



**Vitalis P Lukiri v Commissioner for Cooperatives Development, County Director of Cooperatives Nairobi County Government, Sacco Societies Regulatory Authority & Afya Savings and Credit Society Limited (Petition 21 of 2020) [2020] KEHC 7401 (KLR) (Constitutional and Human Rights) (9 March 2020) (Judgment)**

*Vitalis P Lukiri v Commissioner for Cooperatives Development & 3 others [2020] eKLR*

Neutral citation: [2020] KEHC 7401 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION 21 OF 2020**

**WK KORIR, J**

**MARCH 9, 2020**

**BETWEEN**

**VITALIS P LUKIRI ..... PETITIONER**

**AND**

**COMMISSIONER FOR COOPERATIVES DEVELOPMENT .. 1<sup>ST</sup> RESPONDENT**

**THE COUNTY DIRECTOR OF COOPERATIVES NAIROBI COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**THE SACCO SOCIETIES REGULATORY AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

**AFYA SAVINGS AND CREDIT SOCIETY LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. Prior to 10<sup>th</sup> January, 2020, the Petitioner, Vitalis P. Lukiri was a Committee Member and Chairman of the 4<sup>th</sup> Respondent, Afya Savings and Credit Society Limited. On the said date, a letter Ref. No CS/1981/Vol. XXVIII/(18)/75 was addressed to him by the 1<sup>st</sup> Respondent the Commissioner for Co-operatives Development.
2. The letter addressed the Petitioner thus:-

“RE: Removal From Office

Pursuant to Section 28(4)(m) of the Co-operative Societies Act, Cap 490 you are illegally in office as a Committee Member as well as the Chairman of Afya Sacco Society.



The said illegality is in view of the Award of the Co-operative Tribunal Case No 157 of 2006 dated 6<sup>th</sup> November 2009, which declared that you are unfit to hold office. The Co-operative Tribunal Award was upheld by the High Court in the Nairobi High Court Civil Appeal No 625 of 2009.

Consequently, you are hereby removed from holding the office of a Committee Member and that of the Chairman of the Afya Sacco Society with effect from 1<sup>st</sup> January 2020.

By a copy of this letter, the County Director of Co-operatives Nairobi is directed to convene a Board Meeting for the purpose of reconstituting the office and/or co-opting other members into the Board if deemed necessary in accordance with the Society By-Laws.”

3. The letter was signed by Geoffrey N. Njang’ombe, the Acting Commissioner for Co-operatives Development and copied to the 2<sup>nd</sup> Respondent, the County Director of Co-operatives, Nairobi County Government and the 3<sup>rd</sup> Respondent, the Sacco Societies Regulatory Authority (SASRA).

4. The 1<sup>st</sup> Respondent’s action triggered the filing of the petition dated 22<sup>nd</sup> January, 2020 by the Petitioner in which he seeks orders as follows:-

- “(a) An injunction restraining the 1<sup>st</sup> Respondent whether by himself, his servants or agents or howsoever otherwise from removing the Petitioner from holding the office of a Committee Member and Chairman of the 4<sup>th</sup> Respondent.
- (b) An injunction restraining the Respondents jointly, whether by themselves, their servants or agents or howsoever otherwise from reconstituting the Board of the 4<sup>th</sup> Respondent.
- (c) A declaration that the decision and order of the 1<sup>st</sup> Respondent dated 10<sup>th</sup> January, 2020 removing the Petitioner from holding the office of a Committee Member and Chairman of the 4<sup>th</sup> Respondent is illegal, null and void.
- (d) Costs of the Application be provided for.”

5. A perusal of the pleadings and submissions filed in this matter shows that the Petitioner’s case revolves around Article 47 of the Constitution. The Article provides inter alia:-

- “47. Fair administrative action
  - (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
  - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

6. The petition is based on two grounds namely that the Petitioner was removed without being afforded a hearing and that the removal was unjustified.

7. The 1<sup>st</sup> – 3<sup>rd</sup> respondents’ case is premised on a notice of preliminary objection dated 10<sup>th</sup> February, 2020 through which the petition is opposed on the grounds that:-

- “a) That the Constitution Petition and the application praying for conservatory orders should be dismissed in limine as the High Court lacks jurisdiction



to determine the matter in light of the provisions of Article 165, since the matter has been heard and determined by a court of concurrent competent jurisdiction.

- b) That the Constitution Petition should be dismissed as the issues raised therein are *res judicata* having been previously dealt with in CTC 157 of 2006 Peter Kariuki Mugo & 10 others v D. L. R. Waroe & 9 others and the said decision confirmed by the High Court on appeal in Nairobi HCCA No 625 of 2009.
- c) That the matter is sub judice.”

