



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CIVIL CASE NO 1 OF 2014

BENARD NZIOKA..... PLAINTIFF

VERSUS

FRANCIS KITONGU..... 1ST DEFENDANT

NGUI MAKAU MAITHA..... 2ND DEFENDANT

HARRISON MAINGI..... 3RD DEFENDANT

JOSEPH MATEVU..... 4TH DEFENDANT

RULING

INTRODUCTION

1. In his Amended Plaintiff that was dated 29th September 2015 and filed on 2nd October 2015, the Plaintiff had sought the following reliefs:-

- i. The actions of the defendant be declared null and void.**
- ii. The Group Voi Akamba Welfare group be declared as unlawful society.**
- iii. The said society be wound up and all the assets be divided to members as per their shareholdings.**
- iv. General damages.**
- v. Costs of the suit plus interest.**
- vi. Any other relief this Court may deem fit to grant.**

2. In its decision that was rendered on 30th March 2017, in Paragraph 61 therein, this court determined as follows:-

- a. A declaration that the Defendants' action suspending the Plaintiff for six (6) months was null and void.**
- b. Nominal damages in the sum of Kshs 20,000/=**

c. Reimbursement of the Plaintiff's shares at the current market value less any loans and/or outstanding monies he may owe Voi Akamba Welfare Unity Group in line with Article 17(g) of the Constitution thereof within sixty (60) days from the date of this Judgment.

d. Interest on the Nominal damages awarded in Paragraph 61(b) hereinabove and on any sums that the Plaintiff shall not have been paid under Paragraph 61(c) hereinabove shall be at court rates until payment in full.

e. As the Plaintiff only partially succeeded in his claim, each party shall bear its own costs.

3. On 14th July 2017, the Plaintiff filed a Notice of Motion application dated 11th July 2017 that was brought pursuant to the provisions of Order 51 Rule 1, Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law seeking the following orders:-

a. THAT the Court be pleased to give its interpretation of Paragraph 61 (c) of the Judgment delivered by this Court on 30th March 2017.

b. THAT the costs of this application be in the cause.

4. The Defendants filed Grounds of Opposition dated 21st July 2017 and filed on 26th July 2017. The same were as follows:-

a. THAT the application was an abuse of the court process.

b. THAT the judgment delivered by this Hon. Court on 30th March 2017 was clear, lucid and unambiguous that does not require any interpretation.

c. THAT the application was a ploy to unnecessarily inflate costs, a sheer waste of courts precious judicial time.

d. THAT it was fair, just and equitable and in the interests of justice if the application is dismissed with costs.

LEGAL ANALYSIS

5. In his Written Submissions that were dated and filed on 28th August 2017, the Plaintiff argued that the reimbursements of his shares ought to be on the total worth of investment Voi Kamba Welfare Group (hereinafter referred to as "the Welfare Group") Association had made. In other words, he ought to be paid for what he would be entitled to if all the assets of Welfare Group were to be disposed of. He pointed out that the Welfare Group only refunded him his contribution which is not what this court directed.

6. He therefore urged this court to direct that the Defendants deposit in court the latest valuation since it was done every year, the latest list of the shareholders, their investment if the Welfare Group was to be sold less the shares that he had already been paid.

7. On the other hand, the Defendants argued that Paragraph 61 (c) of this court's judgment was clear that the Plaintiff was only entitled to the amount he had contributed to calculated at the value of Kshs 20/=. They argued that the shares of the Welfare Group were not subject to valuation as those of a limited liability company and that any capital gains could not be enjoined by a member who had withdrawn as the objectives of the said welfare Group was to improve the lives its members through granting of loans for education, health and economic empowerment of its members.

8. They were emphatic that the value of the shares from Kshs 20/= could not be revised without a resolution of the entire membership and that members were only entitled to dividends whenever they were declared and paid. They pointed out that the said Welfare Group does not give members who

withdraw from its membership any send-off package but rather that one (1%) per cent was deductible from the shares of a member who was withdrawing from being a member of the said Welfare Group.

9. It was correct as the Plaintiff contended that the Constitution of the Welfare Group envisaged for the distribution of all its assets to its members upon dissolution. However, it was evident that the dissolution could only be done in accordance with Article 17(a) of the Constitution of the Welfare Group, which dissolution had to be approved by the Ministry in line with Article 20.0 of the said Constitution.

10. In Paragraph 39 of its decision of 30th March 2017, this court had due regard to the said Article 17 (a) of the Constitution that provides as follows:-

“The Welfare group shall not be dissolved except by a resolution at a general meeting by a vote of two thirds of the members present.”

11. Article 20.0 of the Constitution of the Welfare Group showed that:-

“When the dissolution of Group has been approved by the Ministry, no further action shall be taken by the Committee or any office bearer of the Group other than to get in and liquidate for cash all assets of the Group subjected to payments of all debts of the Group the balance thereof shall be distributed according to the ratio of individual shares.”

12. In Paragraph 58 of its decision of 30th March 2017, this court noted that both the Plaintiff and the Defendants were agreed that it would be best if the current value of his shares was calculated so that he could be paid off. It had due regard to Article 17(g) of the Constitution of the Welfare Group and rendered itself as follows in Paragraph 59:-

““Notably, Article 17(g) of the Constitution of the Welfare Group provided as follows:-

“Under no circumstances will the Investment Group refund shares to any member who resigns or dies but the shares will be floated for sale to the members at the prevailing share value upon notification to the Executive Committee. A refund of 1% share fee should be deducted from withdrawing member from his/her shares.””

13. It is logical to expect that since the Plaintiff had contributed to the growth and purchase of the assets for the Welfare Group, he ought to have benefitted more from his investments. However, this court was hesitant to give meaning to Paragraph 61 (c) of its decision beyond what was contemplated in the Constitution of the Welfare Association.

14. The ambiguity of the Constitution of the Welfare Group led this court to observe in Paragraph 60 therein, that there was no specific procedure for refund that had been provided in the Article 17(g) of its Constitution. The danger of directing that the reimbursements to the Plaintiff ought to be on the total worth of investments would be that there was a possibility of him getting nothing if the loans outstripped the assets. There was also a possibility that members would get higher amounts if at the time of the dissolution the Welfare Group had no loans. It was therefore difficult to determine how much the Plaintiff would be entitled to if his proposal was adopted.

15. Ordering the Defendants to deposit a valuation of the shares would be *ultra vires* and in any event, this court was already *functus officio* and could not give further substantive orders in relation to the case after it rendered its judgment on 30th March 2017.

DISPOSITION

16. Accordingly, having considered the affidavit evidence and the Written Submissions by all the parties, this court found the Plaintiff's Notice of Motion application dated 11th July 2017 and filed on 14th July 2017 was not merited and the same is hereby dismissed with costs to the Defendants.

17. Orders accordingly.

DATED and **DELIVERED** at **VOI** this **18th** day of **January** 2018

J. KAMAU

JUDGE