REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1159 of 2006

LIVINGSTONE KAMADI OBUGA ……..……..…… PLAINTIFF

VERSUS

HON. UHURU KENYATTA ……..…… 1ST DEFENDANT

HON. WILLIAM RUTO ……..…..…..…….. 2ND DEFENDANT

CHRIS OKEMO ……...……...…… 3RD DEFENDANT

HENRY KOSGEI ……..…..…… 4TH DEFENDANT

RULING

On 2nd November, 2006, Mr Livingstone Kamadi Obuga (the Plaintiff) commenced this action against Hon. Uhuru Kenyatta, Hon. William Ruto, Mr. Chris Okemo and Hon. Henry Kosgei (the Defendants) seeking, among other things, a Declaration that the Defendants' purported merger with ODM-K contravened the KANU Constitution, and to stop the same.

The Defendants entered Appearance and immediately thereafter filed an application to stay those proceedings and to refer "the dispute" to arbitration in accordance with the KANU Constitution.

It is not in dispute that all the litigants before this Court are indeed members of KANU, and are subject to its Constitution. Article 23 of that Constitution states, in material part, as follows:

Article 23 (1) No member, as a condition-precedent for membership of the Party, shall resort to a Court of Law for the resolution of any dispute arising out of the conduct of any Party matter, issue or affairs, unless the machinery here established has been exhausted.

(2) If the dispute in question arises out of or relates to the outcome or the conduct of any nominations for elections or elections within the Party or any matter connected therewith, the aggrieved member shall refer the same to the Elections Appeals Tribunal established under this Article **and in the case of any other dispute it shall be referred to arbitration as provided under this Article**. (emphasis provided)

(3) ……..

(4) (a) The National Chairman in consultation with the National Executive Council, shall establish such number of arbitration panels from time to time as circumstances may warrant, to arbitrate on disputes specified in clause 2 of this Article. PROVIDED THAT no panel shall hear the dispute in question unless the parties to the dispute agree to its composition.

The issue before me is whether this matter should be referred to arbitration and the suit stayed in accordance with the above Constitution, and the law.

The Applicants (who are the Defendants) strongly argue that the subject of the litigation here is a "dispute" within the meaning of the KANU Constitution; that the said Constitution is binding upon its members; and that the Applicants are willing to submit themselves to arbitration.

The Respondents, on the other hand, assert that Article 23 of the KANU Constitution does not identify the types of disputes that may be referred to arbitration; that the said Article applies essentially to disputes relating to "nominations"; that here the Applicants are said to be in breach of the Constitution giving this Court the power to intervene {see ***Tanui & 4 others vs Birech and 11 others (1991) KLR*** and ***Josephat K. Mulusia & 57 others vs Kenya African National Union and another, Mombasa HCCC No. 10 of 1977 unreported***}

So, then, what is the nature of the dispute between the parties? Is it a dispute to which the provisions of Article 23 apply? Should this matter then be referred to arbitration? Will that cause prejudice to any party, and will such party be left without a remedy?

The Applicants argue that the nature of the dispute is set out in paragraph 7 of the Amended Plaint and "relates to whether the Plaintiff has a legitimate interest in ensuring obedience of the party Constitution by the Defendants and whether the prayers sought therein are available to the Plaintiff …".

In my humble opinion, that is not quite the dispute that I discern looking at the totality of the Plaint, and the prayers sought. I believe the substance of the dispute can be more accurately discerned from paragraphs 13, 14 and 15 of the Amended Plaint, and from the nature of the prayers sought. Essentially, the dispute relates to the right of the Applicants to commit KANU to "merge" with ODM-K without the authority of its National Delegates Conference, an act which the Plaintiff/Respondent says is in breach of the KANU Constitution.

Whether the actions of the Applicants constitute a breach of the Constitution, and whether the Applicants have indeed a right to commit the political party "to merge" with other political organs or parties, is clearly a dispute envisaged by Article 23 of the party's Constitution, and ought in the first instance, be referred to Arbitration by way of a process outlined in Article 23 (4) of the Constitution.

Where members of an organization have chosen, by virtue of their very membership, to settle their disputes through arbitration, I see absolutely no reason why the Courts should interfere in that process. It is not in public interest, nor in the best interests of the organization, that each time they have a dispute with people they have chosen to lead them, that they should rush to the Court to seek redress which is available within the instrument governing such organization. The Courts should encourage, as far as possible, settlement of disputes outside of the Court process. Arbitration is one of several methods of Alternate Dispute Resolution (ADR) and is certainly less expensive, expeditious, informal and less intimidating than the formal Court system. This Court will certainly encourage the use of ADR wherever it is appropriate to do so. Clearly, there are situations where the Court must intervene – where the principles of natural justice have been violated, or where there is, or likely to be, a serious breach of the Constitution of the party leading to irreparable injury. Now, those are extreme situations, and I cannot say that such a situation exists here to warrant the Court's intervention. The Hon. Law, Ag. P alluded to some of the situations when the Court might intervene, in the case of ***Patel vs Dhanji (1975) E A 301*** as follows:

"***The Courts will entertain suits by members claiming to have been irregularly or improperly expelled, and will interfere if the rules providing for expulsion have not been strictly observed or if the principles***

of natural justice have been violated. The foundation for this jurisdiction is the right of property vested in the member, of which he is unjustly deprived by the unlawful expulsion.

But where property rights are not affected courts should be slow to interfere in the ordinary running of club affairs by the committee into whose hands the management of the club has been entrusted by the members. If wrong decisions are made, and the club's affairs are mismanaged so that the majority of members are dissatisfied then the remedy is primarily in the hands of the members. So long as the committee is acceptable to the majority of the members, then its decisions, and its interpretation of the Rules, should be accepted so long as honestly and fairly arrived at, which will be presumed to be the case unless the contrary is shown. It is only in the most serious cases where mala fides on the part of office bearers is established that interference by a court in the internal affairs of a club, not involving property rights would be warranted."

I believe this to be a proper case to be referred to arbitration in accordance with the party's Constitution. I am satisfied that by doing so no party would suffer any prejudice, or be left without a remedy, as the parties are at liberty to come before the Court for any injunctive or other reliefs that the Arbitration process is unable to afford them. **Accordingly, I will invoke Section 6 of the Arbitration Act and stay all further proceedings, and direct that the parties submit themselves to arbitration in accordance with the KANU Constitution**.

I also have, before me, another application – this one by the Plaintiffs, dated 13th November, 2006, for the amendment of the Plaint. The only amendment that the Plaintiffs are seeking is to add to the title of the case the following words:

"Being sued herein as the Chairman, Secretary General, Vice Chairman, and Vice Chairman respectively, of Kenya

an National Union (KANU)".

In order to clarify that the Defendants are being sued in their official capacities as officers of the party. The Defendants have opposed this application. Their only reason for doing so is that the suit ought to be "stayed" under Section 6 of the Arbitration Act. That notwithstanding, the Plaintiff has a right to amend his pleadings, unless the Defendants can show what injustice or prejudice will be occasioned by the grant of such an Order. Since that has not been done, and I believe this amendment is sought in good faith, I will allow the same, as prayed in the application dated 13th November, 2006.

The costs of both applications shall be in the cause. Those are the Orders of this Court.

Dated and delivered at Nairobi this 18th day of December, 2006.

ALNASHIR VISRAM

JUDGE