



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISC. APPLICATION NO.536 OF 2018

ORGANICS 4 ORPHANS INTERNATIONAL.....1ST APPLICANT
DALE PATRICK BOLTON.....2ND APPLICANT
LINDA BOLTON.....3RD APPLICANT
ORGANICS 4 ORPHANS.....4TH APPLICANT

VERSUS

BOAZ ODOUR OGOLLAH.....1ST RESPONDENT
DOUGLAS KINABEL.....2ND RESPONDENT
THE NON-GOVERNMENTAL ORGANIZATIONS
CO-ORDINATION BOARD.....3RD RESPONDENT

RULING

1. Through the application dated 23rd December 2018, the applicants seek the following orders:

1. Spent

2. That a temporary injunction be issued against the 1st and 2nd respondents whether acting by themselves, their agents and/or servants restraining them from accessing Organics for Orphans International Training Centre at Milimani Estate, Kitale, or in any other way interfering with the operations and projects of the organization pending the hearing and determination of this application inter- partes.

3. That a temporary injunction be issued against the 1st and 2nd respondents whether acting by themselves, their agents and/or servant restraining them from appropriating to themselves, alienating, selling, transferring, leasing or utilizing the real and movable assets legally and /or beneficially owned by the 1st and 4th applicants including the motor vehicle registration numbers KCF 914P & KBD 581D, the land and Guest House known as Eden Guest House registered as L.R. No. 2116/1090 and the Training Centre both within Milimani Estate, Kitale pending the hearing and determination of this application inter- partes.

4. That an order of temporary prohibition be issued against the 3rd respondent restraining it from amending the list of officials, members of board directors pursuant to the minutes of two meetings that purportedly took place on 23rd July 2018 and 24th October 2018 pending inter-partes hearing of the application.

5. That a temporary injunction be issued against the respondents whether acting by themselves, their agents and/or servants restraining them from accessing Organics for Orphans International Training Centre at Milimani Estate, Kitale, or in any other way interfering with the operations and projects of the organizations pending conclusion of the arbitral proceedings envisaged under Clause 5.8 of the Constitution of the 1st applicant.

6. That a temporary injunction be issued against the respondents whether acting by themselves, their agents and/or servant

restraining them from appropriating to themselves, alienating, selling, transferring, leasing or utilizing the real and movable assets legally and /or beneficially owned by the 1st and 5th applicants including the motor vehicle registration numbers KCF 914P & KBD 581D, the land and Guest House known as Eden Guest House registered as L.R. No. 2116/1090 and the Training Centre pending conclusion of the arbitral proceedings envisaged under Clause 5.8 of the Constitution of the 1st applicant.

7. That an order of temporary prohibition be issued against the 3rd respondent restraining it from amending the list of officials, members of board directors pursuant to the minutes of two meetings that purportedly took place on 23rd July 2018 and 24th October 2018 pending conclusion of the arbitral proceedings envisaged under Clause 5.8 of the Constitution of the 1st applicant.

8. That the 1st respondent whether by himself, his family members, relatives and/or servants be barred from accessing, occupying or residing at the 4th applicant's Eden Guest House in Kitale registered L.R. No. 2116/1090 unless he can pay the daily commercial rate of US\$ 200.

9. That the applicant is at liberty to apply for such further orders and /or directions as this Honourable Court may deem fit and just to grant in order to preserve the subject matter of the dispute pending conclusion of Arbitral proceedings.

10. The costs of this application be provided for.

2. The application is brought under Sections 7(1) and (2) of the Arbitration Act, Section 68(1), (2) and (3), 69 of the Land Registration Act and Order 40 and 51 of the Civil Procedure Rules.

3. The application is supported by the affidavit of the 1st applicant's Chief Executive Officer, dated 23rd December 2018 and a further affidavit dated 4th February 2019.

4. The applicants' case is that sometime in the year 2007 the 2nd and 3rd applicants started a non-profit organization in Canada known as Organics for Orphans whose mission was to help alleviate poverty through a sustainable organic agriculture and natural medicine. It is stated that the said organization was later registered in Kenya in 2011 and that the 1st respondent acted as the 2nd and 3rd applicant's agent.

