



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 8 OF 2011

PETER MWANGI CHEGE.....1ST APPELLANT
NGANGA WAMAL.....2ND APPELLANT
FRANCIS GAKURE.....3RD APPELLANT
ZACHARIA MBURU.....4TH APPELLANT
JOSEPH WAWERU MACHARIA.....5TH APPELLANT
WAMBUI NJOROGE.....6TH APPELLANT
MUIRURI GITIMU.....7TH APPELLANT
STEPHEN MBURU NDUNGU.....8TH APPELLANT
PETER MOSES MBAU GAKURU.....9TH APPELLANT
DEDAN NJOGU KIBUGU.....10TH APPELLANT
AJELICA WANJIKU MWANGI.....11TH APPELLANT
GATHURA NJUGUNA.....12TH APPELLANT
ANTHONY MWANGI KIMANI.....13TH APPELLANT
DAVID M. KIMANI.....14TH APPELLANT

VERSUS

JOSEPH WANYOIK.....1ST RESPONDENT
NELSON NDUNGU.....2ND RESPONDENT
JOSEPH KAMANDE.....3RD RESPONDENT
CHARLES NDUNGU.....4TH RESPONDENT
PETER L. NGANGA.....5TH RESPONDENT
MBUGUA GAKURU.....6TH RESPONDENT
CECILIA WAMBUI.....7TH RESPONDENT

PUNDAMILIA FARMERS CO-OPERATIVE

SOCIETY LIMITED.....8TH RESPONDENT

(Being an Appeal from the Award of the Co-operative Societies Tribunal in Nairobi Co-operative Tribunal Case No 146 of 2008 delivered on 21ST December 2010)

BETWEEN

PETER MWANGI & 13 OTHERS.....CLAIMANTS

VERSUS

JOSEPH WANYOIKE & 7 OTHERS.....RESPONDENTS

JUDGMENT

1. In their Statement of Claim dated and filed at the Co-operative Tribunal (hereinafter referred to as “the Tribunal”) on 29th April 2008, the Appellants’ sought the following reliefs:-

a. orders of injunction to restrain the Respondents herein from holding themselves out or transacting any business on behalf of Pundamilia Farmers Co-operative Society; and

b. orders to account for monies received and assets realised for the period between August 2005 and April 2008 with an order for restitution.

2. In its decision delivered on 21ST December 2010, the Co-operative Tribunal dismissed the Appellants’ claim against the Respondents with costs.

3. Being aggrieved by the said decision, the Appellants filed their Memorandum of Appeal dated 12th January 2011 on the 13th January 2011 seeking to set aside the Award by the Tribunal and beseeched this court to allow the prayers they had sought in their Statement of Claim. They relied on six (6) Grounds of Appeal.

4. Their Record of Appeal was dated and filed on 10th July 2014. Subsequently, they filed their Written submissions dated 4th May 2018 on 19th May 2018. The Respondents filed their Written Submissions dated 20th May 2018 on 22nd May 2018. This Judgment is thus based on the grounds cited in the memorandum of appeal and the parties’ written submissions.

LEGAL ANALYSIS

5. This being a first appeal, this court is reminded of its primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the Tribunal are to stand or are to be disturbed and give reasons explaining why it has arrived at a particular conclusion.

6. This has been the holding in several cases amongst them the case of **Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2EA 212** wherein the Court of Appeal held *inter alia* that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

7. Having perused the parties’ respective Written Submissions, we find that the following issues emerge for our determination:-

1. Whether or not the Tribunal was improperly constituted for lacking the requisite quorum to render the subject Award; and

2. Whether or not the Tribunal misapprehended the Appellants’ case and thus reached a wrong decision.

8. These were the same two (2) main issues that the Appellants had condensed for determination. We shall address the two issues under the following distinct and separate heads.

I. COMPOSITION OF THE TRIBUNAL

9. Ground of Appeal No (1) was dealt with under this head.

10. The Appellants submitted that Section 80 of the Co-operative Societies Act provides that the requisite quorum of the tribunal consists of the Chairman and two other members. They pointed out that the Award of the Tribunal was signed by the Chairman and the Deputy Chairman but that the third member, Mr. G.O. Nyamwange, did not sign the Award. It was their contention that this rendered the Award a nullity.

