



Ndolovo & 3 others (Suing on Behalf of Executive Board of Mudete Factory Tea Growers Cooperative Savings and Credit Society) v Mwisanyi & 4 others (Petition 1 of 2022) [2022] KEHC 13454 (KLR) (23 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13454 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
PETITION 1 OF 2022
WM MUSYOKA, J
SEPTEMBER 23, 2022**

BETWEEN

**SAMWEL MUHANJI NDOLOVO 1ST PETITIONER
ELAM INDULAJI LUGANO 2ND PETITIONER
JOHN MATAKAYIA 3RD PETITIONER
CHARLES KIBISU GUNYALI 4TH PETITIONER
SUING ON BEHALF OF EXECUTIVE BOARD OF MUDETE FACTORY TEA
GROWERS COOPERATIVE SAVINGS AND CREDIT SOCIETY**

AND

**DUNSTON MWISANYI 1ST RESPONDENT
HEZRON MUKAVALA 2ND RESPONDENT
EZRA MUTANGE 3RD RESPONDENT
THOMAS ADULA 4TH RESPONDENT
COUNTY DIRECTOR OF COOPERATIVE - KAKAMEGA .. 5TH RESPONDENT**

RULING

1. The petitioners moved the court by way of a petition, dated March 24, 2022, and notice of motion of even date. The motion was compromised by consent of the parties, in terms that the court should proceed to deal with the petition, that there be status quo to the extent of the petitioners and the 1st to 4th respondents not executing any duties of their offices pending determination of the petition, that the Chief Executive Officer (CEO) of Mudete Factory Tea Growers Cooperative Savings and Credit Society (the Society) to continue performing his duties unaffected by the pendency of the petition.



Directions were given for filing of responses and the canvassing of the petition by way of written submissions.

2. Further orders or directions were made by the court on April 25, 2022, to effect that judgment on the petition was to be delivered on April 27, 2022, the CEO of the society to fully operate account No xxxx at Cooperative Bank Kakamega Branch and to render an account on operational issues of the society to court every 30 days until further orders, and that the CEO of the society was permitted to receive and consider applications for scholarships for the needy or deserving students. The parties were given liberty to apply.
3. The case by the petitioners is that they are currently the recognized officials of society in the capacities indicated in this petition. They aver that, by dint of by-law No 35 of the society, the society is supposed to hold elections at every annual general meeting, which is normally held in the months of March of every succeeding year, and prior to any elections being held, the secretary is mandated to issue a fourteen (14) days mandatory notice to all delegates after the board of directors has approved the issuance of such notice. They aver that by-law No 36 of the society provides for a rotational membership of the board, and the current members of the board have a tenure of 3 years, but one third of them must retire every year, but are also eligible for re-election, based on the rotational basis provided under by-law No 36. It is averred that the regions with representation in the board of directors of the society are Sabatia, Hamisi, Vihiga, Shinyalu and Ikolomani Sub-Counties, each with two slots at the board.
4. They aver further that it is a requirement that any eligible candidate for the position of director to have, prior to the electioneering period, accumulated deposits of Kshs 100,000.00. They aver that pursuant to the notice issued by the Secretary on the March 4, 2022, the respondents proceeded to hold elections in the rotational regions, where the said respondents were irregularly and unprocedurally, and in total disregard to the provision of the Constitution of Kenya, and in particular article 38(2), installed themselves as members of the board of directors of the society.
5. It is contended that to demonstrate the irregularity or illegality of the purported elections the 1st and 2nd respondents all come from Shinyalu Sub-County, which constitutes one rotational electoral unit, in essence denying equitable rotational representations on the board by the other regions. It is further contended that the 2nd respondent is not a supplier of tea to the society's factory, and he did not have the required 100,000 shares at the time of the notice, and that he only topped up his shares after the notice was issued.
6. The petitioners aver that, just like any other elections that involve members of the public, it was prudent that the process be procedural as laid down, allowing members to freely vote and choose their leaders in a free and fair environment, and most importantly upholding the dictates of democracy, as enshrined under the Bill of Rights in the Constitution of Kenya 2010. The petitioners, from the foregoing, aver that the purported elections, carried out on March 19, 2022, purporting to oust them as directors, were not in accordance with the society's by-laws, the election rules and regulations, and the Constitution of Kenya 2010, hence the entire process was a sham, a democratic mirage and an unconstitutional exercise.
7. The reliefs sought in the petition are:
 - a) A declaration that the society is an elective public body and as such the petitioners have rights and fundamental freedoms under the Bill of Rights of the Constitution of Kenya, including, but not limited, to free, fair and regular elections based on universal suffrage and the free expression of their will as electors or delegates in the said society;
 - b) A declaration that the resultant activities emanating from the decision taken on the March 19, 2022 by the respondents was null and void for want of consistency with the Constitution;



