



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO.136 OF 2016

JACOB OMONDI NYAMBEGA.....1ST PLAINTIFF/APPLICANT

KENNEDY OMOLLO ONYANGO.....2ND PLAINTIFF/APPLICANT

SAMWEL OTIENO OBUYA.....3RD PLAINTIFF/APPLICANT

PHILIP OTIENDE ADUNDO.....4TH PLAINTIFF/APPLICANT

SIMON OMONDI AKINA.....5TH PLAINTIFF/APPLICANT

PAULINE AKWACHA.....6TH PLAINTIFF/APPLICANT

VERSUS

VICTORIA CONFORT INN LIMITED.....1ST DEFENDANT/RESPONDENT

KENYA AFRICAN NATIONAL UNION....2ND DEFENDANT/RESPONDENT

HON. NICK SALAT.....3RD DEFENDANT/RESPONDENT

HON. GEDION MOI.....4TH DEFENDANT/RESPONDENT

ATTORNEY GENERAL.....5TH DEFENDANT/RESPONDENT

RULING

1. **Jacob Omondi Nyambega, Kennedy Omollo Onyango, Sawmel Oteino Adundo, Simon Omondi Akina and Pauline Akwacha**, the Applicants/Plaintiffs, vide notice of motion dated 15th June 2016 prays for temporary injunction restraining **Victoria Comfort Inn Limited**, the 1ST Respondent/Defendant, from “trespassing into, developing, alienating, disposing off, Charging, or in any other way interfering with the use and occupation by the Applicants and other tenants therein of the entire suit premises designated as **Kisumu Municipality/Block 9/118** measuring 0.4792 hectares pending the hearing and determination of this suit.” The application is based on the nine grounds on its face marked (a) to (i) and supported by the affidavit of Jacob Omondi Nyambega, sworn on 15th June 2016.

2. The notice of motion is opposed by the 1st Respondent through the replying affidavit sworn by Josiah O. Ochieng, the Administration Manager, on 12th July 2016.

3. The 2nd to 4th Defendants, namely Kenya African National Union, Hon. Nick Salat and Hon. Gedion Moi, through Olel, Onyango

Ingutia Advocates, filed the notice of motion dated 8th July 2016 seeking to have the hearing of the notice of motion dated 15th June 2016 stayed together with further filing of other pleadings and have the matter be referred to arbitration. Mr Ouma, Orengo, Olel and Nyauma learned counsel for the Applicants, 1st, 2nd to 4th and 5th Defendants respectively addressed the court on 13th July 2016 after which the following directions were issued.

a) That the notice of motion dated 8th July 2016 be heard before that dated 15th June 2016.

b) That the Respondents in the notice of motion dated 8th July 2016 do file and serve their replying papers in 14 days and corresponding leave granted to the Applicant to reply thereto in three days after service.

c) Filing of written submission on the notice of motion dated 8th July 2016.

d) Those parties do maintain the prevailing status quo on possession and use of the suit land pending the hearing and determination of the notice of motion dated 8th July 2016.

That further directions were given on 13th September 2016 on service of the notice of motion dated 8th July 2016 on the 5th Defendant among others. The counsel for the Plaintiff indicated that they had filed and served their replying affidavits sworn by Jacob Omondi Nyambega on 10th August 2016 on the 15th August 2016.

4. The counsel for the 2nd to 4th Defendants then filed their written submissions dated 15th September 2016. The counsel for the Plaintiff thereafter filed their submissions dated 10th October 2016.

5. The following, are the issues for the court's determination;

a) Whether the issues for determination in this suit are among those subject to the 2nd Defendant's constitution arbitral clause.

b) Whether the parties herein are bound by the arbitral clause in the 2nd Defendant's constitution.

c) Whether the proceedings hearing should be stayed and matter referred to arbitration.

d) Who pays the costs.

6. The court has carefully considered the eleven grounds on the notice of motion dated 8th July 2016, the affidavit evidence in support by the Hon. Nick Salat sworn on the 8th July 2016, the replying affidavit by Jacob Omondi Nyambega sworn on 10th August 2016, the written submissions filed by counsel for 2nd to 4th Defendants and the Plaintiffs and come to the following determination;

a) That other than the 1st to 3rd Plaintiffs who are described at paragraph 1 of the plaint dated 15th June 2016 as branch officials of the 2nd Defendant, the other Plaintiffs are described at paragraph 2 of the said plaint as tenants and representatives of other tenant. Though the 1st and 5th Defendants did not file any responses to the notice of motion dated 8th July 2016, there is nothing on record to show that they are subject to the arbitral clause in the 2nd Defendant's constitution or that they had consented to the matter being referred for arbitration.

b) That the arbitral clause in the 2nd Defendant's constitution as revised in 2012, and which is reproduced at ground (iii) of the notice of motion dated 8th July 2016 and paragraph 10 of the affidavit of Hon. Nick Salat, clearly shows that it is limited to disputes arising out of or relating to the "**outcome or the conduct of any nomination for elections or election within the party or any matter connected therewith**". That it is such matters that would be referred by the aggrieved party or parties to the "**Elections Appeals Tribunal**", and in case of any other disputes, it should be referred to arbitration as provided under the article.

c) That the claim before this court does not arise out of, or related to the outcome or conduct of nominations or election. It is about whether or not the registration of the 1st Defendant with the suit land was procured through fraud and if so revocation of their title and permanent injunction. The prayers in the notice of motion dated 15th June 2016 is for temporary injunctive orders in relation to the suit land and the fact that not all the parties in this suit are members of the 2nd Defendant means it is not a matter to be handled within the 2nd Defendant internal organs.

d) That the Plaintiff has vehemently objected to the matter being referred to arbitration. The 1st and 5th Defendants, have opted not to participate in the application as they did not file any papers to indicate their preferred position. That for the reason set out in (c) above and in the absence of concurrence from the Plaintiffs to a reference to arbitration, the court finds that the matter should be heard in court until and unless there is concurrence on arbitration among the parties.

7. That for the above reasons, the notice of motion dated 8th July 2016 is without merit and is dismissed with costs. The court further issues the following directions;

a) That those parties who have not filed their replies and statements of defence to the notice of motion and suit filed through the documents dated 15th June 2016 should file and serve them within 14 days.

b) The party served will have corresponding leave to file a response in 14 days after service.

c) That a hearing date for the notice of motion dated 15th June 2016 be fixed.

d) The interim order on maintaining status quo on possession and use of the suit property is extended to the next hearing date.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 24th DAY OF JANUARY 2017

In presence of;

Plaintiffs/Applicants 1st, 3rd & 5th present

Defendants/Respondents absent

Counsel: Mr. Ouma for the Plaintiffs

Mr. Olel for 2nd to 4th Defendant and

Mr. Orego for the 1st Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/1/2017

24/1/2017

S.M. Kibunja Judge

Mr Oyugi court assistant

1st, 3rd and 5th Plaintiffs present

Mr Ouma for Plaintiffs/Respondents

Mr Olel for 2nd to 4th Defendants. I also hold brief for Orego for the 1st Defendant.

Court: Ruling dated and delivered in open court in presence of 1st, 3rd and 5th Plaintiffs, their advocates Mr. Ouma, Mr Olel for 2nd to 4th Defendants and holding brief for Mr. Orego for 1st Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/1/2017