent avers that he had gone to the venue of the defendants' meeting, Ufungamano House accompanied by his advocate, and there the process-server served the c*aretaker* [of Ufungamano House]. It is deponed that service was also effected by dropping a copy of the same order inside the 2nd defendant's car, through the car-window.

## IV. SUBMISSIONS OF COUNSEL

### 1. Preliminary

The plaintiff's application first came up for *inter partes* hearing on 11th July, 2005 when learned counsel ***Mr. Mburu*** represented the applicant while learned counsel ***Mrs. Wahome*** represented the defendants.

Hearing began with a preliminary point; counsel for the plaintiff sought to be heard *ex parte,* for the reason that the defendants had not filed their replies with three clear days to the date of hearing. ***Mr. Mburu*** urged that the defendants had not resorted to the provisions of Order XLIX and sought an enlargement of time for a belated filing of replying affidavits; and therefore, it was contended, Order LI, rule 16(1) should come into play and the Court may make an appropriate order on the basis that there is *no reply.*

Learned counsel ***Mrs. Wahome*** submitted that the point raised for the plaintiff would amount to a preliminary objection, and for such an objection, due notice should have been given in advance. ***Mrs. Wahome*** noted that the date fixed for *inter partes* hearing had been *22nd June, 2005* a hearing which, however, did not end up on the cause list; and counsel having noticed that hearing would not take place, on that day, 22nd June, 2005 filed the defendants' response. She urged that the date in reference in the rules of procedure, in relation to *three clear days* preceding hearing, is date *of the hearing* and not date *originally fixed*; and consequently more time had been created within which the defendants could respond as expected. Besides, the possibility that an applicant can be heard *ex parte* just because the respondent lacks a reply, is not an inveterate rule but a *discretionary* matter. So she urged: "Even if we were in breach but have now filed our reply, we are not to be foreclosed from a hearing."

I ruled on this preliminary matter as follows:

"***What came up for hearing today was the plaintiff's Chamber Summons application of 10th June, 2005 which has been brought within the framework of a suit filed by plaint on the same date.***

"***It was not possible to hear the application on the merits, as a preliminary point of law was taken by counsel for the plaintiff/applicant.***

"***The critical point is that learned counsel Mr. Mburu was urging that the Chamber Summons be heard ex parte even though learned counsel for the defendants/respondents, Mrs. Wahome was in Court to represent her clients.***

"***The basis of the matter in contention is the provision of Order L, rule 16(1) [of the Civil Procedure Rules]. This rule states that responses to an application are to come by way of replying affidavit or grounds of opposition served [at least] three clear days to the hearing date."***

"***The key to resolving this whole question turns on the meaning of the expression 'hearing date'. Is this date limited to the date which had been originally allocated for the hearing of the application? Or would it extend to include a later date if the Court, by its internal machinery, has determined that no hearing is to take place on the date originally fixed?***

"***Whereas Mr. Mburu has argued eloquently that hearing date must refer only to the date originally scheduled, Mrs. Wahome has urged that when the original date is changed by the Court, then the new date is the legitimate date with respect to which 'date of hearing' is to be determined. And therefore a service of replies which falls foul of the original date, but is within the new date, is in every respect in accordance with the Civil Procedure Rules.***

"***It is also well understood that this whole question is subject to the exercise of discretion by the Court, which discretion serves the purpose of ensuring that the Civil Procedure Rules are so applied as to give fulfilment to the ends of justice.***

"***I am certain that the three-day rule prior to service of replies under Order L, rule 16(1) is meant to give the original applicant an opportunity to present his or her application properly.***

"***From that position, it will follow that the more progressive interpretation of the word 'hearing date' for the purpose of O.L, rule 16(1) is that, it means any new date such as the Court may prescribe, in departure from the original date.***

"***Such an interpretation serves the dual purpose of not prejudicing the position of the applicant, even as it creates an opportunity for the respondent to put forward his or her case.***

"***In addition, the essential purpose of the Civil Procedure Rules in their totality is to facilitate a hearing on the merits, of the contending positions of the litigants. Being guided by this principle, I would be inclined to ensure that both sides in the dispute have a fair day in Court.***

"***Lastly, the issues which are the subject of contention in the suit and in the application [herein] are important ones involving the play of democratic principles and of constitutional rights and duties.***

"***Claims of such a kind ought not to be determined in limine, on the basis of technicalities of procedure — whenever it can be helped. They ought to be determined on the merits.***

"***Therefore, I will not allow the preliminary point raised from the side of the plaintiff; and I hereby [validate] all the papers filed under the instant application by the defendants; [and] on that basis the application shall be heard and disposed of."***

Hearing of the plaintiff's application on the merits began on 26th July, 2005.

