



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC. APPL. NO. 480 OF 2015

VERONICA MBITHE MATIVO 1ST APPLICANT

MAUR ABDALLA BWANAMAKA.....2ND APPLICANT

TITUS KALOKI 3RD APPLICANT

- V E R S U S -

WAVINYA NDETI.....1ST RESPONDENT

SADJAH PHILIPPE2ND RESPONDENT

CAROLINE MALINDA 3RD RESPONDENT

CHAMA CHA UZALENDO4TH RESPONDENT

RULING

1) The subject matter of this ruling is the motion dated 9th May 2017 taken out by Wavinya Ndeti, Sadjah Philippe, Caroline Malinda and Chama Cha Uzalendo (C.C.U), being the 1st, 2nd, 3rd and 4th respondents/applicants respectively, hereinafter referred to as the **applicants**. In the aforesaid motion the applicants sought for *inter alia*:

1. Spent

2. Spent

3. Spent

4. Spent

5. Spent

6. THAT pending the hearing and determination of this application this honourable court be pleased to stay the execution of the consent order given herein on May 2017

7. THAT pending the hearing and determination of this application Veronicah Mbithe Mativo, Maur Abdalla Bwanamaka and Titus Kaloki, the respondents herein, or their servants, agents, employees, appointees, associates or another person whatsoever, other than the 2nd applicant

herein as the bonafide Secretary general of the 4th applicant Party together with any other bonafide and duly authorised official of the said 4th applicant party, be and are hereby restrained from issuing, submitting, forwarding, sending or transmitting to the Registrar of Political Parties, the Independent Electoral and Boundaries Commission or to any other person, election or political body whatsoever the 4th applicant party's (Chama Cha Uzalendo) Membership list, list of candidates, nomination certificates or any such other nomination or election documents.

8. THAT pending the hearing and determination of this application the Registrar of Political Parties, the Independent Electoral and Boundaries Commission or any other such person whatsoever be and is hereby restrained from accepting, receiving, publishing in the Kenya Gazette or elsewhere or giving effect in any way whatsoever to any party membership list, list of party candidates or nomination certificates processed and submitted by the 2nd respondent, Maur Abdalla Bwanamaka, as the purported chairman thereof or any other person whatsoever other than the 2nd applicant herein, Sadjah Philippe; the bonafide secretary general of the 4th applicant party with due authority of the party.

9. THAT this honourable court be pleased to set aside the consent order given herein on 5th May 2017.

10. THAT costs of this application be awarded to the applicants.

2) The motion is supported by two affidavits of Sadjah Philippe and a supplementary affidavit of Anthony Mureithi. When served with the motion, George Humphrey Kasiba filed a replying affidavit he swore to oppose the application while Maur Abdalla Bwanamaka, the 2nd applicant/respondent herein, filed a replying affidavit to oppose the motion. When the motion came up for interpartes hearing, this court directed the parties to file and exchange written submissions.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have further considered the rival written submission. It is the submission of the applicants that Veronicah Mbithe Mativo, Maur Abdalla Bwanamaka and Titus Kaloki, the 1st, 2nd and 3rd applicants/respondents respectively hereinafter refereed to the **respondents** attended court on 5.5.2017 in the absence of the applicants' previous advocate and colluded and fraudulently caused the consent order contained in the letter dated 25.04.2017 to be adopted as the order of this court. It is argued that the consent order went against the orders issued by this court on 7th December 2015. The applicants aver that they and their advocates, M/s Otieno Ogolla & Co. Advocates did not approve the aforesaid letter of consent. For this reason, the applicants beseeched this court to set aside the consent orders. The applicants pointed out that the consent order purported to withdraw this suit together with criminal case no. Nairobi CMCR case 1240 of 2014, H.C.C.A no 544 of 2015 and H.C.J.R no. 65 of 2017 without the approval and or consent of the other parties. It is also argued that the Director of Public Prosecutions (D.P.P) was not involved nor consulted before the purported consent order was recorded and adopted by the court.

4) The respondents strenuously opposed the motion. It is the respondents' submission that by a letter dated 31.5.2017, the Registrar of Political Parties requested the 4th respondent's party officials to visit her office to discuss the 4th respondent's involvement in forth coming elections. The respondents aver that pursuant to the intervention from the Registrar of Political Parties, the 4th respondent's National Executive Council(NEC) held a meeting on 20th April 2017 at the Party's Headquarters whereof they agreed to appoint the firm of Bernard Muriuki & Co. Advocates as the advocate for the party with clear instructions to settle all matters pending in court by way of consensus in the interest of the party. The respondents also pointed out that Sadjah Philippe was expelled from CCU on 14.12.2014 hence he holds no position in the party.

