



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 382 of 2006

HON.M.M. GALGALO (Secretary for Information & Publicity FORD KENYA)

Jael MBOGO (National Organising Secretary, FORD KENYA)

CAPT. CHARLES MASINDE (Assistant Deputy Director of Election, FORD KENYA)

PETER ORINDA (Chairman, Nyando Branch, FORD KENYA).....APPLICANTS

VERSUS

HON. MUSIKARI KOMBO THE ACTING NATIONAL CHAIRMAN

(FORD KENYA).....1ST DEFENDANT

HON. JOHN K. MUNYES SECRETARY GENRAL

(FORD KENYA).....2ND DEFENDANT

RULING

This Ruling is delivered in the Defendant Respondent's Notice of Preliminary Objection raised in the Plaintiffs'/Applicants' Chamber Summons dated 5th December, 2006 filed herein on the same date.

The parties in this dispute are all members of the political party known as the Forum For Restoration of Democracy – Kenya (hereinafter referred to as FORD–KENYA or “The Party”) they have previously appeared before me the last time being at the hearing of the Notice of Motion dated 24th April, 2006 in

which I delivered a Ruling on 29th September 2006 and ordered, inter alia, that all proceedings in this suit be stayed and the dispute be referred to arbitration pursuant to clause 21 of the partys' constitution, Nomination Rules and Disciplinary Rules. It has been submitted by Counsel for the Defendant/Respondents and not disputed by the Plaintiff/Applicants that the 3rd Respondent, the Deponent of the Affidavit sworn in support of the application has recently passed away. If that be the case the court notes the fact with sympathy but will not make a deal of it since the same does not form part of the grounds of objection itemized in the Notice of Preliminary Objection before me. Whilst my mind is still at this point the court takes this early opportunity to correct the mis-spelling of the 1st Defendant's name both in the Ruling of 29th December, 2006 and also in the cause list of 6th December 2006 and to apologize to the 1st Defendant on behalf of the Court's Typing Pool.

The Plaintiff/Applicant's suit which remains stayed by virtue of the subsistence of my said order of 29th September, 2006 was filed by the plaintiff/applicants seeking reliefs as follows:

- (a) **An injunction does issue restraining the Defendants from continuing to breach the Society's (read party's) Constitution by staying in 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 conduction of election procedurally in accordance with the party Constitution.**
- (c) **Costs of this suit.**
- (d) **Any other order or further relief that this Honourable court may deem fit and just to grant.**

In view of the public attention that this matter appears to have drawn I am compelled to emphasize at this stage that this Ruling is strictly on the Preliminary objection argued before me as raised by the Respondents and replied to by the applicants and does not in any way touch on the merits of the application or the main suit even considering that one of the grounds of objection relates to the inconsistency of the prayers sought in the Chamber Summons and those appearing in the main suit. For the sake of clarity and avoidance of doubt and probably to educate the numerous interested parties herein on what the essence of a preliminary objection is, I find it appropriate to cite the definition given to the same in the celebrated case of MUKISA BISCUIT MANUFACTURING COMPANY LTD. -VS- WESTEND DISTRIBUTORS LTD 1969 E.A. 696 at page 701 which has been followed in numbers other binding authorities and defines a preliminary objection as follows:

"A Preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

In the present case the preliminary objection as stated in the respondents notice of 6th December 2006 are as follows:

- 1. THAT the Honorable court lacks jurisdiction to grant an injunction in a matter already stayed and referred to arbitration under Section 6(1) of the Arbitration Act Number 4 of 1995.**
- 2. THAT the prayer for interlocutory injunction is inconsistent with the prayers in the plaint and cannot validly be granted.**
- 3. THAT the Honourable court lacks jurisdiction to grant an injunction under Order XXX1X of the Civil Procedure Act in a matter governed by the Arbitration Act Number 4 of 1995.**
- 4. THAT the applicants are seeking order that are unenforceable in law.**

The prayers sought in the present Chamber summons are stated as follows:

1. THAT this application be certified as urgent service of this application be dispensed within (sic) the same be heard ex parte in the first instance due to its urgency.