2. **Complaint is against 2nd Defendant, for Taking over the Party: Submissions for the Plaintiff**

Learned counsel ***Mr. Mburu*** stated the purpose of the plaintiff's application as, to seek interim injunctions restraining the holding of the Annual Delegates Congress of Ford-Asili Party by the defendants. He stated that: "The plaintiff has nothing against the 1st and 3rd defendants, for they were not involved in the decision to hold the meeting; and the real complaint is against the 2nd defendant." Learned counsel submitted that the 4th defendant "must of necessity be joined, [as] it is the society [which is] being manipulated."

***Mr. Mburu*** made a presentation of the plaintiff's depositions, the essence of which has been set out above. He objected to the "proposed meeting" of "a purported Annual Delegates Congress" convened by the 2nd defendant. Although it is the position of the defendants that the said ADC has *already taken place*, the plaintiff seeks to stop it, urging: "If that meeting were held, the 2nd defendant would take control of the 4th defendant [Ford-Asili Party]; that would be unconstitutional, illegal, and contrary to the administration of law."

Learned counsel continued to make his submissions on 29th September, 2005 when he contended that there was no legal obligation resting upon the plaintiff to serve plaint with summons to enter appearance, and so the defendants have no valid argument on that score. He submitted that by Order XXXIX, rule 2A the Court may grant an injunction even where the applicant has given no undertaking as to damages to be paid if the cause is ultimately determined in favour of the respondent.

***Mr. Mburu*** invoked in aid of his client's case the English House of Lords decision in ***American Cyanamid Co. v. Ethicon Ltd***. [1951]

A.C. 396 (at p.408 — ***Lord Diplock***):

"…***the governing principle is that the Court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the…loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the Court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.***

"***It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case."***

***Mr. Mburu*** urged, in the light of ***American Cyanamid*** and of the cognate decision of the Court of Appeal in ***Giella v. Cassman Brown*** [1973] E.A. 358, that the plaintiff merited grant of interlocutory injunctions, on grounds that the plaintiff's main cause stood good chances of success; the plaintiff stood to suffer irreparable damage not compensable in damages; the balance of convenience stood in the plaintiff's favour. In learned counsel's words: "When elections are held which are void and against the constitution of a party…, [this] will deny the constitutional rights [of the plaintiff] [and it] cannot be

compensated by an award of damages." In case of doubts, ***Mr. Mburu*** urged, the balance-of-convenience test should be applied; and in his contention, "that convenience lies in favour of he who has complied with the law", and he further urged, "[the] balance tilts in favour of the applicant." So learned counsel prayed for temporary injunction pending the hearing of the main suit.

**3. Other Members do have Rights to the Survival of their Party: Submissions for the Defendants**

It was not until 19th May, 2006 that learned counsel ***Mrs. Wahome*** was able to make her submissions on behalf of the defendants.

***Mrs. Wahome*** presented the defendants' affidavit, and submitted that whereas the plaintiff's application related to one single day, *11th June, 2005*, that date was in the *past*, and what is to be enjoined by the orders sought, had already taken place on that date and could no longer be restrained; hence, in learned counsel's submission, the instant application for interim relief was inapposite and had no merits.

***Mrs. Wahome*** noted from the evidence that it was common cause among the parties, that in terms of office-bearers, nothing but the rump of the original Ford-Asili Party remains; the National Executive Committee (NEC) was last elected in 1992; and most of the members of the top-most organ, the Annual Delegates Congress (ADC), have since then turned their backs on the Party and joined other political parties. With still other members having died, the original ADC is now a much enfeebled one, with only three office-bearers — Acting Secretary-General; Acting Organising Secretary, and one Provincial delegate.

Learned counsel made a submission based on para.13 (ii) of the plaintiff's affidavit of 10th June, 2005: "The Annual Delegates Congress is supposed to be called or convened by me as Organizing Secretary of the fourth defendant." She submitted that whereas by definition the ADC is *annual*, the plaintiff has admitted that the last such meeting took place only as long ago as 1992 — and thus he had made no endeavours to convene such a meeting. Counsel asked; "Is [the plaintiff] proposing the death of the party?" ***Mrs. Wahome*** made reference to clause 6(g) of the Constitution for Forum for the Restoration of Democracy — Asili; it thus reads:

"***Organizing Secretary:*** *He shall supervise the organization of the party, in particular public meetings organised by the party, recruitment of …members, parliamentary and civic elections. He shall co-ordinate the activities of the youth congress, the women's league and in liaison with the Secretary-General, shall supervise the organization of [the] Annual Delegates Congress."*

Learned counsel submitted that no material had been placed before the Court, showing that the plaintiff had carried out his duties as set out under clause 6(g) of the Party's constitution. In the words of counsel: "There is nothing demonstrated to enable the Court to appreciate that the applicant as Organizing Secretary has been carrying out his duties."