- c) An order of mandamus directed at the respondents to carry out a repeat election as per the society's by-law governing elections in the Constitution of Kenya;
 - d) An order of injunction to restrain the respondents whether acting by themselves or through their agents or servants from assuming office as elected directors of the society or doing anything in their capacity as such until proper elections are conducted in accordance with the society's by-laws and the Constitution of Kenya 2010;
 - e) Costs of the petition; and
 - f) Any other or further relief that the court deems fit and just to grant in the circumstances.
8. The respondents filed their reply to the petition on April 6, 2022. They aver that by-laws Nos 35, 36 and 38, cited by the petitioners, are non-existent, and, therefore, the petition is defective. They state that the correct by-laws are those revised in 2011, and approved by the Commissioner for Cooperatives on May 22, 2012. The respondents hold that their participation in the elections of March 19, 2022 was truly in accordance with the society's by-laws, and that they did not in any way violate the Constitution of Kenya 2010. They further hold that the society conducts elections for its directors in two of its electoral areas each year, and that by virtue of the notice dated March 4, 2022, the then secretary, John Matakaya, the 3rd petitioner herein issued a notice for the election of the directors in the electoral areas of Hamisi, Vihiga and Shinyalu which were to be held on March 19, 2022. The respondents hold that the said secretary was, at the time, a sitting director of the Society representing 'Shinyalu A', and he ought to have been retiring, but he was legible for election, and was indeed a candidate for that electoral area in the said elections.
9. It is averred that the 1st, 2nd and 4th respondents did not participate in the said elections as candidates as their electoral areas were not a subject of the rotational elections provided in the by-laws. The 1st respondent who represents Shinyalu B as the director was not due for rotational election, and, therefore, he did not participate in the said elections. It is averred that the petitioners have not fully disclosed the facts on the said elections, as they did not state that one Jason Ingeta participated in the said elections, and was elected as director representing Hamisi West in the board of the society, and, therefore the petitioners are guilty of non-disclosure. It is averred that the 3rd respondent is a director representing Vihiga B, and not going on rotation, and, therefore, he never participated in the elections, and he should not have been brought into the matter. It is stated that the 4th respondent was a sitting director representing Vihiga, and was subject to rotation, and he was the only candidate in the area, and was, therefore, unopposed and his election should not be an issue.
10. The respondents further contend that the 2nd respondent is a duly paid up member, in that he takes his tea to Mudete tea factory, collected at Ileho buying centre No 7, where he is a delegate. It is further averred that the 2nd respondent had reached the 100,000,00-share threshold, and was vetted on March 18, 2022, and found to be duly qualified to participate in the elections.
11. The respondents have attached documents to confirm the electoral areas where the elections were conducted on March 19, 2022 and the respective candidates who participated. These are: 3rd petitioner- John Matakaya for Shinyalu A, 2nd respondent-Hezron Mukavale for Shinyalu A, 4th respondent-Thomas Adula for Vihiga, Jason Ingida for Hamisi (who not a party in this petition), and Stanley Ehagy for Hamisi – (who is not party to this petition). The respondents, therefore, argue that the elections of March 19, 2022 were regular, peaceful and legally conducted, and the leaders who were victorious were: Thomas Adula- Vihiga, Jason Ingida -Hamisi, and Hezron Mukavale – Shinyalu. It is further averred that the three were accordingly issued with certificates.



12. The respondents assert that after the said elections were concluded, the 1st petitioner, who was the then chairperson of the society, presided over a board meeting, where the board was reconstituted, in light of the outcome of the said elections. They aver that in the said meeting it was clear that the 1st petitioner lost to the 1st respondent, 2nd petitioner lost to the 2nd respondent and the 4th petitioner lost to the 4th respondent, respectively, and that the said changes were purely a boardroom reconstitution of the board, not an election, since elections had already been finalized, by participation of the delegates, and hence the absence of the 3rd petitioner from the the boardroom reconstitution since he had lost in the elections for Shinyalu A.
13. It is contended by the respondents that the elections of March 19, 2022 were conducted freely and fairly, and in accordance with the by-laws of the society, and, therefore, the petition lacks merit, has been brought in bad faith and the same ought to be dismissed with costs.
14. The record before me reflects that only the respondents filed written submissions. In the same, they reiterate the averments in their response, and emphasize that the petitioners have not produced any evidence, whether oral or documentary, to prove their case. They hold that contrary to the claim by the petitioners, the elections held on March 19, 2022 were regular, free, fair and democratic. They submit that the petition lacks merits and should be dismissed. On the issue of costs, the respondents submit that in most cases constitutional petitions do not attract costs, but in this case they should be awarded costs, since the petitioners ought to have filed the dispute at the Cooperative Tribunal, and not the High Court, as the issues raised did not merit the filing of a constitutional petition.
15. The issues that arise for determination, from the filings before me, are: whether this court has jurisdiction to deal with the petition, and whether the elections of March 19, 2022 were free, fair and regular in accordance to the by-laws.
16. I will start by addressing the issue of jurisdiction, which is a key consideration, which must be determined beforehand. It has been held, in a number of cases, that jurisdiction is everything, and without it a court should down its tools. The case classicus on this in Kenya is *The Owners of Motor Vessel 'Lillian S' vs. Caltex Oil Kenya Limited (1989) KLR 1* (Nyarangi, Masime & Kwach, JJA), where it was said:

