



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

**HON. M.M. GALGALO
JAEI MBOGO
CAPTAIN CHARLES MASINDE**

PETER ORINDA

PLAINTIFFS

VERSUS

**HON. MUSIKALI KOMBO 1ST DEFENDANT
HON. JOHN K. MUNYES 2ND DEFENDANT**

RULING

This Ruling is delivered in the Defendants/Applicants' Notice of Motion dated 24th April, 2006 brought under Section 6 of the Arbitration Act, 1995 and Order L Rule 1 of the Civil Procedure Rules. The orders sought in the said application are as follows:

- 1. That this application be heard on priority basis and all other proceedings in the suit be stayed pending hearing and determination of the application.**
- 2. That all proceedings in this suit be stayed and the dispute be referred to arbitration pursuant to Clause 21 of the Forum for the Restoration of Democracy-Kenya Constitution, Nomination Rules and Disciplinary Rules.**
- 3. Costs be provided for.**

Prayer 1 is spent and a stay of proceedings has been in force pending this Ruling. The Notice of Motion is supported by the affidavit of the 2nd Defendant sworn on 24th April, 2006 and is premised on the following grounds.

- 1. That there exists an arbitration agreement between the Plaintiffs and the Defendants to refer all disputes concerning the interpretation of the Ford-Kenya Constitution to arbitration.**
- 2. That the Plaintiffs are in breach of the arbitration agreement**
- 3. That it is just that the present proceedings be stayed as per Section 6 of the Arbitration Act 1995.**
- 4. That the jurisdiction of this Court is ousted by the arbitrated Agreement.**

The Application is opposed on the strength of the Replying Affidavit of Captain Charles Masinde, the 3rd Plaintiff in which he depones, inter alia, that the relief sought in the plaint filed herein does not touch on the interpretation of the Constitution of Ford-Kenya but seeks orders to stop the infringement and offences against the party Constitution. He depones further (in paragraph 6) that whilst he admits that

Ford-Kenya has a Constitution which regulates its internal affairs and binds all party members, that one of the things covered in the Constitution is how to resolve disputes arising from the interpretation of the Constitution and that Clause 21 of the said Constitution provides for arbitration and covers the present dispute he denies that the suit has been instituted in breach of the said Clause, there being, according to the deponent no mechanism in place by which to ventilate the Plaintiffs' concerns on party affairs. The deponent explains this alleged predicament by stating that Clause 21 requires that disputes be referred to a single arbitrator from the panel of arbitrators established by the National Executive Council and that no such panel has been established yet. In paragraph 9 of the Replying Affidavit the deponent introduces a curious form of pleadings into the affidavit which not being a deposition but a prayer cannot be allowed and must be struck out, which I hereby do.

This suit was instituted by a plaint dated 12th April, 2006 filed on the same date. In it the Plaintiff/Respondents seek orders of this Court as follows:

- (a) An injunction do issue restraining the defendants from continuing to breach the Society's Constitution by staying in the (sic) office beyond their prescribed term**
- (b) A mandatory injunction do issue to compel the acting National Chairman and the Secretary General to immediately call for General Council Meeting and the Conduction (sic) of election procedurally in accordance with the party Constitution.**
- (c) Costs of the suit.**
- (d) Any other order or further relief this Honourable Court may deem fit and just to grant.**

Counsel for the Applicants has submitted in support of this application that in view of the admission by the Respondents that they are members of the Ford Kenya Party, whose Constitution regulates the internal affairs of the party they have no right to institute these proceedings but ought to have invoked Section 21 of the Constitution which provides for arbitration as the mode for resolving disputes among members. Counsel emphasized that the requirements of the said Clause are in mandatory terms. The said Clause reads as follows:

"21 ARBITRATOR

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 dispute concerning any matters relating to party affairs or the management of the party shall be adjudicated upon through arbitration. The parties concerned shall appoint a single arbitrator from the panel of Arbitrators established by the National Executive Council. The decision of the Arbitrator shall be final. For avoidance of doubt, no member shall institute any Court proceedings unless the members has first invoked and exhausted the arbitration process provided herein."

The Applicant rely on Section 6 of the Arbitration Act, 1995 which mandates this Court to stay proceedings such as are before it in the following terms.

"6(1) A Court before which proceedings are brought in a matter which is the subject of an arbitration Agreement shall, if a party so applies not later than the time when that party enters appearances 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; or**
- (b) That there is not in fact any dispute between the parties with the regard to the matters agreed to be referred to arbitration."**

In view of the above provisions of the Party's Constitution and the Arbitration Act, 1995, Counsel for the applicants submitted that the proceedings have been instituted in breach of Clause 21 of the Party's

Constitution and ought to be stayed having been brought prior to the invocation or exhaustion of the arbitral process.

The Respondents have argued that the Arbitration Act does not apply and is inoperative due to the fact that there exists no panel of arbitrators yet. Counsel for the Respondents submitted that Section 6 1(a) applies in this case without elaborating how. He also submitted that by filing and obtaining orders in the Notice of Motion dated 26th April, 2006 which granted temporary stay of these proceedings the Applicants are deemed to have taken steps in the suit and thereby excluded themselves from the operation of Section 6 of the Arbitration Act. The Respondents argue also that the Applicants have not demonstrated any readiness and willingness to do everything necessary for the proper conduct of the arbitration in that they ought to have called for a National Executive Council Meeting to appoint the necessary arbitral panel.