11. It was their averment that the proviso to Section 80 of the Co-operative Societies Act did not act as a saving grace in the circumstances of the case because the member was present at the hearing but no reason was given for his failure to sign the Award.

12. On their part, the Respondents submitted that the Appellants had challenged the Award for its non-conformity with Section 80 of the Co-operative Societies Act yet the said Section was clear and hence no need to say more on it.

13. Section 80 (1) of the Co-operative Societies Act states as follows:-

“For the purposes of hearing and determining any cause or matter under this Act, the Chairman and two members of the Tribunal shall form a quorum:

Provided that where for any reason either or both of the members is or are not present for any part of the hearing, the jurisdiction of the Tribunal may be exercised by the Chairman, sitting either with one such member or alone as the case may be.”(emphasis added)

14. It is evident that the quorum of the Tribunal consists of the Chairman together with two (2) other members. However, the proviso is clear that where either of the two (2) members are not present for any part of the hearing, the jurisdiction of the Tribunal could be exercised by the Chairman with one such member or alone, if need be. It is clear that whereas a quorum is critical, the chairman of the tribunal can lawfully perform the duties of the tribunal in the absence of the other members.

15. Further, making a decision is a function of the tribunal. From Section 80 of the Co-operative Societies Act, it is apparent that the Chairman can proceed to render the tribunal's Award in the event the other members are absent.

16. Having said so, it is important to point out that the Award can only be valid if it was decided by the votes of the majority. The Chairman cannot purport to render an Award that he had signed alone.

17. Notably, Section 80 (3) of the Co-operative Societies Act stipulates as follows:-**“Any matter considered by the Tribunal shall be decided by the votes of the majority of the members constituting the Tribunal and voting, and the person presiding shall have a casting as well as a deliberative vote...”**

18. The purport of the aforesaid Section is that provided that the Award was signed by a majority, then the same was valid and lawful.

19. In this particular case, the Award was signed by the Chairman and one other member. The fact that G.O. Nyamwange did not sign the same did not render the said Award invalid for the reason that the decision had already been made by a majority. The record shows that appellants claim was heard and determined by the Tribunal which consisted of three (3) members, namely J.L. Ole Kipury Chairman, A.J. Kariuki Deputy Chairman and G.O. Nyamwange.

20. The provision to have disputes before the tribunal being decided by a majority vote was in our view intended to avoid matters stalling merely because some members may have refused to sign an award or had dissented from the majority decision. Although it was not clear to this court why the said G.O. Nyamwange failed to sign the Award, it is evident that his omission did not invalidate the majority decision of both the Chairman and the Vice Chairman.

21. It is thus the finding of this court that the Tribunal was properly constituted and that it rendered a valid and lawful Award. This court does not therefore find any merit in Ground No (1) of the appeal.

II. ALLEGED MISAPPREHENSION OF THE APPELLANTS' CASE

22. Grounds of Appeal Nos (2), (3), (4), (5) and (6) were dealt with under the above head as they are all related.

23. The Appellants pointed out that the Consent Order that was recorded in **High Court Judicial Review Misc Case No 764 of 2005** excluded them yet they were the protagonists in the disputed elections that were held on 15th April 2005. They averred that this exclusion was what led Dulu J to set aside the said Consent Order on 15th April 2008.

24. It was their contention that following the Ruling by Dulu J, they approached the Co-operative Societies Tribunal to deregister the Respondents as officials but unfortunately, the Tribunal failed to do so and dismissed their Statement of Claim.

25. It was their argument that, the Tribunal completely misapprehended their case that the issue before it was not who the registered officials of the society were but rather whether the registered officials were validly elected. They faulted the Tribunal for having relied on a search dated 28th April 2008 showing who the registered officials were and relied on it without establishing the manner in which the 1st – 7th Respondents ascended to office which in their view was unlawful.

26. It was their contention that since they were seeking for accounting of monies over a particular period of time to wit August 2005 – April 2008, their Appeal cannot be said to have been overtaken by events as argued by the respondents.

27. They therefore urged this court to set aside the Tribunal's Award and grant the prayers that were set out in their statement of claim.

28. On their part, the Respondents pointed out that the 6th Respondent had since passed away in May 2018, a fact his Co-Respondents and their counsel learnt about after attending court on 8th May 2018.

29. It was their contention that the Appeal herein was a mere academic exercise for the reason that since the filing of the Appeal herein, several other elections had taken place and some of the Respondents had since been removed from office amongst them, the 1st Respondent.

