



REPUBLIC OF KENYA



KENYA LAW
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**Shibira v Agini (Sued in his Capacity as Chairman Vihiga Teachers Benevolent Fund) & 2 others
(Civil Appeal E025 of 2022) [2023] KEHC 25946 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25946 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL E025 OF 2022
JN KAMAU, J
NOVEMBER 27, 2023**

BETWEEN

FRANCIS SEVENI SHIBIRA APPELLANT

AND

**ELPHAS AGINI (SUED IN HIS CAPACITY AS CHAIRMAN VIHIGA
TEACHERS BENEVOLENT FUND) 1ST RESPONDENT**

**BORNFACE MUJIVANE (SUED IN HIS CAPACITY AS SECRETARY VIHIGA
TEACHERS BENEVOLENT FUND) 2ND RESPONDENT**

**NICHOLAS ANYANJE (SUED IN HIS CAPACITY AS THE CHAIRMAN
INDEPENDENT ELECTORAL BOARD - IEB) 3RD RESPONDENT**

*(Being an Appeal from the Judgment of Hon S.O. Ongeru (SPM) delivered at Vihiga in
Senior Principal Magistrate's Court in SPMCC No 102 of 2021 on 26th August 2021)*

JUDGMENT

Introduction

1. In a Plaintiff dated 23rd June 2021 and filed on 24th June 2021, the Appellant herein sought the following reliefs:-
 - a) A permanent injunction restraining the defendants jointly and severally from conducting elections on 26th June 2021 or any other date contrary to the Vihiga Teachers Benevolent Fund By Laws Revised, 2016.
 - b) A declaration that the elections scheduled to be conducted by the 3rd defendant on 26th June 2021 or any other subsequent date are ultra vires the Vihiga Teachers Benevolent Fund By Laws Revised, 2016 and as such the scheduled elections are null and void.



- c) The costs of the suit.
2. On 26th August 2021, the Learned Trial Magistrate, Hon S.O. Ongeru (SPM) dismissed the Plaintiff's suit with costs to the Respondents herein.
 3. Being dissatisfied with the said Judgement, on 20th December 2021, the Appellant herein lodged the Appeal herein. The same was of even date. He set out seven (7) grounds of appeal.
 4. On 28th February 2023, the Respondents wrote to the Deputy Registrar Vihiga High Court seeking to have the Appellant's Record of Appeal dated 5th December 2022 and filed on 9th December 2022 struck out on the ground that several pleadings, affidavit, decree and order to be appealed from had not been annexed in the Record of Appeal. Notably, their Notice of Preliminary Objection dated 1st March 2023 and filed on 2nd March 2023 was not in the court file.
 5. Be that as it may, the Respondents filed Written Submissions dated 17th April 2023 in support of their Preliminary Objection on 20th April 2023. On his part, the Appellant filed his Written Submissions dated 6th June 2023 on even date.
 6. This court did not determine the said Preliminary Objection as the Respondents withdrew the same after the Appellant filed a Supplementary Affidavit dated 25th May 2023 on 26th May 2023. The same had attached copies of documents the Respondents had averred had not been attached in the Record of Appeal. The said Preliminary Objection was withdrawn on 21st June 2023 whereafter the court gave directions on the filing of Written Submissions in respect of the main Appeal.
 7. The Appellant's Written Submissions were dated 7th July 2023 and filed on 11th July 2023 while those of the Respondent were dated 1st August 2023 and filed on 1st August 2023. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

8. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
9. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
10. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issue that had been placed before it for determination was whether or not the Learned Trial Magistrate erred when he dismissed the Appellant's suit.
11. This court therefore dealt with the said under different and distinct heads as shown hereinbelow.

I. Contempt of Court Orders

12. Grounds of Appeal Nos (1), (5) and (6) of the Memorandum of Appeal were dealt with under this head.
13. The Appellant set out the history of the case and pointed out that the Learned Trial Magistrate found that the 3rd Respondent had knowledge of the order but he refused to act as a result of which he found



him in breach and proceeded to fine him a sum of Kshs 10,000/= in default of which his property was to be attached. He added that the 3rd Respondent conducted elections contrary to the injunction order and it was therefore not possible for the Learned Trial Magistrate to have sanitised an election that he had found to have been illegal in the first place.