5) It is further argued that the applicants were served through an office orderly of the 1st respondent a Mr.

Nzuki. The respondents denied the assertion that the consent order did not direct the Registrar of Political Parties to remove their names from form PP5 as officials of the 4th applicant. The respondents also denied terminating the pending criminal cases but stated that it is the members of the National Executive Committee(NEC) of the 4th respondent who wrote to DPP who in turn had audience with the Director of Public Prosecutions to initiate the process of withdrawal. The respondents averred that the 4th applicant's N.E.C procedurally and legally confirmed the positions held by the respondents therefore the consent order dated 7.12.2015 was superseded by the consent order of 5.5.2017 which was born by party resolutions and therefore there was nothing stopping the party from recording a further consent since there were no recorded minutes with the resolutions of the 4th applicant that ratified the initial actions of the three applicants. The respondents further admitted that the consent order recorded on 5th May 2017 set aside all orders and consent orders in all matters involving the 4th applicant and all parties herein at the instructions of the 4th applicant.

6) Having considered the material placed before this court for consideration, it is not in dispute that on 5th May 2017 the respondents in the current application namely: Veronica Mbithe Mativo, Maur Abdalla Bwanamake and Titus Kaloki together with their advocate and that of the 4th applicant appeared before Lady Justice Njuguna whereof they convinced the Honourable judge to adopt the consent order dated 25.4.2017 and filed in court on 26.4.2017. The record shows that the respondents had approached the court to adopt the consent order vide the chamber summons dated 2nd May 2017. The consent order read as follows:

1. That all previous consent orders recorded be and hereby set aside and all the cases mentioned above are marked as settled on the following terms:

2. That the 4th respondent herein has entered into this consent order as per the instructions and on behalf of the NATIONAL EXECUTIVE COUNCIL of the 4th respondent.

3. That the applicants and the 4th respondent have entered into this consent order by dint of the 1st, 2nd and 3rd respondents having ceased or never been members of the 4th respondent.

The 1st respondent has resigned from being a member of the 4th respondent.

The 2nd respondent has been acting contrary to section 14(2) (a) (e) of the Political Parties Act by associating and promoting activities of the political parties other than the 4th respondent.

The 3rd respondent has been confirmed by the Registrar of Political parties to have never been a member of the 4th respondent.

4. THAT the 1st, 2nd and 3rd applicants and the 4th respondent have by this consent order agreed to withdraw the following cases filed at Milimani Courts High Court Misc. Application No. 480 of 2015, Nairobi Chief Magistrate's Criminal Case no. 1240 of 2014, HCCA no. 544 of 2015 and Nairobi H.C.J.R no. 65 of 2017.

5. THAT the 1st, 2nd and 3rd applicants and the 4th respondent have consented that the 1st applicant is and continues being the chairman of the 4th respondent, the 2nd applicant and continues being vice secretary women affairs of the 4th respondent, the 3rd respondent is and continues as the secretary information and publicity of the 4th respondent.

6. That the 1st, 2nd and 3rd applicants and the 4th respondent, have consented that the 4th respondent to instruct the Commercial Bank of Africa to confirm the signatories of the accounts no. 6617930015 and 6617930028 as follows:

- i. MAUR ABDALLA BEANAMAKA
- ii. VERONICAH MBITHE MATIVEO
- iii. TITUS KALOKI

That Safaricom Company Limited be and is hereby ordered to close down till no.821714. further the 1st, 2nd and 3rd respondents be and is hereby ordered to cease operating any till number including till no. 821714 for or on behalf of the 4th respondent.

7. That the Registrar of Political parties be and is hereby ordered to recognize and acknowledge correspondence from the 4th respondent's chairman and secretary general acknowledged by the Form PP5 filed on the 24th April 2012 only.

That the Registrar of Political Parties and the Independent Elections and Boundaries Commission be and is hereby ordered to acknowledge the Party membership list and the list of party candidate processed at the 4th respondent's registered office at Portal Place Building room 311 and through the official party email address chamachauzalendoccu@gmail.com only

8. That the Registrar of Political Parties and the Independent Elections and Boundaries Commission be and is hereby ordered to acknowledge nomination certificates issued by the 4th respondent signed by the chairman, the secretary general and the director of Election and Nomination, as shall be appointed by the National Executive Committee of the 4th respondent.

