



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**CIVIL CASE NO. E004 OF 2021**

**JULIUS KARIUKI WANGAI.....1<sup>ST</sup> PLAINTIFF**

**JEFFERSON KARIUKI MWANGI.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**OL KALOU CENTRAL FARMERS COOPERATIVE**

**SOCIETY LTD..... DEFENDANT**

**RULING**

1. The Plaintiffs/Applicants lodged instant suit challenging election of Defendant Society of 28/11/2019 and sought same to be annulled.
2. The Plaintiffs are members of the Defendant. The defendant denied claim in the instant suit the Plaintiffs/Applicants lodged. The applicants contemporaneously in filing suit lodged for interim injunction to which it was directed to be canvassed via submissions which parties filed and exchanged.
3. The application is undated but filed on 22/04/2021 and it sought to stop Defendant/Agent from allowing its newly elected leaders elected in SGM of 28/11/2019 from assuming office pending hearing and determination of the suit.
4. The same is supported by Affidavit of Julius Kariuki Wangeci sworn on 19/04/2021. The same is opposed via affidavit of Patrick Muthaka Secretary of Defendant sworn on 28/06/2021.

**APPLICANTS CASE**

5. Ol Kalou Central Farmers Co-operative Society Ltd was registered on 20/01/1965. Most of its founding members have since died or ceased to be members of the society. As per the Society's by-laws, the members are required to appoint nominees who shall become members after their death.
6. Between 1996 and 2018 the Society went through a period of dormancy occasion by financial struggles. The Society became active again in 2018 and according to the elections held on 15/05/2019, the Plaintiffs/Applicants were elected as Chairman and Secretary of the Society respectively.
7. Owing to the period of the Society's dormancy, it was imperative that the members' register be updated to ascertain the legitimacy of the members of the Society. A number of illegitimate members had sneaked into the Society and started posing as true members.
8. Six months after the Plaintiffs had been elected as officials of the Society, illegal elections were held by the Defendant and new officials elected and the Plaintiffs were locked out of the said elections. The election is contested as most members who participated in the said elections are not bona fide members of the Society.

**SUBMISSIONS:**

9. They submit that they have established a prima facie case as was held in the case of ***Mrao Ltd v First American Bank of Kenya & 2 Others [2003] KLR 125*** where the Court of Appeal defined a prima facie case as:

***“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”***

10. Reason being, they are the immediate former Chairman and Secretary of the Society. The Plaintiffs have also shown that they were locked out of the illegal elections held on 28/11/2019 by the Defendant in which new officials were elected to the Society. The Plaintiffs had barely held office for six months before the Defendant conducted illegal elections which led to their ouster.

11. **They contend that, they are likely to suffer irreparable loss in that** On or about January 2019, an inspection report was conducted by the Ministry of Industrialization, Trade and Co-operative Development of Nyandarua County which recommended that the Society's members' register be updated. This was crucial to ascertain the legitimacy of the members of the Society.

12. To date, the members' register is yet to be updated and illegitimate members continue posing as real members of the Society. The Plaintiffs are apprehensive that the newly elected officials will interfere with the Society's original documents including its members' register if the orders sought in this application are not issued by the Honorable Court.

13. This may in turn permanently lock out the Plaintiffs from holding office in the Society. Such an incident cannot be quantified in terms of monetary damages hence irreparable loss will be occasioned to the Plaintiffs.

#### **RESPONDENT CASE:**

14. The Defendant's case is set out in its secretary's replying affidavit dated 28/06/2021, which is to the effect that, by a letter dated 08/11/2019 as per **Section 27(6) (b) of the Co-operative Societies Act, 1997**, the said letter is said to have expressly stated the objects and reasons for the meeting, which included elections as agenda number 6. The said meeting was conducted as per the aforesaid law and elections were validly done hence no right of the Plaintiffs was infringed as claimed.

15. As indicated above, elections were done legally and lawfully and new officials were validly elected. It is the Plaintiffs who have continued to interfere with the activities of the Defendant, bringing great discord in its operations and denied public interest an office service that the public is dully entitled to.

16. The Plaintiffs have been instituting cases in various courts as indicated in the Defendant's replying affidavit, which have either been dismissed by the court or withdrawn by the Plaintiffs. The Plaintiffs have been forum-shopping by making applications and instituting suits that are in bad faith, with a view of hampering the activities of the Defendant.

17. The Plaintiffs are also in contempt of court orders which were issued by the Honorable Tribunal on 25/02/2020, whereby the new officials were to assume office and hold the said offices in the interest of continuity. The Plaintiffs have blatantly refused to cease and desist from interfering with the activities of the Defendant and allow the new officials to take mantle and continue its activities.