***Mrs. Wahome*** noted that in May 2005 the plaintiff had written to the Registrar-General's office contesting actions taken by the 2nd defendant to move forward the affairs of the Party (Ford-Asili); and the Deputy Registrar-General by her letter of 3rd June, 2005 (plaintiff's annex WN – 2) had thus responded:

"*We would advise that the Registrar of Societies at present cannot halt the scheduled Annual Delegates Congress for reasons given by yourself or any other reason. This is because the Registrar has no powers to involve herself with [the] internal management of societies.*

"*The Registrar only receives and considers returns and minutes of and any objection arising out of the said ADC."*

Learned counsel submitted that under s.6(g) of the Party's constitution, the *primary role* in moving the

affairs of the party has not been entrusted to the Organising Secretary; "his role is supervisory, but it is the Secretary-General who is responsible for all party affairs under the direction of NEC." Counsel urged that it was the responsibility of the Secretary-General [clause 8(c) of the Party's constitution] to ensure that meetings of the ADC and the NEC are held. She urged that all party affairs are subject to the direction of the NEC, but the responsible officer in this regard was the *Secretary-General;* and therefore, the 2nd defendant should not be "faulted for doing what he has been authorised to do." Learned counsel noted that the Secretary-General's term started on 20th December, 2001 and it was not in dispute that his occupancy of that office now is lawful. She drew the Court's attention to the Deputy Registrar-General's letter of 16th February, 2004 by which the *Secretary-General* of the Party had been directed to ensure that elections were held. On 16th April, 2005 the 2nd defendant had sent out the Notice and Agenda for the 2005 ADC; and the meeting took place on 11th June, 2005 — with elections being conducted. Thereafter the notification form was filled in for *notification of change of officers.*

Learned counsel submitted that such actions taken by the Secretary-General, on behalf of the Party, stood in contrast with the plaintiff's position which is expressed in para.35 of the 2nd defendant's affidavit:

"*THAT the applicant has…not shown in any way what activities he has carried out in favour of the Party save for perpetual fighting and wrangling without [a] focus or direction. That as Organizing Secretary before his term expired, the applicant has not demonstrated what efforts he made to keep the Party activities alive. That it is [instructive] to note that under the constitution one of the applicant's duties was recruitment. He has not demonstrated or brought in evidence of members [whom] he has recruited, and [in] whose interests he is acting…"*

Counsel urged that an applicant in such a position did not merit equitable relief orders in his favour.

Learned counsel urged that the *expense* of holding the Party's ADC on 11th June, 2005 had been substantial, and there would be no basis for granting the plaintiff's prayers; the remedy of injunction would seek to stop a *process not yet completed* — and this was different from the role of a remedy such as *certiorari* which would quash, or such as *mandamus* which would require action *de novo.*

***Mrs. Wahome*** contested the plaintiff's claim that his rights would be infringed if his prayers were not granted; his rights, counsel urged, "exist in the context of the rights of other party members"; his rights are to be exercised bearing in mind the rights of members to have their Party survive.

Learned counsel submitted, on the basis of the evidence, that the applicant had continued to carry himself as a member of the NARC Council — something which the Ford-Asili Party has resisted; and Ford-Asili is a *parliamentary party* in its own right, with two parliamentarians, and "will not agree to be merged with another party without a proper structure."

***Mrs. Wahome*** urged that the applicable principles, where interlocutory injunction is sought as in the instant matter, are laid out in case law — such as ***Mureithi v. City Council of Nairobi*** [1981] KLR 332 (at p.332 – 333):

"***The conditions for grant of an interlocutory injunction are: existence of probability of success, likelihood of irreparable harm which would not be adequately compensated for by damages, and balance of convenience."***

Learned counsel submitted that the applicant had not demonstrated that he has a *case with a probability of success*; and that there was nothing to support the claim that the plaintiff would *suffer prejudice* if his prayers are denied. Since the Party's essential works *have been done* thanks to the defendants' actions now being impugned, an injunctive order could not nullify the same; and *convenience* lay on the side of the defendants — it was urged. ***Mrs. Wahome*** urged that injunctive relief be not given in favour of a single person, as against the interests of a party.