8. The three respondents also filed a replying affidavit sworn on 17<sup>th</sup> February, 2020 by the Acting Commissioner for Co-operatives Development, Geoffrey N. Njang’ombe in which he reiterates the contents of the notice of preliminary objection. Mr Njang’ombe also averred that although the Petitioner had obtained stay of the decision in CTC No 157 of 2006 in High Court Civil Appeal No 718 of 2017, the said stay was only for a period of 45 days and it lapsed on 31<sup>st</sup> March, 2018 and had not been extended.
9. It was Mr Njang’ombe’s averment that the 1<sup>st</sup> Respondent removed the Petitioner who was illegally in office in accordance with the Co-operative Tribunal Award in CTC No 157 of 2006 which was confirmed by the High Court in HCCA 625 of 2009.
10. The 4<sup>th</sup> Respondent opposed the petition through two replying affidavits sworn by its Chief Executive Officer, Felix M. Ndoi on 5<sup>th</sup> February, 2020 and 10<sup>th</sup> February, 2020.
11. In summary, the 4<sup>th</sup> Respondent’s case is that the removal of the Petitioner from office is legal as the same was done in accordance with the orders issued in Co-operative Tribunal Case No 157 of 2006 and confirmed by the High Court in HCCA No 625 of 2009. Further, that although the Tribunal’s award in CTC No 157 of 2006 was stayed by the High Court in HCCA No 718 of 2017, the stay which was only for 45 days lapsed on 31<sup>st</sup> March, 2018 and there has never been any extension of the orders to date.
12. It is the 4<sup>th</sup> Respondent’s CEO’s deposition that the award in CTC No 157 of 2006 confirmed in HCCA No 625 of 2009 found the Petitioner unfit to hold office and that award remains in force to date.
13. As for the merits of the petition, Mr Ndoi averred that there is no violation of rights disclosed by the petition. Further, and without prejudice, that if any elections were to be held the Petitioner will not be eligible to contest as he has already served two terms and has attained the age of sixty years.
14. The Petitioner had filed an application at the time of filing the petition seeking conservatory orders. The 4<sup>th</sup> Respondent responded to it through grounds of opposition dated 27<sup>th</sup> January, 2020. Some of those grounds raise jurisdictional issues as follows:-

“3. That the Petitioner’s suit before this Honourable Court seeks to get the same Orders already sought in other suits in different Courts all having the same jurisdiction, that is:-

- i) Judicial Review Application Miscellaneous Application No 4 of 2020 by the Petitioner herein and the same Respondents.
- ii) The Co-operative Tribunal Case No 7 of 2020.



iii) Judicial Review Application No 11 of 2020 by the former Vice-Chairman Mr. Simon Kariuki against the same Respondents and the Petitioner herein is also a Party.

4. ....

5. That the Orders sought under prayer 2 of this petition have already been addressed by a competent Court and the attempt by the same litigant to bring it back is not only an abuse of the Court, but Res-judicata.

6. ....

7. ....

8. That the Petitioner's interpretation of the Court Orders made in Co-operative Tribunal Case No CTC 157 of 2006, High Court Appeal Case No 625 of 2009 and High Court Civil Appeal No 718 of 2017, and several rulings made in the same case are totally wrong.

9. That the Petitioner's claim that the Constitution of the society in its By-Laws which governs its operations and the day-to-day running and which binds everybody including the Petitioner, and according to the same By-Laws, the Petitioner's term is 2 terms of 3 years each and to the contrary, the Petitioner has been in office for more than 5 terms"

15. The Petitioner filed written submissions dated 26<sup>th</sup> February, 2020. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' submissions were filed on 27<sup>th</sup> February, 2020 and those of the 4<sup>th</sup> Respondent were filed on 25<sup>th</sup> February, 2020.

16. The Petitioner has correctly flagged out the two key issues for determination in this case being whether this court has jurisdiction to entertain the petition and if so, whether the orders sought in the petition should be granted.

17. The respondents raise a jurisdictional question on two grounds namely that the issues raised herein are sub judice other matters filed at the Co-operative Tribunal and the High Court by the Petitioner, and that the issues raised in the petition are *res judicata*.

18. There is a related issue raised by the 4<sup>th</sup> Respondent, which though not an issue of jurisdiction is best disposed of at this stage. This is the claim that the Petitioner has served more than two terms of three years each hence violating the by-laws of the 4<sup>th</sup> Respondent. The answer to this issue is that what is before this court is not whether or not the Petitioner is illegally in office for any other reason other than what is stated in the letter of the 1<sup>st</sup> Respondent dated 10<sup>th</sup> January, 2020. Nowhere in that letter is the Petitioner accused of having overstayed in the office. The attack on the petition on this particular ground finds no favour with the court. The opposition on this ground is therefore rejected and dismissed

19. Now to the question of sub judice. When the petition came up for hearing on 27<sup>th</sup> February, 2020 the advocates for the parties indicated to the court that the Petitioner has since withdrawn Co-operative Tribunal Case No 7 of 2020 and Judicial Review Miscellaneous Application No 4 of 2020. That means the only remaining matter is Judicial Review Application No 11 of 2020 filed by one Mr Simon Kariuki. The 4<sup>th</sup> Respondent alleged in the grounds of opposition dated 27<sup>th</sup> January, 2020 that the Petitioner is also a party to that case but did not pursue the allegation during the hearing. In the



circumstances I find that the issue of sub judice has been overtaken by events and does not merit any further attention from this court.

20. On the issue of *res judicata*, the respondents claimed that the issues raised herein were addressed by a competent court of co-ordinate jurisdiction in Nairobi HCCA No 627 of 2009 D. M. K. Waroe & 9 others v Peter Kariuki Mugo & 10 others. Counsel for the Petitioner brushed off this assertion and stated that the cause of action in the instance petition arose on 10<sup>th</sup> January, 2020 and could not have been addressed in the said civil appeal.
21. The ingredients of the doctrine of *res judicata* were reiterated by the Court of Appeal in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR; Civil Appeal No 105 of 2017 (Nairobi) as follows:-
  - “Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
    - a. The suit or issue was directly and substantially in issue in the former suit.
    - b. That former suit was between the same parties or parties under whom they or any of them claim.
    - c. Those parties were litigating under the same title.
    - d. The issue was heard and finally determined in the former suit.
    - (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
22. It does not require great mental exercise to agree with the Petitioner that when the doctrine of *res judicata* is applied to the facts of this case it becomes clear that this case is indeed not *res judicata*. The Petitioner’s petition is premised on the decision of the 1<sup>st</sup> Respondent conveyed through the letter dated 10<sup>th</sup> January, 2020. The Petitioner alleges that the letter violated his constitutional rights. Although the letter may be implementing the decision in Nairobi HCCA No 625 of 2009, it actually generates a new cause of action which is separate and independent from the cause of action adjudicated upon in Nairobi HCCA No 625 of 2009.
23. The question that needs to be asked is whether the 4<sup>th</sup> Respondent’s said letter has actually violated the Petitioner’s constitutional rights. This is a novel issue which has not be tried before by any other court and the Petitioner is entitled to knock upon the door of this court and hear the opinion of the court on that issue. There is therefore no merit in the respondents’ claim that the petition is *res judicata*.
24. During the hearing of the petition I heard the Petitioner say that the respondents had submitted that this was a matter for the Co-operative Tribunal and this court therefore lacked jurisdiction in that respect. I do not seem to see this particular allegation in the respondents’ pleadings. I do not find this line of argument in the 1<sup>st</sup> – 3<sup>rd</sup> respondents’ submissions. I also do not seem to place a finder on this argument in the 4<sup>th</sup> Respondent’s submissions. I will therefore let the matter rest on the understanding that since it was not raised in the pleadings, it cannot form the basis of the court’s decision even if it was taken up in the submissions. See *Daniel Torotich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR.
25. The preliminary objections raised by the respondents’ having fell by the wayside, the only question that remains for the determination of this court is whether this petition has merit.



26. The journey must start in Co-operative Tribunal Case. No 157 of 2006 Peter Kariuki Mugo & 11 others v D. M. K. Waroe & 9 others. One of the orders made in the award dated 6<sup>th</sup> November, 2009 was to the effect that:-

“7. Regarding prayer No (f), we declare that section 28(4)(m) applies in view of the Tribunal’s ruling dated, 27<sup>th</sup> September, 2007.”

27. The award was made in respect of a claim filed in May, 2006 by the claimants seeking among others an order that:-

“f) The Defendants be declared unfit to hold office on their own admission as liability.”

28. The respondents in the CTC No 157 of 2006 filed Nairobi High Court Civil Appeal No 625 of 2009 D. M. K Waroe & 9 others v Peter Kariuki Mugo & 10 others. In a judgment delivered on 27<sup>th</sup> January, 2017, Serгон, J dismissed the appeal.

29. Upon dismissal of the appeal by the High Court, the respondents in the appeal went back to the Co-operative Tribunal and filed an application dated 16<sup>th</sup> March, 2017 seeking various orders against the appellants. In its ruling on that application, the Tribunal stated as follows:-

“

“24. Prayer No 6 asks that the commissioner be ordered to comply with the tribunal’s award dated 6/11/09 by holding fresh elections. We have discussed part of this prayer in the preceding paragraphs. We are, however alive to order No 7 in the award of the tribunal. The order is not affected by resignation or death of the claimants. If the affected respondents are deceased then it’s a different matter. The tribunal ordered:-

“We declare that section 28(4) applies in view of the tribunal ruling dated 27/9/2007.”

25. Section 28(4)(m) provides:-

“(4) No person shall be a member of a committee if he -  
(m) has been convicted of any offence under this Act or rules made thereunder.”

26. The tribunal’s order having been upheld by the High Court stands. This means that the respondents were declared unfit to hold office of a committee member. Those orders remain. If any one of them is in office it is clearly illegal and against clear orders of the court. This relates to holding of office which may have started from 22/3/2017 or 29/4/2017. In that regard the commissioner is hereby ordered to conduct fresh elections and comply with the tribunal orders on who is fit to hold office.”

30. An attempt was made before the Co-operative Tribunal to review the finding that some committee members were unfit to hold office but that attempt failed when the application for review was dismissed on 15<sup>th</sup> December, 2017. After the delivery of the ruling on the application for review the applicants in the application for review proceeded to the High Court vide Nairobi HCCA No 718 of 2017 D. M.



- K. Waroe & 9 others v Peter Kariuki Mugo & 10 others and obtained an order of stay for a period of 45 days from 14<sup>th</sup> February, 2018 against the ruling delivered by the Tribunal on 15<sup>th</sup> December, 2017.
31. The 4<sup>th</sup> Respondent indicated through pleadings and submissions that the order of stay was never extended beyond the 45 days. Counsel for the Petitioner did not offer any resistance to this statement. That being so, it means that what remains is the implementation of the award of the Co-operative Tribunal dated 6<sup>th</sup> November, 2009 which was confirmed by the High Court on 27<sup>th</sup> January, 2017. Can the 1<sup>st</sup> Respondent be said to have acted unconstitutionally in enforcing the decision of the Co-operative Tribunal? The Petitioner claims that he has not committed nor has he been convicted for any offence and it was therefore wrong for the 1<sup>st</sup> Respondent to claim that he was illegally in office pursuant to Section 28(4)(m) of the *Co-operative Societies Act*, Cap. 490.
  32. In view of the background given in this matter, it is now apparent that the language used by the 1<sup>st</sup> Respondent in the letter dated 10<sup>th</sup> January, 2020 was lifted from the award of the Co-operative Tribunal.
  33. It must be appreciated that the Co-operative Tribunal found certain members of the 4<sup>th</sup> Respondent unfit to hold office. The Petitioner does not say he was not one of those members. As correctly pointed out by the advocates for the respondents, the 1<sup>st</sup> Respondent is, according to Section 3(3) of the *Co-operative Societies Act*, responsible for the growth and development of the co-operative societies by providing such services as may be required by co-operative societies for their organization, registration, operation, advancement and, dissolution and for administration of the provisions of the Act. In my view that mandate extends to ensuring compliance with the decisions of the Co-operative Tribunal. The 1<sup>st</sup> Respondent cannot therefore be faulted for doing that which the law requires of him.
  34. Another ground upon which the 1<sup>st</sup> Respondent's decision is challenged is that the Petitioner was not given an opportunity to be heard before the decision was made. It needs to be stated that no decision was made by the 1<sup>st</sup> Respondent. He was simply conveying the decision of the Co-operative Tribunal and complying with orders from the Tribunal. I do not see what any hearing given to the Petitioner could have changed the decision of the Co-operative Tribunal. I do not think that the right to a fair hearing guaranteed by the Constitution extends to a situation where those enforcing orders of courts or tribunals will need to extend an opportunity to be heard to the judgment debtors.
  35. The opportunity to be heard will have been given in the proceedings. Any opportunity extended for hearing by the enforcer of the judgment will amount to sitting as an appellate organ over the decision of the court or tribunal which made the decision that is being enforced. Our laws do not envisage such a situation.
  36. It is clear from what I have stated in this judgment that this petition is without merit. The same is dismissed for lack of merit and each party is directed to meet own costs of the proceedings.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF MARCH, 2020.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**