14. He submitted that the Learned Trial Magistrate misdirected himself seriously by treating contempt of the orders as a technicality as envisaged in Article 159(2)(d) of the Constitution of Kenya which ought to be reviewed by this court.
15. On their part, the Respondents submitted that none of them were sued as candidates or for having been declared as winners of an illegal election but rather they were sued as officials of Vihiga Teachers Benevolent Fund (VTBF). It was their submission that the Learned Trial Magistrate could not nullify elections of person who were not parties to the suit as that was against the rules of natural justice. They asserted that the persons who were elected ought to have been enjoined as interested parties so that they could defend themselves.
16. They further argued that an election could not be nullified merely because one (1) official in the 3rd Respondent conducted the elections contrary to a court order. They disagreed with the Appellant that the Learned Trial Magistrate treated the issue of contempt of court as a technicality as he had contended.
17. They pointed out that the 3rd Respondent was punished for contempt and none of those who were elected were found to have been in contempt of court orders.
18. In his decision, the Learned Trial Magistrate pointed out that the 3rd Respondent was punished for contempt. He added that the office of the 3rd Respondent had not been impugned and that it was in the interests of the parties that he upheld the elections.
19. A perusal of the order of 29th June 2021 that was subsequently annexed to the Supplementary Record of Appeal dated 25th May 2023 and filed on 26th May 2023 showed that the Respondents were restrained from conducting the elections of VTBF that were scheduled on 26th June 2021 or on any other day pending the hearing and determination of the application dated 23rd June 2021. It was apparent that the 3rd Respondent carried out elections and was punished for having been in contempt of court.
20. Nothing stopped the Learned Trial Magistrate from upholding the elections after hearing both sides during trial. Notably, the order of 26th June 2021 was hearing and determination of the application dated 23rd June 2021 (emphasis court). It was an interlocutory order that could be revised, reviews, vacate and/or set aside in the final decision. Indeed, interlocutory injunctive orders are issued to preserve the status quo and do not reflect the conclusive determination of the trial court.
21. This court did not therefore find favour in the Appellant's submissions that the Learned Trial Magistrate contradicted himself and/or was inconsistent in his decision relating to the contempt of court.
22. In the premises foregoing, Grounds of Appeal Nos (1), (5) and (6) of the Memorandum of Appeal were not merited and the same be and are hereby dismissed.

II. Validity or Otherwise of Constitution and by Laws 2016

23. Grounds of Appeal Nos (2), (4) and (7) of the Memorandum of Appeal were dealt with under this head.



24. The Appellant argued that the Learned Trial Magistrate erred and seriously misdirected himself in not having determined whether it was the By Laws 2016 or the Constitution that was valid in the conduct of the elections. He asserted that his analysis of the said issue was contradictory and inconsistent with the pleadings that were filed by both parties.
25. It was his submission that the Learned Trial Magistrate ignored his submissions on what constituted a constitution under the Societies Act Cap 108 (Laws of Kenya). He added that the Respondents failed to discharge their burden when they failed to present the court with the valid documentation after which the Learned Trial Magistrate was to determine which document was fake.
26. He was emphatic that the documents the Respondents produced were fake as they alluded to County Government which institutions were not in existence at the time of promulgation of the Constitution which the Respondents relied upon as the Constitution governing VTBF.
27. On their part, the Respondents submitted that the Appellant failed to prove that the 3rd Respondent could not conduct elections on the ground that it was outside the VTBF By Laws, that the elections of VTBF had to be supervised either by the Department of Social Services or an official from KNUT Regional Council, that the 3rd Respondent was in office illegally or that the 3rd Respondent had usurped the powers given to the Executive Committee by the By Laws.
28. They pointed out that it was actually them who proved that there was nothing known as VTBF By Laws 2016 but that what was in existence was VTBF 2016 Constitution which provided for the 3rd Respondent herein. They further averred that VTBF was the registered Constitution. They faulted the Appellant for not having invoked the Societies Act which had a dispute resolution mechanism.
29. The question of which document was valid was pertinent. Section 20(1)(a) of the Societies Act stipulates as follows:-