Counsel urged further, that it was inapposite for the plaintiff to come before the Court on the basis that the Party's elections which are in contention here, and which were held on 11th June, 2005 were so held in *contravention of Court orders*; for were that the case "they would have moved through *contempt action*, [and] not in the manner adopted herein."

Of the conduct of the plaintiff which, it was urged, would in equity disentitle the plaintiff to grant of his prayers, ***Mrs. Wahome*** contended: "There has been reluctance, laxity and occupation of office without rendering a service [on the part of the plaintiff]. He knows he ought to leave the party. Is this a person [truly] interested in the survival of the party?" Learned counsel urged that the scales of justice should look at *both* litigants; and that in that perspective, the plaintiff was "not a person with clean hands."

**4. 2nd Respondent moved the Party by his sheer whims: Plaintiff's Rejoinder**

Learned counsel ***Mr. Mburu*** maintained that even if the Registrar-General's office had entrusted to the 2nd defendant the mandate to conduct the Ford-Asili Party elections, "he could not hold them contrary to the spirit of the [Party's] constitution." In the words of counsel, the 2nd defendant "was not to hold elections in accordance with his own whims." Of all the major initiatives of the 2nd defendant to shore up a political party clearly in meteoric decline, learned counsel had the riposte: "That is what we have been saying; the 2nd respondent has no authority to do those things. He has done it as personal property." Counsel also contended: "How could the applicant show any interest in the party's affairs? He was kept out by the 2nd respondent." Counsel further urged: "In truth, the 2nd respondent has worked very hard, but in the wrong direction inasmuch as it was not authorised. He has been a lone ranger."

Counsel restated from the evidence that the Ford-Asili Party "has been having many wrangles, right from the beginning, and it is a matter of public notoriety." He contended that the wrangles were still continuing, and urged that the Court "should stop the wrangles, by preventing an infringement of the Constitution."

Counsel acknowledged that the *plaintiff had brought no contempt proceedings* in respect of the impugned Party elections, but, in his words, "that is neither here nor there." He stated that when the plaintiff had obtained *ex parte* Court orders, the same had been served upon the Registrar-General; and consequently these orders had held back the Registrar's hands in registering the newly-elected officials of the Ford-Asili Party.

**V. ANALYSIS, AND ORDERS**

***(i) Analysis***

The outcome of this interlocutory application is to be determined on the basis of the following considerations:

*(a) Is there, before the Court, a tell-tale state of injury to a suitor which cannot wait to be resolved in the normal mode, by the tested machinery of trial, in the shape of evidence-in-chief, cross-examination and re-examination?*

*(b) Does the short-term grievance alleged properly lend itself to resolution by means other than the tested method?*

*(c) Does the applicant's claim in the main suit have a high probability of success?*

*(d) Does the applicant run the risk of sustaining irreparable harm such as cannot be recompensed, in the due course of time, by an award of damages?*

*(e) In whose favour does the balance of convenience stand?*

From the facts, it is the internecine *strife* of political-party personages that has been brought before the Court. The said political party, FORD-Asili, has had a chequered career since its founders *abandoned* it at the beginning of the 2000-decade and formed or defected to others of the burgeoning number — and *judicial notice* may be taken of this — of political parties rather randomly created since the wave of multipartyism took hold, in the early 1990s.

From 2001 the 2nd defendant became the Acting Secretary-General of the Party, and the office-bearer apparently holding superior responsibility, in the play of the various organs of the party such as the National Executive Committee (NEC) and the Annual Delegates Conference (ADC). The post of Acting Organizing Secretary was entrusted to the plaintiff herein. The Party has not functioned normally; and in the past it has not been possible to revitalise it through elections, since the defection of crucial office-bearers as noted earlier, and notwithstanding that the Registrar of Societies has consistently required that the *Secretary-General* should see to the conduct of Party elections. The applicant, as shown in his depositions, knows very well that the Party is a *hamstrung party* with hardly any capacity to conduct the normal life of a constitutionally and politically-significant agency in the motions of public institutions — a situation which has prevailed as from the 1990s. But the applicant complains that the 2nd respondent's many initiatives to breathe life into the Party are purely private, proprietory in design, and intended to "achieve his desire of taking control of the [Party], to the detriment of the plaintiff and the members of the 4th defendant which action is also unconstitutional, illegal and against the good order of society and the administration of law and justice."