' By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'



17. Section 76 of the *Cooperative Societies Act*, Cap 487, Laws of Kenya, deals with disputes. It states as follows:

' 76. Disputes

- (1) If any dispute concerning the business of a co-operative society arises—
 - (a) among members, past members and persons claiming through members, past members and deceased members; or
 - (b) between members, past members or deceased members, and the society, its committee or any officer of the society; or
 - (c) between the society and any other co-operative society, it shall be referred to the tribunal.
- (2) A dispute for the purpose of this section shall include—
 - (a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or
 - (b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not; or
 - (c) a claim by a sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.'

18. In *Alex Malikhe Wafubwa & 7 Others vs Elias Nambakha Wamita & 4 Others [2012] eKLR (Gikonyo J)*, the court said, with respect to jurisdiction of the High Court, over disputes around elections in cooperative societies:

- (65) I therefore find that the disputes herein relate to; elections, illegal holding of office, failure to convene a general meeting by the management committee, or special general meeting by the Cooperative Commissioner which are not akin to the powers of the Cooperative Tribunal under sections 76, 77 and 80 of the act. In particular, the tribunal does not have jurisdiction to issue judicial review orders which is one of the jurisdictions the petitioners are seeking orders from.
- (66) I am aware that the value of constitutional remedies will be greatly diminished if every legal complaint is elevated to a constitutional issue. But, in my assessment, the allegations in the petition are not trivial complaints which have merely been inflated in the hope that they will pass for constitutional issues. They are issues which merit a trial by this court; it is the one with jurisdiction to hear and decide constitutional issues under article 165 of the *Constitution*.



The course I have taken does not offend the Cooperative Societies Act, neither is it a replacement of the dispute-resolution mechanism provided in the act nor a prejudice to the right to access to justice. It is as a result of the finding of the court that the matters complained of herein raise constitutional issues on which the tribunal will not have jurisdiction.'

19. In this case, and guided by the above authority, I find and hold that this court has jurisdiction to handle this matter, for the reason that the issues raised do not fall under the description of a dispute under the ambit of section 76 of the *Cooperative Societies Act*. Therefore, the position by the respondents that this petition ought to be handled by the Cooperative Tribunal is not the correct.
20. On whether the elections held on March 19, 2022 were free, fair and regular in accordance to the by-laws, the petitioners have annexed a full set of what they consider to be the relevant by-laws, but the same are neither dated nor signed. It is, therefore, not clear when they became effective, or whether they are even authentic. The second document annexed is a letter dated March 4, 2022, on the annual rotational elections and by-elections. The other bundles of documents annexed are, in my opinion, irrelevant, to the context of this petition, as they do not relate to the elections held on March 19, 2022. The respondents have, on the other hand, availed all relevant information, by their annexures, in respect of the elections, such as the by-laws dated May 22, 2012 duly signed, the various notices, relevant minutes and the certificates issued to the victorious members. I am satisfied that the due procedures were followed in the election process.
21. Burden of proof lies with the petitioners, to establish that the elections were irregular or unlawful. Section 107 of the *Evidence Act*, Cap 80, Laws of Kenya, states as follows, with respect to burden of proof:
 - ' 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'
22. I have very closely perused through the documents presented by the petitioners, and I am not persuaded that the petitioners have established a case for grant of the orders that they are seeking. The preponderance of evidence tilts in favour of the respondents, and I hereby accordingly dismiss the case against them. Being a constitutional petition, brought in public interest, to audit how public bodies conduct their affairs, I am not inclined to grant orders. The interim or interlocutory orders, granted herein earlier, are hereby discharged. Orders accordingly.
23. This judgment had been fixed for delivery in May 2022. Unfortunately, the file was misplaced, hence the delay. I regret the same, and I apologise to the parties and their advocates, for the inconvenience and the anxiety that has, no doubt, been occasioned.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 23RD DAY OF SEPTEMBER, 2022.

WM MUSYOKA

JUDGE

Erick Zalo, Court Assistant.

Mr Chitwah, instructed by DC Chitwah & Company, Advocates for the petitioners.



Mr JJ Mukavale, Advocate for the respondents.

