



Muchemi (Chairperson), Macharia (Secretary) & Ali (Treasurer) Suing as the Representatives of Safaricom Dealers Association) v Ondieki & 4 others (Commercial Case E109 of 2024) [2024] KEHC 11274 (KLR) (Commercial and Tax) (16 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11274 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E109 OF 2024
JWW MONG'ARE, J
SEPTEMBER 16, 2024**

BETWEEN

**ESTHER WANJIRU MUCHEMI PLAINTIFF
CHAIRPERSON), MACHARIA (SECRETARY) & ALI (TREASURER) SUING AS
THE REPRESENTATIVES OF SAFARICOM DEALERS ASSOCIATION**

AND

**KENNEDY ORANGI ONDIEKI 1ST DEFENDANT
CHECHE TELECOMMUNICATIONS LIMITED 2ND DEFENDANT
MOHAMED MOHAMUD IDOW 3RD DEFENDANT
DREAMWORLD ENTERPRISES LIMITED 4TH DEFENDANT
REGISTRAR OF SOCIETIES 5TH DEFENDANT**

RULING

1. What is before the court for determination is the Notice of Motion application dated 5th March 2023 that was amended on 18th March 2024 where the Plaintiffs seek an injunction against the 1st -4th Defendants(“the Defendants”) whether by themselves, their servants and or agents or any other person(s) whatsoever or whomsoever respectively or any other agent acting as a returning officer from conducting the elections of the office bearers to the Safaricom Dealers Association(“the Association”) Special General Meeting on 5th March, 2024(now past) at 680 Hotel at Nairobi or at any other date thereof pending the hearing and determination of the suit.



2. The Applicants further seek that in the event that the election of the office bearers of the Association are held on 5th March, 2024 or any other date thereafter, 5th Defendant (“the Registrar”) be ordered by an injunction from registering the purported elected office bearers as the office bearers of the Association pending the hearing and determination of the suit.
3. The application is supported by the grounds on its face and the amended supporting affidavit sworn on 18th March 2024 by Nahashon Macharia, one of the Plaintiffs and the Association’s Secretary. It is opposed by the Defendants through the Notice of Preliminary Objection dated 13th March 2024 and the replying affidavit of the 1st Defendant sworn on 2nd April 2024. It is also opposed by the Registrar through the Notice of Preliminary Objection dated 12th March 2024 and the replying affidavit of Maria Goretti Nyariki, an advocate and Chief State Counsel at the Office of the Attorney General, sworn 15th April 2024. The parties have also supplemented the arguments in their pleadings by filing written submissions.
4. It is common cause that the Defendants are members of the Association. On 5th March 2024, the Plaintiffs filed the present suit claiming that they received a notice for a Special General Meeting for 5th March, 2024 to be held at 680 Hotel, Nairobi to commence from 10.00 AM and that without the Plaintiffs’ notice, the Defendants and a small group of members of the Association held a meeting on 17th February, 2024 in the absence of the Association’s current office bearers to compel the Association’s Secretary to call for a Special General Meeting.
5. The Plaintiffs contend that the meeting called for 5th March, 2024 is irregular and that the issue of notice vide the letter dated 17th February, 2024 for the Special General Meeting was done by a mysterious and unnamed “Interim Secretary” who is not recognized by the Association’s Constitution. That the 1st and 3rd Defendants were also one of the signatories of the purported Requisition and that the Plaintiffs also realized that the number of members who requisitioned for the Special General Meeting was less than the required third (1 / 3) of the Association’s Members, because upon asking other members whose names were featured on the Requisition whether they signed said requisition, they denied ever signing or being part of the meeting.
6. The Plaintiffs state that the Special General Meeting of 5th March 2024 was to address two issues; (1) To compel the current board who are illegally in office to disclose the commercial details to the membership; (2) Election of new office bearers; A.O.B.
7. The Plaintiffs state that Agenda number one, with regard to the commercial details, was already discussed on a previous SGM, which the 1st Defendant was also present, held on 30th September, 2023 with a Two-Third (2/3) majority voting for the Association’s Governing Council to conduct discussions with Safaricom PLC with regard to the Association’s Commercial. The Plaintiffs claim that the 1st Defendant has a history of being disruptive and detrimental to the smooth operation of the Association as he has taken the Association to court numerous times and stopping the Association’s legal and procedural Annual General Meetings when they were to proceed for Office bearer elections through the cases Mombasa High Court Petition Number 45 of 2015, High Court Commercial 64 of 2018 and Nairobi High Court Petition Number 414 of 2018.
8. The Plaintiffs are apprehensive that the meeting of 5th March, 2024 where the Defendants were to elect new office bearers in the absence of the Association’s current office bearers and further proceeding to registering the newly elected office bearers was irregular and will be a detriment and infringement to the Plaintiffs’ rights and thus urges the court to grant the orders sought.