What is directly in contention is the latest *Annual Delegates Conference* of the Party, called by the Secretary-General on 11th June, 2005. The applicant contests the legal authority for calling such ADC which also carried out elections for the positions of office-bearers. The applicant avers that under clause 6(g) of the Party's constitution, it is he as Acting Organizing Secretary, who should call the ADC "acting in liaison with the Secretary-General". And he protests that since the Party has *not held elections since 1992* it is not in a position to hold an ADC, for "it is *not capable of having delegates* as defined by clause 8(a) of the Party's Constitution." This is because *the said delegates* "*have more or less ceased to exist…*"

The respondents have shown in Court a letter written to the 2nd defendant, by the Registrar of Societies, dated 16th February, 2004:

"*…I am…instructing the Acting Secretary-General, who was elected on 20th December, 2001 to convene an Annual Delegates Conference….at which the Party will hold elections.*"

Of that letter, the respondents contend, the plaintiff has always been aware; and in pursuance of the directions in that letter, the Party's ADC was conducted on *11th June, 2005* "after all requirements for the holding of such a meeting were met." As the respondents did fully realise that their plans for the ADC did not please all, they had organised a *reconciliation forum* just before the ADC meeting aforementioned; but the same was snubbed by the applicant herein.

Although the plaintiff's case is filed against four defendants, the plaintiff has a position on such joinder of parties:

"*The plaintiff has nothing against the 1st and 3rd defendants, for they were not involved in the decision to hold the meeting; and the real complaint is against the 2nd defendant.*"

***Mrs. Wahome,*** learned counsel for the defendants, urged that the conduct of elections, left in the hands of the plaintiff, would in all probability fail to take place — with death of the party as the consequence — since the plaintiff had made no endeavours to convene any election meeting. To this contention, learned counsel ***Mr. Mburu*** made the riposte that the defendants had never allowed the plaintiff a chance to call election meetings. It is thus a circular shifting of blame which, I would expect, would run on *ad infinitum* — and in the process the party would come to a *natural death.*

I have earlier on stated the *five* criteria which should determine the outcome of the instant application for *interlocutory relief*. I will now add a *sixth* one: as a political party correctly perceived is, I believe, a *socia*l (in a broad sense) organisational framework for mustering the people's participation and the people's constructive opinion and will, for the purpose of determining or influencing political directions, there cannot be a true political party which exists only on the records, but has no individuals to move it forward in terms of operations. It will not be, in my opinion, a desirable application of the law to pronounce in favour of moribund political party outlines which have no *thrust* to move them forward. FORD-Asili is on record as having held no elections between ***1992*** and ***2005***. So this must have been a comatose party to all intents and purposes, save that in 2005 attempts were made by the defendants to inject some life into it. I cannot overlook the role of an electoral initiative such as was made in June, 2005 in determining the *common sense* of the respective positions of the parties, and thus, in assigning the *balance of convenience* in this matter.

In the light of the foregoing analysis, I have seen no tell-tale state of injury to a suitor herein — and in particular to the plaintiff — which cannot wait to be resolved on the basis of a hearing of the *plaintiff's suit.*

So controversial, besides, are the claims herein, I cannot but conclude that the short-term grievance of the plaintiff does not lend itself to an *interlocutory answer* by such orders as I could make herein.

In the circumstances as described herein, it is not possible in my opinion, to state with certainty that the plaintiff's suit has a *high probability of success.*

What irreparable harm would the plaintiff suffer, for which damages would in the end be inadequate to provide a recompense? None, I would hold.

In whose favour does the balance of convenience lie? This, I believe, would be in a favour of any initiatives such as would *breathe life* into FORD-Asili, and accord it a significant place alongside Kenya's more steady political parties, as an organising medium for political activity and for participation in governance. That is to say, the balance of convenience lies, in my assessment, in favour not of the plaintiff, but of the defendants.

***(ii) Orders***

With regard to the plaintiff's application by Chamber Summons dated 10th June, 2005 I will, therefore ***order*** as follows:

***1. The ex parte orders made in favour of the plaintiff, on 10th June, 2005 are hereby vacated.***

***2. The plaintiff's prayer that the 2nd and 4th defendants and their servants or agents be restrained from holding a purported Annual Delegates Congress is refused.***

***3. The plaintiff shall bear the costs of the defendants in this application.***

***4. The plaintiff shall take a date at the Registry, to be given on the basis of priority, for the hearing of the main suit; and the hearing thereof shall take place in the Civil Division of the High Court.***

***5. If any further application shall arise in respect of the suit or of the ruling herein, it shall be heard and determined in the Civil Division of the High Court.***

**DATED** and **DELIVERED** at Nairobi this 9th day of June, 2006.

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court Clerk: Mwangi**

**For the Plaintiff/Applicant: Mr. Mburu, instructed by M/s. J.M. Mburu & Co. Advocates**

**For the Defendants/Respondents: Mrs. Wahome, instructed by M/s. Wahome & Gichohi Advocates**