“No registered society shall amend its name, or its constitution or rules except with the prior consent in writing of the Registrar, obtained upon written application to him signed by three of the officers of the society.”
30. Maria Goretti Njuki, the Registrar of Societies (hereinafter referred to as “DW 1”) testified that the VTBF proposed amendments of the previous Constitution several times. She indicated that on 30th September 2016, her office received a request seeking the approval of the 1994 Constitution which was approved on 19th November 2016.
31. She denied that a society could be registered on the basis of by laws that were referred to in Section 2 of the Societies Act. She clarified that a Constitution has by laws but that anyone registering a society must produce a constitution.
32. The court perused a document that was known as the Constitution of VTBF. It indicated that the 3rd Respondent was established under Article 20.0 of the Constitution. Its duty was to deal with all matters relating to the election of officials of VTBF. the Constitution was duly executed by the Chairman, Secretary and Treasurer of VTBF.
33. The By Laws Revised 2016 in the Record of Appeal appeared to have been incomplete as they did not reflect the procedure of how elections were to be conducted.
34. It was evident that VTBF already had a Constitution in 1994 and the same had undergone several amendments. A constitution is the grund norm. This means that what is stipulated in by laws cannot override what is stated in a constitution. As there was already in place a Constitution herein by the



- time the alleged VTBF By Laws were enacted in 2016, the Constitution was for all purposes and intent the governing document.
35. Notably, DW 5 told the Trial Court that her office did not have any record of the said By laws, a fact that she stated when she was cross-examined and reiterated when she was re-examined.
36. The burden lay with the Appellant to prove its case as stipulated in Section 107 (1) of the *Evidence Act* which states as follows:-
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
37. Further, Section 108 of the *Evidence Act* stipulates as follows:-
- “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
38. In addition, Section 109 of the *Evidence Act* further states that:-
- “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
39. Notably, the reasoning of the Learned Trial Magistrate on why he dismissed the Appellant’s suit was different from the reasoning of this court. He dwelt more on what the Appellant ought to have done.
40. On the other hand, this court considered all the evidence that was adduced during trial and the respective Written Submissions and came to the firm conclusion that the Appellant did not prove its case to the required standard which in civil cases is proof beyond reasonable doubt.
41. It was this court’s finding that the elections of VTBF could only have been conducted by the 3rd Respondent as was envisaged in the Constitution and that having been conducted in such manner, the officials who were elected were deemed to have been validly elected after the Appellant’s suit was dismissed by the lower court.
42. Indeed, the fact that elections of the officials of VTBF were elected pursuant to a disregard of court orders did not negate the validity of their elections after the Learned Trial Magistrate heard the dispute on merit. In other words, the disobedience of the court orders did not taint the process of the elections which were conducted as per the VTBF Constitution as the 3rd Respondent was punished for having conducted the elections contrary to a court order, a fact that the Learned Trial Magistrate aptly elucidated in his decision.
43. As this court found and held that the elections of VTBF were to be conducted in accordance with the VTBF Constitution and not under the VTBF By laws 2016 which were the substratum of the Appellant’s case in the lower court, there was no leg for the Appellant’s suit to stand on. It therefore lent to his Appeal herein being dismissed.
44. In the premises foregoing, Grounds of Appeal Nos (2), (4) and (7) of the Memorandum of Appeal were not merited and the same be and are hereby dismissed.



Disposition

45. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated and filed on 20th September 2022 was not merited and the same be and is hereby dismissed. As the Appellant was a member of Vihiga Teachers Benevolent Fund (VTBF), this court will deviate from the general principle that costs follow the event and direct that each party will bear its own costs of the Appeal herein.
46. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF NOVEMBER 2023

J. KAMAU

JUDGE