9. In opposition, the Defendants state that the court lacks jurisdiction to entertain the dispute between the parties as Clause 15 of the Association's constitution provides for the dispute resolution mechanism to wit; arbitration and for this reason, they urge that the present application is incompetent for want of jurisdiction. On the substance of the application and on a without prejudice basis, the Defendants depone that they are bona fide fully paid up members of the Association and that the Plaintiffs have no capacity whatsoever to bring forth any action on behalf of the Association as they are former officials of the Association whose term of office expired and or terminated upon election of a new Board and Governing Council.
10. The Respondents urge the court to find that the application brought forth by the Plaintiffs is frivolous and vexatious and that the Plaintiffs have come to court with unclean hands having been removed from office by a majority of the members of the Association because of incompetence and having overstayed office illegally. They believe that the application by the Plaintiffs seeking to hold onto office illegally has been overtaken by events as a new Governing Council was elected on 5th March 2024 and has already taken over full mandate of the affairs on behalf of the membership.
11. The Defendants claim that the application is a smokescreen by the Plaintiffs in a ploy to retain control of the Association's bank accounts which they have failed to hand over or disclose full accounts to the members and current Governing Council. That the application is brought with malafides and directed at the wrong parties, a personal attack against them as there is already a new governing body of the Association duly elected by the majority of members and the application is merely vexatious and meant to malign the Defendants.
12. The Respondents contend that the Plaintiffs were found to have breached Rule 4 (2) of the Association's Constitution which is part of the reason the members removed them from office in accordance with the Association's Rules after they were found to have been illegally in Office for more than the permitted 6-year tenure. That the Plaintiffs failed and/or refused to carry out any Annual General Meetings as required by Clause 8 (d) Of the Association's Constitution and contrary to section 29 of the Societies Act during their illegal tenure comprising of 18 years in office.
13. The Defendants state that the Plaintiffs have further approached the court with tainted hands and are simply attempting to continue to hold office despite their lawful removal from office by the Defendants and other members of the Association and therefore any purported activities conducted in the pretext as representatives of the Association past the date of the expiry of their tenure are blatantly illegal.
14. The Defendants claim that following a meeting of a majority of the members, a notice was issued in accordance with Clause 14 (a) (ii) of the Constitution on 17th February 2024 inviting all the members of the Association including the Plaintiffs to take part in a Special General Meeting of the members set to be held on 5th March 2024. That a special general meeting may be requisitioned for any specific purpose by a quorum of not less than a third of the members and can be held within 21 days of the date of the requisition and that the former Secretary, Nahashon Nyaga Macharia, received a valid requisition dated 17th February 2024 from 85 members being more than a third of the 241 members that agreed to the requisition of the Special General Meeting.
15. The Defendants aver that as opposed to an Annual General Meeting; a Special General Meeting merely requires a Written Notice be issued to all members not less than 7 days before the date of the meeting. That the Notice sent to the members was issued 16 clear days before the Special General Meeting was held in compliance with Clause 14 (a) (ii) and that on 5th March 2024 a Special General Meeting was conducted by the members. The Defendants claim that in attendance were a total 188 members out of a total 241 members of the Association who ratified the election of the new appointment of the



Council, which equates to approximately 78% of the membership well over required threshold of two thirds 2/3 of the membership equating to 66.67% of 241 members is equivalent to 160.67 members.