It is common ground between the parties that there does exist under their Party's Constitution an Arbitration Agreement. It cannot be disputed that there is indeed a dispute between the parties, otherwise they would not be in court. The questions arising and which I have asked myself are:

- 1. Whether the Arbitration Agreement is null and void, inoperative or incapable of being performed as claimed by the respondents?**
- 2. Is the dispute between the parties one which is governed by Section 21 of the Constitution of Ford-Kenya party which clause constitutes the arbitration agreement?**
- 3. Are the applicants justified in filing this application and are the orders sought herein available to them or have they lost their right to invoke the provisions of S.6 of the Arbitration Act by reason of filing the Notice of Motion of 26th April, 2006 as claimed by the Respondents?**
- 4. Can the applicants be said not to have demonstrated any readiness or willingness to do everything necessary for the proper conduct of the arbitration as alleged by the respondents and have they lost the right to invoke Section 6 of the Act for that reason?**
- 5. Does the arbitration agreement oust the jurisdiction of this court as stated in ground No. 4 of the Notice of Motion?**

In answer to the first question it is clear that the legal validity of the arbitration agreement is not in issue. The respondents claim only that it is inoperative and incapable of being performed for the reasons that there does not exist any panel of arbitrators at the moment and that the applicants should call a National Executive Council meeting for that purpose. It is not clear under what provision of the party's Constitution the respondents deem it the sole responsibility of the applicants to put the arbitral process in motion and to call for a National Executive Council meeting without prompting.

Clause 21 of the party's constitution clearly stipulates that:

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

It goes without saying therefore that the establishment of a Panel of the Arbitrators by the National Executive Council is an integral stage of the arbitral process which process in my view ought to be put in motion by the party desiring that some matter or dispute be adjudicated upon. To invoke in my view, which view I consider to be correct, means to resort to or to set in motion by way of or to revert to or bring into force. No evidence has been tendered by the respondents to the effect that they called upon the applicants to facilitate the appointment of the requisite panel and that the applicants refused. The respondents have not even shown anywhere that they invited the applicants to go into arbitration before the filing of the suit. In my view, the invocation of the arbitration agreement is the responsibility of the party with a complaint and the putting in place the required mechanisms necessary for the conduct of the arbitration is a joint responsibility of the parties concerned, which the respondents cannot escape or blame

the applicants for. For these reasons, I find that the grounds on which the respondents claim the arbitration agreement is incapable of performance or is inoperative are not tenable. I find that there exists herein a valid and operative arbitration agreement, capable of performance.

As already set out in this Ruling the reliefs sought in the suit filed herein involves members of the Ford-Kenya Party and concerns matters of party affairs or the management of the party being intended to limit the term of office of the defendants and to compel the calling of a National General Meeting and the conduct of elections. Clearly, the same is governed by the arbitration agreement and I need not add anything more.

Regarding the invocation of Section 6(1) of the Arbitration Act by the applicants I am not persuaded that the applicants lost their right to invoke the same by filing the application dated 26th April, 2006 which application was necessitated by an order made in these proceedings.

Section 6(1) requires that an application for stay be made

“..not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings..”

The firm of Wetangula & Company Advocates, having entered appearance under their Notice of Appointment dated 24th April, 2006 and at the same time the application before me the applicants are well within their legal rights conferred by Section 6(1) of the Arbitration Act. They have not filed any pleadings in the suit and have not taken any steps in those proceedings which instead they ask the court to stay and order that the parties proceed to arbitration as provided in the arbitration agreement in force.

To my mind, the challenge to the suit filed herein and the application for an order compelling the parties to go to arbitration is a demonstration by the applicants of their readiness and willingness to do everything necessary for the proper conduct of the arbitration, given that it is not they, but the respondents who consider that there are issues requiring adjudication between the parties. I have earlier found that the setting in motion of the arbitral process is a joint responsibility of the concerned parties and that the invocation of the arbitration agreement is the responsibility of the party with a complaint.

Proceedings in this court are not barred by the provisions of Section 6 of the Arbitration Act which only entitles a party to an arbitration agreement to apply to court for an order that proceedings filed in court be stayed pending the exhaustion of arbitral process as provided for by the agreement between the parties. The jurisdiction of the High Court remains intact as is well settled in the case of **HON. MICHAEL CHRISTOPHER S. KIJANA WAMALWA & OTHERS – vs – HON. AMOLO RAILA ODINGA & OTHERS Misc Civil Application No. 1356 of 1995** which is distinguishable only on the ground that the same did not involve an application for stay but was for directions in respect of the hearing of an Originating Summons.

Having considered the Application, the opposition thereto, submissions by counsel, the authorities cited herein and the law, I am of the considered view that the applicants have demonstrated merit in their application and that they are rightly entitled to the orders sought.

Consequently, I allow the application and grant the order sought in prayer 2 thereof with costs to the Applicants.

Dated and Delivered at Nairobi this 29th day of September 2006.

M. MUGO

JUDGE

Ruling delivered in the presence of

No Appearance for Applicant

Mrs. Muriithi for Respondent