2. THAT the Forum for the Restoration of Democracy – Kenya elections purported (sic) to be held on the 7th of December, 2006 be stayed until the disputes existing among the party members are resolved.

or in the alternative

THAT an injunction do issue restraining the Respondents by themselves, agents servants or otherwise howsoever from conducting or officiating Forum For the Restoration of Democracy – Kenya elections on the 7th of December until the disputes existing among the party members are resolved.

3. THAT the costs of this application be in to (sic) suit.

The urgency with which the application was drawn and filed is obvious from the numerous grammatical errors appearing on the face of the same. This court takes note of the same but chooses not to dwell on them but rather to deal with the more pertinent issues raised in and by the Notice of Preliminary Objection and the imminent party elections sought to be pre-empted at the 11th hour by the Applicants' Chamber Summons.

Before proceeding to hear the preliminary objection I studied the points raised therein and noted that the same were pure points of law touching on the Court's jurisdiction and the conflicting prayers appearing in the Applicants' Pleadings and the Chamber Summons. That in itself confirms that this court finds the Notice of Preliminary Objection to fall squarely within the definition of a preliminary objection previously reproduced in this Ruling. Nowhere in his reply did Mr. Namisi for the Applicants submit that the preliminary objection as raised fails the legal test laid down by the MUKISA BISCUITS case.

The Chamber Summons is said to be principally brought under the provision of Order XXXIX Rules 2 and 9 of the Civil Procedure Act, although it also cites Section 3 (NOT 3A) OF THE Civil Procedure Act and all other enabling provisions of the law. Having allowed the innovation of Section 6 (1) of the Arbitration Act and stayed the Applicant's present suit by my Ruling of 29th September, 2006 the subsistence and effect of which is admitted by the Applicants in their supporting Affidavit at paragraph 5 and annexed thereto as annexure "CM1", the matter is clearly one falling under the Arbitration Act until the Arbitral process said in paragraph 11 of the said supporting Affidavit to have commenced "**on the strength of the Court Order....**" is exhausted as provided under Article 21 of the party's Constitution. The applicants claim that the Respondents have by neglect, failure or refusal to call for a National Executive Council Meeting thus frustrating the arbitral process. Whether that is true or not, it does not remove the dispute from the ambit of the Arbitration Act and swing it back into the purview of the Civil Procedure Act without the invocation of Section 7 (1) of the Arbitration Act which for reasons best known to the advocates for the Applicants was not invoked preferring instead to move the court under order XXXIX Rules 2 and 9, section 3 of the Civil procedure Act which clearly do not apply in the present circumstances, choosing only to mention the same in passing during their submissions in reply to the Preliminary Objection. In this connection I accept the submission by Senior Counsel Mr. Mutula Kilonzo the for the Respondents that once the matter was stayed under order 6(1) on 29th September, 2006, the same remains governed by the arbitration Act and only the invocation provisions of Section 7 can enable a party to subject the same to this Courts' jurisdiction and/or the application of the Civil Procedure Rules. It is not worthy that even the wording of Rule 11 of the Arbitration Rules 1997 clearly states that the Civil Procedure Rules shall apply to the proceedings under the Arbitration Rules only **so far as is appropriate**.

I am of the considered view that the attempt to apply the Civil Procedure Rules, given in the

circumstances of this suit and the orders made herein is quite inappropriate.