30. They argued that the elections in question were held on 4th September 2004 when the Respondents were validly elected. They stated that the 4th and 9th Appellants moved to the **High Court in Misc Application No 1249 of 2004** for orders of Prohibition and *certiorari*, which orders were granted.

31. However, the Ministry for Co-operative Development ordered for fresh elections across all the co-operative societies and when the 8th Respondent's elections were held on 15th April 2005, the 1st to 7th Respondents were elected again. They stated that none of the Appellants contested any seat in the 8th Respondent.

32. They contended that after the elections of 15th April 2005, the District Co-operative Officer Maragua purported to cancel the said elections and convened a Special General Meeting for 27th May 2005. They stated that this is what led them to file **High Court Misc Application No 764 of 2005** but the same was withdrawn on the basis that it had been overtaken by events.

33. Subsequently, the Ministry for Co-operatives convened and held a Special General Meeting on 11th April 2008 where the 1st to 7th Respondents were validly elected yet again. It was their averment that these elections had never been challenged.

34. They submitted that the only issue that was before the Tribunal was whether or not the Respondents were validly in office which was confirmed by an official search dated 27th October 2009 which was admitted by the consent of both parties. They therefore prayed that the Appeal be dismissed with costs to them.

35. A perusal of the record showed that on 12th August 2004, the 8th Respondent issued a Notice for the holding of a Special General Meeting on 4th September 2004. One of the agenda of the meeting was elections. The following were elected office bearers;

1. **Joseph Wanyoike – Chairman**
2. **Nelson Ndungu – Vice Chairman**
3. **MbuguaGakuru – Treasurer**
4. **Joseph Kamande – Hon Secretary**
5. **Charles Ndungu- Member**
6. **P. L. Nganga- Member**
7. **James Ngugi- Member**
8. **Cecilia Wambui- Member**
9. **MwanikiMwoche – Member**

36. The election was challenged in **High Court Judicial Review Misc Application No 1249 of 2004 KibueKirori & 5 Others vs District Co-operative Officer Maragua** where the applicants sought orders of prohibition and *certiorari* against the District Co-operative Officers and Commissioner of Co-operatives barring them from receiving any results of the election that was carried out on 4th September 2004 and if such returns had been received, the elections to be quashed so that the results therefrom could not be acted upon.

37. On 21st September 2004, Nyamu J (as he then was) granted the applicants therein leave to apply for orders of prohibition and *certiorari* as aforesaid and ordered that the leave granted would operate as a stay provided that the main application was filed within twenty one (21) days and served within eight (8) days failing which both orders would automatically lapse.

38. The Respondents subsequently filed a Notice of Motion dated 22nd June 2005 seeking to terminate the proceedings in **Judicial Review Misc Application No 1249 of 2004** on the ground that the same had been overtaken by events. On 12th July 2006, Emukule J (as he then was), terminated the proceedings and discharged, vacated and/or lifted the *ex parte* orders issued on 21st September 2004. Notably, the said proceedings had been commenced after complaints were raised about irregularities during the election that was held on 4th September 2004.

39. In his Affidavit in support of the aforesaid Notice of Motion application, the 1st Respondent deponed that during the pendency of the proceedings, the Minister for Co-operative Development and Marketing had in a Notice dated 11th February 2005 ordered for fresh elections

for office bearers in all Co-operative Societies by 30th April 2005.

40. Following elections that were conducted on 15th April 2005, the following officials were elected:-

1. **Joseph Wanyoike – Chairman**
2. **Nelson Ndungu – Vice Chairman**
3. **Joseph Kamande – Secretary**
4. **Charles Ndungu – Treasurer**
5. **MbuguaGakuru – Committee Member**
6. **Cecilia Wambui - Committee Member**
7. **Peter L. Nganga - Committee Member**
8. **Francis Gakure – Supervisor**
9. **Moses Mbau – Supervisor**
10. **Antony Mwangi – Supervisor**

41. In his letters dated 29th April 2005 to the 1st – 7th Respondents herein, the District Co-operative Officer informed them that their elections had been nullified because they had been in management before. Fresh elections were to be carried out by the District Co-operative Office. A Notice was issued to the members of the 8th Respondent notifying them that a Special General Meeting would be held on 27th May 2005. The agenda was a repeat of elections of Management and Supervisory Committees.