5. In 2013, the 2nd and 3rd applicants discovered that they had not been included in the organization's registration documents as founders. It was then agreed that they would be included in the organizational record as founders and board members but that in 2017, the relationship between the applicants and the 1st respondent soured when the applicant discovered that the 1st respondent had attempted to introduce new members to the organization and to review organization's constitution through forged minutes of board meeting that never took place.

6. The applicants contend that the operations of the organization have been affected by the raging dispute between them and the 1st respondent which dispute, they have referred to arbitration in line with Clause 5.8 of the 1st applicant's constitution.

7. It is therefore the applicants' case that the orders sought are merited and will ensure that the operations of the 1st applicant continue seamlessly and the property preserved pending the determination of the dispute before the arbitration where the chairman of the Chartered Institute of Arbitrators is currently seized of the matter.

8. At the hearing of the application **Mr. Kimuli**, learned counsel for the applicant submitted that the court is enjoined to find out if there is an arbitration clause that binds the parties and to refer the matter to arbitration if a dispute has arisen while preserving the subject matter of the suit. For this argument counsel referred to the case of **Safaricom Limited v Ocean Beach Hotel Ltd & 2 Others** [2010] e KLR wherein the Court of Appeal outlined the nature of interim protective measures and the factors to be taken into account before granting an interim order of protection.

9. Counsel added that Ongaya J. had already issued interim reliefs through an order locking out the respondent from the affairs of the 1st applicant and that following the said order, the 1st respondent was on 4th January 2019 evicted from the 1st respondent's premises after which the 1st applicant's affairs have been going on smoothly without any interference. It was the applicant's position that the status quo prevailing at the 1st applicant organization after 4th January 2019 should be maintained pending the determination of the arbitral proceedings.

1st and 2nd respondents' case.

10. The 1st and 2nd respondent opposed the application through the replying affidavit dated 31st January 2019 and the written submissions filed on 5th April 2019.

11. The respondents' case is that there is no arbitrable dispute between them and the applicants that is fit to go to arbitration and that the application has therefore been filed in vain.

12. The 1st and 2nd respondents aver that they are the genuine founders of the 1st applicant organization holding positions of chairman and secretary respectively and that the applicants were donors who supported the organization by raising charity funds in Canada.

13. They further state that the applicants were merely co-opted as Board of Directors of the 1st applicant but were later lawfully removed from their positions of chairman and treasurer on the basis that they have never held work permits as required under the provisions of the Kenya Citizenship and Immigration Act.

14. At the hearing of the application, **Mr. Kraid**, learned counsel for the 1st and 2nd respondents submitted that Clause 5.8 of the 1st applicant's constitution does not apply to the 2nd, 3rd and 4th applicants as they are Canadians and therefore strangers to the 1st applicant in as far as the registration with the 4th respondent is concerned. Counsel added that the 2nd and 3rd respondents have no permits to conduct charitable activities in the country and thus have no legal basis to go for arbitration.

15. Counsel further submitted that Ongaya J. lacked the jurisdiction to issue eviction orders against the 1st respondent and that the arbitrator has no jurisdiction to hear parties who have acted illegally.

3rd respondent's case

16. The 3rd respondent's case was that its joinder in these proceedings is not warranted as the applicants had not established any identifiable breach of duty on their part.

17. The 3rd respondent states that it was aware of the dispute between the parties herein and that it is under no obligation to effect any changes in the 1st respondent's membership until the matter is amicably resolved.

Analysis and determination.

18. I have considered the application filed herein, the respondents' response and the parties' respective submissions. The issue that falls for determination is whether the applicant has made out a case for the issuance or orders of interim protection pending the outcome of the arbitral proceedings. There was also the issue of whether or not this court has the jurisdiction to grant the prayers sought.

19. On jurisdiction, I find that Section 7(1) of the Arbitration Act No. 11 of 2009 grants this court the powers to grant interim measures of protection. The said section stipulates as follows:

It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

20. In the instant case, it was not disputed that the arbitration proceedings have already commenced. The 1st and 2nd respondents however argued that since the applicants had not established that they had complied with registration laws they cannot claim to have a dispute with the respondents. My take is that the validity of the applicant's claim before the arbitration or their qualification as parties to the said process are issues that can only be determined in the arbitral proceedings. The function of this court at this juncture, is not to delve into the merits of the case before the arbitration or the suitability of the parties to the case, but to determine if there is a justification for issuance of preservative orders pending the outcome of the arbitration.