16. The Defendants state that the Plaintiffs were duly informed of the Special General Meeting well in advance of the meeting and Abdisalam Ali was in attendance at the said meeting and made representations during the plenary which shows that the Plaintiffs have instituted this cause in bad faith. That following the election of the new Governing Council by the membership, a Notice was duly sent to the Registrar for purposes of recognition and registration of the new office bearers and that upon the lodging of the registration documents for the new Governing Council with the Registrar a complaint was lodged against the said registration by the Plaintiffs with the Registrar and it is still pending before the Registrar for determination.
17. For the above reasons, the Defendants assert that the application is an abuse of the court process and mere forum shopping by the Plaintiffs in order to frustrate the progress of the new board and cripple the Association's operations. That all the members of the Association agreed to be bound by the Association's Constitution in its entirety including the mode of dispute resolution being arbitration and that the application is dead on arrival as the orders of injunction sought in the prayers of the application have been overtaken by multiple concrete events. As such, the Defendants depone that the application has no merit and urge the court to dismiss it with costs.
18. The Registrar also raises preliminary points including that the Plaintiffs have blatantly disregarded section 18 of the Societies Act which sets out the procedure of resolving an impasse of officials in a society which is the basis of the application and that based on the foregoing, the Plaintiffs have not properly invoked the jurisdiction of the Court and thus the court should not entertain this matter. That the application is therefore premature, vexatious and an abuse of the court's well outlined and established process and procedures and ought to be struck out.
19. The Registrar depones that it received a letter from the interim secretary requesting the office to attend and observe the elections slated for 5th March, 2024 and it further received a letter dated 7th March, 2024 from the Chairperson and Assistant Secretary forwarding a Court Order dated 6th March, 2024.
20. The Registrar subsequently received a complaint letter from the Association's officials dated 11th March, 2024 complaining about the sham elections held on 5th March, 2024 and further requesting the Registrar to convene a meeting aimed at resolving the issue. The Registrar states that it is mandated by the Societies Act to regulate and ensure compliance of the Association own constitution and the Act by registered Societies.
21. The Registrar contends that it does not intermeddle with the internal affairs of the Societies and only intervenes where a dispute has risen as set out under section 18 of the Societies Act and it reiterates that there exists a dispute under section 18 of the Act since from its records the Association has not held elections since the year 2015 and if indeed the elections were held the same was not brought to the Registrar for concurrence which is in blatant contravention of its own Constitution and section 29 of the Societies Act.
22. The Registrar urges that parties to a dispute must first exhaust internal and statutory remedies before proceeding to Court and that a Court must first satisfy itself before seizing jurisdiction that the parties seeking its intervention have first exhausted the prescribed statutory mechanisms for redress. The Registrar states that the Plaintiffs have not exhausted the statutory mechanisms provided under the Societies Act and the court should not entertain their application since this is tantamount to forum shopping and the Court should frown upon this mischievous behavior.



23. The Registrar further states that Clause 15 of the Association’s Constitution provides for arbitration and that Article 159 of the Constitution encourages the use of alternative dispute resolution and further where a dispute resolution mechanism exists outside Courts, the same must be exhausted before the jurisdiction of the Courts is invoked. For these reasons, the Registrar urges the court to dismiss the application.