9. That the director of criminal investigations be and is hereby ordered to commence investigations vide the 4th respondent's complaint filed on the 13th January 2017 and take the necessary action against the suspects posing as the officials of the 4th respondent and purporting to operate from the 4th respondent's official office.

10. That the Registrar of Political Parties be and is hereby ordered to recognize and acknowledge correspondence from the 4th respondent's chairman and secretary general's offices only.

7) It is also apparent from the record that the applicants herein, Wavinya Ndeti, Sadjah Philippe, Caroline Matinda and Chama Cha Uzalendo were not present in court at the time of seeking to have the consent adopted as the order of this court. However, one M/s Esami appeared as holding brief for Mr. Nyamu for applicants.

8) The record also shows that Mr. Muriuki who appeared for C.C.U the 4th applicant informing the court that the respondents namely Veronicah Mativo, Maur Abdalla Bwanamaka and Titus Kaloki had filed a notice to act in person. It is also apparent that the advocate for the 1st, 2nd and 3rd applicants was not present in court. The respondents have admitted the applicants were not served with the application except for one Mr. Nzuki who is alleged to have received on behalf of the 1st applicant. It is said Mr. Nzuki was the office orderly of the 1st applicant. I am convinced by the applicants' assertion that they were not aware of the consent order nor the summons which sought for its adoption as the order of this court. This ground alone is sufficient to have the consent order set aside. The respondents simply misled the court into believing that all the parties to this dispute had agreed to settle the dispute by consent. The respondents misrepresented the facts to steal a march from the applicants.

9) The proceedings and the material presented before Lady Justice Njuguna on 5th May 2017 shows that the respondent colluded amongst themselves to obtain the contentious consent without the involvement, participation and concurrence of the applicants. In R =vs= **Registrar of societies Exparte Justus Nyangaya & 3 others (2005)** eKLR Justice Nyamu (as he then was) stated *inter alia*:

Since it is common ground that the IPS were not parties to the consent letter an order and yet they were affected parties how does this affect the consent letter and order.

In the case of FLORA N WASIKE V DESTIMO WAMBOKO cited by Mr. Mwaura learned counsel for the original applicant, the Court of Appeal in holding 1 stated the law as under:

“It is settled law that a consent judgment can only be set aside on the same grounds as would justify the setting aside a contract for example on grounds of fraud, mistake or misrepresentation.”

On this I find that in the circumstances of the case before me since the IPS were parties to the proceedings in law and they were deliberately excluded from the consent letter/order or judgement the very act of excluding them is a fraudulent act taking into account that the exclusion was clearly aimed at conferring benefits to the excluding parties and denying the IPS of the same benefits. Similarly the exclusion of the IPS if not done fraudulently does in the circumstances constitute negligent misrepresentation to say the least and on unforgivable mistake as well.

I therefore find that the applicants are perfectly entitled as they did to apply to set aside the challenged order/judgement even on the basis of the three limbs of the laws (or grounds) as expounded in the FLORA case above.

10) The applicants were parties to these proceedings and the respondents deliberately excluded them from the consent letter of 25.04.2017 and they deliberately failed to give the respondents notice of the mention of 5.5.2017 and they further fraudulently misrepresented to this court that the consent was with the concurrence of all parties hence obtaining orders adversely affecting the rights of the applicants in this action. In other words, the applicants were not parties to the consent order despite the fact that they are parties to this suit.

11) A critical examination of the consent order will reveal that the consent order was calculated to circumvent and defeat the order of this court issued on 7th December 2016 which had restrained the respondents from acting or purporting to act as officials of C.C.U. The consent order gave the respondents a chance to take over the leadership of the 4th applicant (C.C.U) by virtue of an order reinstating them to their previous positions.

12) It obvious that the consent orders affected the rights of the applicants and other parties who did not participate in the making and recording of the same. Such an order cannot be defended in law, hence it must be set aside.

13) In the end, I find the motion meritorious. It is allowed in terms of prayers 5, 6, 7, 8 and 10 pending the hearing and determination of the miscellaneous application.

Dated, Signed and Delivered in open court this 14th day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent