



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CONSTITUTIONAL PETITION NO.7 OF 2018
IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CO-OPERATIVE SOCIETIES ACT, CAP 490 LAWS OF KENYA

SHADRACK MOGESI OBEBO.....1ST PETITIONER /APPLICANT

LAWRENCE O. NYANGAGA.....2ND PETITIONER/APPLICANT

VERSUS

THE COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT.....1ST RESPONDENT

THE CO-OPERATIVE COMMISSIONER KISII COUNTY.....2ND RESPONDENT

JEREMIAH OMWANSA OBWONA.....3RD RESPONDENT

GEORGE MOMANYI MIRONGA.....4TH RESPONDENT

SAMULE OKIRIGITI MOKOBI.....5TH RESPONDENT

MBOTELA NELSON OPANGA.....6TH RESPONDENT

HENRY NYABUTO NGARANA.....7TH RESPONDENT

RULING

1. The petitioners herein filed a petition against the respondent on 14th June 2018. They also moved the court vide a Notice of Motion filed on the same day for various interlocutory orders.

2. The application is based on Order 53, Rules 1 & 2 of the Civil Procedure Rules, 2010, Sections 1, 1 A, 3 A & 63 (E) of the Civil Procedure Act and the Co-operative Societies Act. It is also supported by the grounds on the face of it and an affidavit sworn by the 1st petitioner, Shadrack Mogesi Obebo, on 14th June 2018. He deposes as follows that; he and his co-petitioner are members of Mobamba Finance Cooperative Society (hereinafter referred to as "*the Society*") whose main objective is the promotion of the welfare and economic interests of its members who are majorly coffee growing farmers. The members of the Society elected Ernest **Ombogo**, **Edward Miroro** and **Elizabeth Bosibori** to serve as the Society's Management Committee but the 2nd respondent unilaterally disbanded the Committee and had them replaced with an Interim Committee comprised of the 3rd to 7th respondents for alleged mismanagement of the Society's resources.

3. The petitioners complain that the 2nd respondent gave a very short notice by a letter dated 17th May 2018 of a Special General Meeting to be held on 24th May 2018 which did not indicate the agenda of the meeting thus the members were taken aback by the allegations made against the officials and their removal from office. He deposes that the 2nd respondent acted *ultra vires* and failed to observe the procedure set out in the Society's by-laws and the Cooperative Societies Act (herein "*the Act*") in the removal of the elected management committee members.

4. In response, the 1st and 2nd respondents filed a Notice of Preliminary objection on the grounds that the court lacked jurisdiction to hear and determine the matter. They also stated that the application did not raise any reasonable cause of action and was an abuse of court process. The preliminary objection was dismissed by a ruling dated 18th October 2018 where this court found that the petitioners were challenging the administrative actions of the 1st and 2nd respondents which issues fell outside the jurisdiction of the Co-operative Tribunal as provided by **section 76** of the Act.

5. The 3rd respondent, Jeremiah Omwansa Obwona, being the chairman of the Society at the time and having been authorised to respond to the petition by the 4th to 7th respondents swore a replying affidavit on 14th December 2018. He opposed the averments made by the petitioners and deposed that the actions of the 2nd respondent had only been meant to pave way for an inquiry into allegations made by the members against the then management committee.

6. It had been alleged that the previous Committee had sold off the Society's property without the consent of the members or the relevant government department and afterwards income from the sale and from the Society's rental premises could not be traced in the Society's bank account. This necessitated the appointment of an Interim Committee by the members which had inquired into the matter and presented a report implicating the officials for improper conduct. The members had resolved to elect a new Management Committee to inquire further on the mismanagement of the Society's resources and had proceeded to hold fresh elections appointing new officials. Thus the 3rd respondent deposed that the reliefs sought by the applicant had been overtaken by events.

7. The parties filed written submissions and highlighted them when this matter came up for hearing. Mr. Ochoki, counsel for the petitioners abandoned most of the reliefs sought in the application on the grounds that they had been superseded by events. He urged the court to grant the 3rd and 6th prayers of the application as follows;

3.) Pending the hearing and determination of the instant petition, the Honorable Court be pleased to issue a temporary order of injunction restraining the Interim Caretaker Committee members purportedly appointed by the respondents herein from assuming office in that capacity or from conducting any transaction relating to the management and/ or business of the Applicant Sacco Society;

6.) The conservatory orders, if any granted by this Honourable Court be implemented and/ or enforced by the OCPD, Kisii Central Police Division and/or any other such officer as the Honorable Court may decree;

8. He argued that the petitioners were aggrieved by the 1st and 2nd respondents' decision to remove from office duly elected officials and replacing them with the 3rd to 7th respondents without involving them in the election of the members and without following the procedure set out in **Section 58** of the Act. He argued that the petitioners had a constitutional right to participate in the process of management of the society and were not aware of any meeting that was held to replace the officials. He argued that if any elections had subsequently been held then the same was held with the knowledge that this matter was pending and were held to defeat this matter.

9. Counsel argued that the threshold for granting an injunction in constitutional petitions is unlike that in an ordinary civil matter as the court is required to determine whether the applicant's rights have been infringed and if the court finds so then the court can grant the orders. He relied on the cases of **Konza Ranching and farming Co-operative Society Ltd v Registrar of Cooperatives Civil Misc. Application No. 17 of 2003 [2004] eKLR** and **Republic v Matheka Kithome & 4 others Misc. Civil appl. No. 444 of 2010[2012]eKLR** in support of his position.

10. Ms Ondeyo, counsel for the 3rd to 7th respondents opposed the application and submitted that the interim committee had been created in May 2018 to investigate allegations made against the officials and had left office soon after making a report on their findings. She argued that any orders granted would be issued in vain. She relied on the cases of **Samwel Marak & 6 others v Commissioner of Co-operatives; Josephat Mochomba Onchiri & 5 others (interested Parties) Civil Suit No. 1 of 2018[2019] eKLR; Geoffrey Asanyo & another v John Kiragu Ngunyi & 11 others CA NRB Civil application No. 252 of 2015 [2016] Eklr** in support of the argument that it would be futile for the court to grant the orders sought where they have been overtaken by events.

11. She also pointed out that the petitioners had mistakenly dwelt on the merits of the petition and had failed to prove the elements required to grant an interlocutory application. It was argued that the balance of convenience lay in favour of the respondents. On this the respondents cited the case of **Theresa Shitakha v Mary Mwamado & 4 others [1986] eKLR** where the court held thus;

“In these circumstances where does the balance of convenience lie? A union must of necessity depend in large measure on the loyalty and reliability of its officers in what is plainly often a difficult and controversial field of human activity. I do not think it would be right to force the plaintiff onto the union until the matter is finally resolved one way or the other. I am not satisfied that this is a case of interlocutory injunction.”

12. The principles by which the courts are guided in determining whether to grant interlocutory injunctions are settled and were spelt out by Spry VP in the case of **Giella v Cassman Brown & Co. Ltd (1973) EA 358** thus;

“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.”

13. From the foregoing, the first element the petitioners needed to prove is that they have a *prima facie* case with a high chance of success. A *prima facie* case is defined as a case which the court properly directing itself on the material placed before it will conclude that there exists a right which has apparently been infringed by the other party as to call for an explanation from the other party. (See **Mrao Ltd vs. first American Bank of Kenya Ltd & Others (2003) eKLR**)

14. For interlocutory injunctions sought to protect constitutional rights, the courts have gone further and will inquire into whether granting the orders will advance constitutional values. In **Satrose Ayuma & 11 Others v The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 Others [2011] eKLR** cited with approval in **the case Symon Gatutu Kimamo & 587 Others –vs- East African Portland Cement Co. Ltd. [2011]eKLR Machakos High Court Petition No. 333 of 2011** the court held:

“In an application for an interlocutory injunction to restrain breach of a fundamental right, the court may have to go beyond the ordinary tests as stated in Giella v Cassman Brown Co. Ltd. While the applicants must demonstrate that there has been breach or threatened breach of their constitutional rights and thereby show that they have a prima facie case with a likelihood of success, the court has a duty to consider whether grant or denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of Rights.

15. In this case, the petitioners contend that their right to fair administrative action as protected under **Article 47** of the Constitution was infringed by the 2nd respondent’s actions to unilaterally oust the sitting Management Committee from office without following due procedure and without giving the members an opportunity to participate in the process. The petitioners argue that the Act provides a clear guideline for the removal of committee members from office at **sections 58** and **section 28 (7)** but the 2nd respondent failed to comply with the statutory process or the Society’s by-laws.

16. **Section 58** of the **Act** stipulates;

58. Inquiry by Commissioner

(1) The Commissioner may, of his own accord, and shall on the direction of the Minister, as the case may be, or on the application of not less than one-third of the members present and voting at a meeting of the society which has been duly advertised, hold an inquiry or direct any person authorized by him in writing to hold an inquiry, into the by-laws, working and financial conditions of any co-operative society.

(2) All officers and members of the co-operative society shall produce such cash, accounts, books, documents and securities of the society, and furnish such information in regard to the affairs of the society, as the person holding the inquiry may require.

(3) The Commissioner shall report the findings of his inquiry at a general meeting of the society and shall give directions for the implementation of the recommendations of the inquiry report.

(4) Where the Commissioner is satisfied, after due inquiry, that the Committee of a co-operative society is not performing its duties properly, he may—

(a) dissolve the Committee; and

(b) cause to be appointed an interim Committee consisting of not more than five members from among the members of the society for a period not exceeding ninety days.

(5) A person who contravenes subsection (2) shall be guilty of an offence and shall be liable to a fine not exceeding two thousand shillings for each day during which the offence continues.

17. **Section 28 (7)** provides;

28.(7) The Commissioner may suspend from duty any Committee member charged in a court of law with an offence involving fraud or dishonesty pending the determination of the matter.

18. Additionally, **Section 5** of the **Fair Administrative Actions Act** which gives effect to Article 47 of the Constitution stipulates that an administrator is required to give public notice of a proposed administrative action that is likely to adversely affect the interests of a group of persons. The administrator is required to consider all views on the matter before taking the administrative action.

19. The respondents agree that an Interim Caretaker Committee was appointed in place of the Management Committee at the time to investigate claims of mismanagement by that committee of the Society’s resources. The petitioners argue that they were unaware of the allegations made against the elected management committee whose performance they were satisfied with. The petitioners contend that such removal or suspension of an elected management committee vested in the Annual General Meeting where all members could participate democratically. The respondents having admitted that steps were taken to remove the Society’s management committee from office, I find that the petitioners have established a *prima facie* case, and the question of whether or not the members of the Society were accorded an opportunity to participate in the removal of the officials remains a question to be answered in the substantive suit, not at an interlocutory stage.

20. As for whether the petitioners have suffered irreparable loss incapable of compensation by an award of damages, I find that they failed to prove this element. The petitioners filed this suit in their capacity as members of the Society. None of the displaced Management Committee Members have been enjoined to this suit to give their version of the case. The respondents on their part contend that the Interim Caretaker Committee has already left office and has been replaced by a new management committee elected by other members of the Society. The petitioners have failed to prove that they have suffered harm which will not adequately be compensated by an award of damages. Since the Interim Caretaker Committee members have already left office the orders sought cannot be granted thus the balance of convenience tilts in favour of the respondents. Accordingly, I dismiss the application dated 14th June 2018 with costs to the respondents.

Dated, signed and delivered at Kisii this **20th** day of **June 2019**.

R.E.OUGO

JUDGE

In the presence;

Mr. Nyakundi h/b for Mr. Ochoki For the Petitioners

Mr. Magara h/b for Mr. Kaburi For the 1st & 2nd Respondents

Ivayo Court clerk