Analysis and Determination

24. I have carefully considered the application and the supporting documents filed alongside it together with the parties’ depositions and their written rival submissions. I propose to first deal with the technical objections filed by the Defendants and the Registrar as their determination have the ability of disposing of this matter preliminarily.
25. The Defendants and the Registrar both argue that the court lacks jurisdiction as there exists dispute resolution mechanisms outside of the court for the parties to settle their disputes including arbitration and with the Registrar under section 18 of the Societies Act. In response, the Plaintiffs have submitted that the Defendants have improperly raised points of law by way of Preliminary Objection when they could have filed an application under Section 6 of the Arbitration Act and they rely on the court’s decision in CM & A Logistics Limited v Upland Premium Diaries and Foods Limited [2022] KEHC 14428 (KLR) and the Court of Appeal’s decision in Niazsons (K) Ltd v China Road & Bridge Corporation Kenya; [2001] KECA 376 (KLR).
26. Going through the above decisions, I find that the filing of an application as opposed to a preliminary objection is necessary when the determination involves the need for examination of evidence and factual matters between the parties. In this case, the Plaintiffs have not disputed the existence of the arbitration clause in the Association’s constitution, neither did they respond to the preliminary objections by stating that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration or that the arbitration clause is null and void, inoperative or incapable of being performed.
27. The Plaintiffs did not actually plead any of the reasons under section 6 of the Arbitration Act that would make the court not refer the matter to arbitration and that would warrant the court to examine factual issues between the parties. The Preliminary Objections would thus suffice in the present situation. In any case, the filing of a preliminary objection as opposed to an application is not fatal and the court can still determine whether there exists a dispute capable of being referred to arbitration and whether the matter ought to be referred to arbitration (see Zulfiqar Qamar Din & Shamsbad Begum Mohd Rafique v Brookside Pearl Limited [2020] KEHC 3438 (KLR))
28. As such, since the Preliminary Objections are not contested then it is assumed that the arbitration clause in the Association’s constitution is valid, operative and capable of being performed and that there is a dispute between the parties with regard to the matters agreed to be referred to arbitration. Based on the foregoing, I find that the dispute between the parties ought to be referred to arbitration in line with the Association’s constitution. In any case, assuming that an arbitration agreement did not exist in the Association’s constitution, I agree with the Registrar that section 18 provides for a dispute resolution mechanism among the members or officers of a registered society as follows:
8. Disputes as to officers
- (1) If the Registrar is of the opinion that a dispute has occurred among the members or officers of a registered society as a result of which the Registrar is not satisfied as to the identity of the persons who have been properly constituted as officers of the society,



the Registrar may, by order in writing, require the society to produce to him, within one month of the service of the order, evidence of the settlement of the dispute and of the proper appointment of the lawful officers of the society or of the institution of proceedings for the settlement of such dispute.

- (2) If an order under subsection (1) of this section is not complied with to the satisfaction of the Registrar within the period of one month or any longer period which the Registrar may allow, the Registrar may cancel the registration of the society.
- (3) A society aggrieved by the cancellation of its registration under subsection (2) may appeal to the High Court within thirty days of such cancellation.

29. Whereas the above process is couched in discretionary rather than mandatory terms, the Registrar has demonstrated that the Plaintiffs have already written to it complaining about the impugned meeting of 5th March 2024 which is also the subject of the present suit and application. The Plaintiffs specifically urge the Registrar to intervene, call a meeting, hear the parties and advise on ways of resolving the issue. Since the complaint is with the Registrar, I find that it would be appropriate for the Plaintiffs to follow through with this process first before approaching the court, if at all and I therefore agree with the Registrar that the present suit and application is premature and borders on an abuse of the court process as the Plaintiffs have initiated two parallel separate proceedings over the same subject matter (See *Republic v Registrar of Societies & Njuri Ncheke Supreme Council of Meru Elders Suing through its official: Paulo Mithingia, Phares Mutwiri & Simon Mwamba Mukangu Ex-parte Linus Kathera & Josphat Muranguri* [2018] KEHC 8088 (KLR))
30. From the above, it is clear that the Plaintiffs have not exhausted all dispute resolution mechanisms available to them before approaching the court. Article 159(2)(c) of the *Constitution* requires the court to promote alternative forms of dispute resolution including arbitration and it is exactly what the court will do.

Conclusion and Disposition

31. The net effect of my findings above is that the Plaintiffs' Notice of Motion dated 5th March 2024 is struck out with costs to the 1st – 5th Defendants. In the interest of justice, I direct that the matter be referred to the Registrar of Societies for arbitration and resolution in accordance with section 18 of the *Societies Act*. This matter is therefore stayed pending the outcome of the arbitral proceedings and the Registrar is hereby directed to file a report on the same once the process is concluded which should be within Ninety (90) days.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF SEPTEMBER, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. N/A for the Plaintiff.
2. Ms. Omar for the 1st, 2nd 3rd and 4th Defendants.
3. N/A for the Registrar of Societies.



4. Amos - Court Assistant