In his reply Mr. Namisi relied on my Ruling of 3rd May, 2006 wherein I stated that the invocation of S.6 (1) of the Arbitration Act and Article 21 did not oust the jurisdiction of this court. With due respect to Learned Counsel this argument seems to be self defeating in that in the same phrase quoted from my said Ruling, I specifically stated that it was the court's jurisdiction to grant the orders sought or to make any appropriate orders in the circumstances of the case which was not ousted. I sense a misinterpretation or misapprehension of the purport of my quoted Ruling in Mr. Namisi's submissions. I am persuaded by Counsel for the Respondent that having stayed these proceedings and referred the dispute to arbitration my jurisdiction to entertain the same dispute no longer exists until and unless properly re-invoked under the provisions of the Arbitration Act. That is what inherent jurisdiction of the High Court is all about. It exists as a natural and permanent feature within the system but must be properly invoked by the person wishing to take advantage of the same within the set statutory procedures and provisions of the law. Although as already mentioned Mr. Namisi did mention that S. 7 (1) does provide for a party to request the court for an interim measure pending the determination of arbitral process, it is quite clear from the Act that S.7 (2) is the applicable provision to move the court for such interim measure as provided quite clearly under Rule 2 of the Arbitration Rules 1997. Mr. Namisi is therefore clearly wrong to say that there is no procedure provided as he did in his submissions before me. I must say at this point that I have exhaustively dealt with grounds of objection Numbers 1 and 3 of the Notice of Preliminary Objection.

As regards objection Number 2, read together with Order XXXIX Rule 2 on which the applicants rely, I am persuaded by the very wording of Rule 2 to accept Mr. Kilonzo's submission that the orders sought in the interlocutory application must be in consonance with the reliefs sought in the main suit. The said Section reads as follows:

“2. In any suit for restraining the Defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit and either before or after Judgment apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or any injury of a like arising out of the same contract or relating to the same property or right”.

The reference to Judgment no doubt refers to the ultimate reliefs sought in the main suit. Even after being generous and ignoring the grammatical errors in the application or accepting Mr. Namisi's submissions that the same are typographical errors (!) a simple glance at the orders sought in the Chamber Summons dated 5th December 2006 shows that the same have no resemblance whatsoever, nor do they relate in any way to the prayers sought in the plaint in respect of which a final judgment is hoped to be obtained by the Applicants should the suit be resumed sometime in the future or an arbitral award is made in relation thereto and recorded as a Judgment by this court. For these reasons, objection No.2 is also upheld. I also uphold objection No.4 of the Respondents preliminary objection having accepted as correct counsel's submission that the Applicants' suit, having been and remaining stayed then no injunction or stay orders can issue in the same. The application is not only incompetent and an abuse of the process of court but is also a clear violation of this court orders of 29th September, 2006 which have neither been appealed against, stayed or set aside.

As a Judge of this Court with a Constitutional duty to protect and uphold the dignity of this Honourable Court, I would be failing in my said duty in not dealing with an issue of contempt of this court's orders when the same has arisen. Being very much aware of my Ruling of 29th September, 2006 which to my knowledge had never been challenged either on appeal or by an order for variation or setting aside, I was surprised to note that the application listed before me was in the same suit. Rather I had assumed that the Plaintiff applicants had filed a fresh suit.

It has been emphasized time and again and I would wish to believe that Mr. Namisi is quite aware that courts do not make orders in vain and any orders made must be obeyed. It is clear that the Applicants though admitting that the order made on 29th September 2006 staying their suit was indeed made and does subsist they do not consider the same worthy of respect and have deliberately disregarded the same

by filing these proceedings. I find this to be sheer contempt on the face of the Court and in respect of which I have the power to punish the contemnors.

However, I will at this point exercise my discretion and only issue a stern warning to the Applicants to desist from further disobeying orders issued by the Court.

Having said this and considering the submissions by Counsel, the legal authorities cited in support of arguments on either side in light of my various findings on points of law, I am persuaded that the preliminary objection is valid and do uphold the same.

Consequently, the Chamber Summons dated 5th December, 2006 is hereby dismissed with costs to the Defendant/Respondents.

Dated and delivered at Nairobi this 7th day of December, 2006.

M.G. MUGO

JUDGE

IN THE PRESENCE OF:

Mr. Fred Namisi)

Assisted by Mrs. Muriithi) For the Applicants

Mr. Kilonzo Mutula)

Assisted by Mr. Otiende Amolo)

Mr. T.J. Kajwang)

Mrs. Judy Sijeni)

Mr. Eugene Wamalwa) For Respondents

Mr. Ahmed adan)

Mr. Daniel Maanzo)

Mr. Abenago Wasike)

Mr. Ndichu Nick)