#### **SUBMISSIONS:**

18. Thus Respondent submit that applicants will not suffer any irreparable loss. Reason being that, the allegations that the members' register is yet to be updated and illegitimate members continue posing as real members of the Defendant are misleading and flawed.

19. The impugned elections were done legally and lawfully and new officials were validly elected. It is the Plaintiffs who have continued to interfere with the activities of the Defendant, bringing great discord in its operations and denied public interest an office service that the public is dully entitled to.

20. The Plaintiffs have been instituting cases in various courts as indicated in the Defendant's replying affidavit, which have either been dismissed by the court or withdrawn by the Plaintiffs.

21. The Plaintiffs have been forum-shopping by making applications and instituting suits that are in bad faith, with a view of hampering the activities of the Defendant.

22. The Plaintiffs are also in contempt of court orders which were issued by the Honorable Tribunal on 25/02/2020, whereby the new officials were to assume office and hold the said offices in the interest of continuity.

23. The Plaintiffs have blatantly refused to cease and desist from interfering with the activities of the Defendant and allow the new officials to take mantle and continue its activities.

24. In light of Plaintiffs' conduct, it is the Defendant that will suffer irreparable loss since it is also on the verge of losing proprietorship of some of its properties which the Plaintiffs have been pushing to be demolished, with not colour of right or authority whatsoever.

#### **ISSUES, ANALYSIS AND DETERMINATION**

25. After going through the materials before me, I find the issues are **whether the application has merit and what is the order as to costs?**

26. law on granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides: -

*"Where in any suit it is proved by affidavit or otherwise—*

*(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or*

wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;

*(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."*

27. The conditions for consideration further in granting an injunction is now well settled in the case of Giella vs Cassman Brown & Company Limited (1973) E A 358, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction: -

*"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."*

28. Under Section 27 of the Cooperatives Societies Act cap 490 Laws of Kenya, the society can hold a general meeting. Thus by a letter dated 08/11/2019 as per Section 27(6) (b) of the Co-operative Societies Act, 1997, the said letter expressly stated the objects and reasons for the meeting, which included elections as agenda number 6.

29. The impugned elections were done pursuant to the cited provisions 27 of Coop Act supra and new officials were elected.

30. By application no 726 of 2019 dated 2/12/019 the applicants challenged the said elections before the cooperative tribunal. The applicants failed to disclose that fact in the instant matter as a sign of bad faith on their part.

31. The respondent stated that the applicant failed to secure any favorable order a fact not denied. The court notes that on 3/3/021 the said case was withdrawn also a fact not disclosed by the applicants.

32. In the case of Lillian's S versus Caltex Oil K Ltd [1989] LLR 1653 (CAK) at page 20 the court stated that *"in considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure the principles relevant to the issues in these appeals appear to me to include the following: - The duty of the applicant is to make a full and fair disclosure of the material facts. The material facts are those which it is material for the judge to know in dealing with the application was made, materiality is to be decided by the court and not by the assessment of the application or his legal advisor.*

33. The above no disclosure is enough to disentitle applicant's orders sought.

34. The elections were held on 28/11/019 and this suit was lodged on 12/4/019 without any explanation of over 5 months since elections were held. No wonder the court found no urgency in the application for temporary injunction.

35. Another fundamental error by the applicants is the omission to sue and /join the officials elected on 28/11/019.They are vital and interested persons who would be affected by the orders of nullification of elections impugned.

36. The court, in Pinnacle Projects Limited vs. Presbyterian Church of East Africa, Ngong Parish & another [2018] eKLR, had the following to say on Article 50 with respect to fair trial principles in civil cases:

*"While the wording of Article 50 of the Constitution on the right to a fair hearing prima facie seems to focus on criminal trials it's not lost that fair trial in civil cases includes: the right of access to a court, the right to be heard by a competent independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit is filed, the right to a public hearing, and the right to be heard within a reasonable time."*

11. The court went on to say:

*"... it is important that in any judicial process adjudication parties involved be given opportunity to present their case and have a fair hearing before the decision against them is made by the respective judge or magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system."*

37. This is a matter which commends itself to go for full trial while the status quo being maintained. The status quo being that the officials elected on 28/11/019 to continue running the affairs of the respondent without interference by the applicants until the suit is heard and determined.

38. Thus the court finds no merit in the instant application and same is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 21ST DAY OF OCTOBER, 2021.

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**CHARLES KARIUKI**

**JUDGE**