21. I have considered arbitration Clause No. 5.8 of the 1st applicant's constitution that was attached to the applicants' affidavit as an annexure and I note that it stipulates as follows:-

Save where by this constitution the decision of the Board is made final if at any time hereafter any dispute difference or question shall arise between the Founders, Members, Trustees (if any) or other persons or their personal representatives or any of them respectively touching the construction meaning or effect of this constitution or any cause or anything therein contained or the rights or liabilities of the said parties respectively or any of them under this constitution or otherwise however in relation to the constitution then every such dispute or question shall be referred to arbitration by a single arbitrator appointed by agreement between the parties and in default of such agreement by the Chairman for the time being of the Chartered Institute of Arbitrators (Kenya Branch) in accordance with and subjected to the provisions of the Arbitrators Act (Chapter 49) of the Laws of Kenya or any statutory modification or reenactment thereof for being in force.[Emphasis mine]

22. Having regard to the above cited clause and considering the fact that the respondents do not deny that the 2nd and 3rd applicants were donors who were co-opted into the 1st applicants' Board of Directors, I am of the considered view that the applicants fall within the classification of persons whose disputes fall within the purview of the arbitration clause. It is therefore my finding that the respondents' objection to the jurisdiction of the arbitration panel and the parties to the arbitration is not well founded considering the clear provisions of the arbitration clause that I have already highlighted in this ruling.

23. In the case of **Safaricom Limited v Ocean Beach Hotel Ltd & 2 Others (supra)**, the Court of Appeal observed that the suitable interim measures of protection to be issued in instances such as the one before the court would depend on the facts of each case.

24. In the present case, the applicants conceded that because of the orders already earlier issued by Ongaya J. in this case, there was calm and peaceful operations at the 1st plaintiff's organization. The 1st and 2nd respondents however argued that the said Ongaya J. lacked the jurisdiction to issue the orders of eviction against the 1st respondent. My finding is that considering that no material has been placed before the court to show that the orders of Ongaya J. have been varied or set aside, the said orders are still valid. Taking into account the applicants' position that the affairs of the 1st respondent are currently running smoothly, I find that there is any imminent threat on the part of the 1st applicant that would warrant the issuance of the orders of preservation.

25. The above finding notwithstanding and bearing in mind the apprehension expressed by the applicants in this application I find that this case in which it will be in the interest of justice to allow this application in the following terms:

a) That a temporary injunction be issued against the respondents whether acting by themselves, their agents and/or servants

restraining them from accessing Organics for Orphans International Training Centre at Milimani Estate, Kitale, or in any other way interfering with the operations and projects of the organizations pending conclusion of the arbitral proceedings envisaged under Clause 5.8 of the Constitution of the 1st applicant.

b) That a temporary injunction be issued against the respondents whether acting by acting by themselves, their agents and/or servant restraining them from appropriating to themselves, alienating, selling, transferring, leasing or utilizing the real and movable assets legally and /or beneficially owned by the 1st and 5th applicants including the motor vehicle registration numbers KCF 914P & KBD 581D, the land and Guest House known as Eden Guest House registered as L.R. No. 2116/1090 and he Training Centre pending conclusion of the arbitral proceedings envisaged under Clause 5.8 of the Constitution of the 1st applicant.

c) That an order of temporary prohibition be issued against the 3rd respondent restraining it from amending the list of officials, members of board directors pursuant to the minutes of two meetings that purportedly took place on 23rd July 2018 and 24th October 2018 pending conclusion of the arbitral proceedings envisaged under Clause 5.8 of the Constitution of the 1st applicant.

d) That the 1st respondent whether by himself, his family members, relatives and/or servants be barred from accessing, occupying or residing at the 4th applicant's Eden Guest House in Kitale registered L.R. No. 2116/1090 unless he can pay the daily commercial rate of USD 200.

e) The costs of the application shall abide the outcome of the arbitral proceedings.

Dated, signed and delivered in open court at Nairobi this 3rd day of October 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mrs Kayugira for the applicant

Mr. Mwangi for the 3rd respondent

Court Assistant- Margaret