42. The Respondents herein then filed High Court Judicial Review proceedings in Misc Civil Cause No 764 of 2005 challenging the decision of the District Co-operative Officer canceling elections of 15th April 2005. The Respondents were granted leave to institute judicial review proceedings vide Court Order that was issued on 26th May 2005 by Makhandia J (as he then was).

43. The parties to the aforesaid proceedings in Judicial Review Misc Civil Cause No 764 of 2005 entered a Consent Order in which it was agreed that the elected and authorised officials of the 8th Respondent were as follows:-

1. **Joseph Wanyoike – Chairman**
2. **Nelson Ndungu – Vice Chairman**
3. **Joseph Kamande – Secretary**
4. **Charles Ndungu – Treasurer**
5. **MbuguaGakuru- Committee Member**
6. **Peter L. Nganga- Committee Member**
7. **Cecilia Wambui- Committee Member**
8. **Francis Gakure- Committee Member**
9. **Anthony Mwangi- Committee Member**
10. **Moses Mbau – Committee Member**

44. The said Consent was adopted and endorsed by the Deputy Registrar on 15th September 2005 making it an order of the court. However, upon application by the 2nd Appellant alongside two (2) other interested parties, the Consent Order issued on 15th September 2005 was set aside in a Ruling delivered on 15th April 2008 by Dulu J. The Appellants then proceeded to the Co-operative Tribunal where they filed their Statement of Claim on 23rd April 2008.

45. Before Dulu J delivered his aforesaid Ruling, the 8th Respondent held a Special General Meeting on 11th April 2008 with a special agenda of elections. The following persons were elected into office:-

1. **Joseph Wanyoike**
2. **Nelson Ndungu**
3. **Charles Ndungu**
4. **MbuguaGakuru**
5. **Cecilia Wambui**

46. An official search dated 28th April 2008 from the Ministry of Co-operative Development and Marketing showed that the registered officials of the 8th respondent were as follows:-

1. **Joseph Wanyoike – Chairman**
2. **Nelson Ndungu – Vice Chairman**
3. **Charles Ndungu – Treasurer**
4. **MbuguaGakuru – Secretary**
5. **Cecilia Wambui – Committee**

47. On hearing the Appellants' claim, the Tribunal rendered its Award on 21st December 2010 where it found that the 1st – 7th Respondents were in office lawfully and thus dismissed the Claim. As can be seen hereinabove, the Appellants were aggrieved by this decision hence this appeal.

48. Evidently, by the time Dulu J set aside the Consent Order on 15th April 2008, the 8th Respondent had carried out fresh elections on 11th April 2008 in which the 1st, 2nd, 3rd, 4th, 6th and 7th Respondents were elected as office bearers of the 8th Respondent. The letter by the Ministry of Co-operative Development and Marketing dated 28th April 2008 was in response to a letter from the 8th Respondent and the same confirmed the aforesaid as the office bearers. These were the same names that were contained in the letter dated 27th October 2009 from the said Ministry to the Tribunal that was admitted by consent of the parties.

49. This court thus wholly concurs with the finding of the Tribunal that the question regarding whether the Respondents were in office lawfully was firmly in the positive.

50. On carefully analysing the evidence that was adduced by the parties herein, we find that the Appellants did not demonstrate that the names contained in the search of 27th October 2009 which were the same names in the search dated 28th April 2008 were registered pursuant to the Consent order that was set aside by Dulu J on 15th April 2008.

51. Evidently, the 8th Respondent conducted fresh elections on 11th April 2008 where the 1st, 2nd, 3rd, 4th, 6th and 7th Respondents were elected as its office bearers. Further, since 4th September 2004, several elections were held and the same persons were elected as officials of the 8th Respondent. In addition, there is nothing to show or prove that the registration of the respondents as officials of the 8th respondent as shown in the search dated 27th October 2009 was done pursuant to the Consent order that was set aside because several elections were conducted after 4th September 2004, notably the elections held on 11th April 2008 whose results have apparently not been challenged to date.

52. Besides, the names in the search of 28th April 2008 and 27th October 2009 are different from the names of officials listed in the Consent order of 15th September 2005 as shown hereinabove. Indeed, the 5th Respondent, Francis Gakure, Anthony Mwangi and Moses Mbau were not in the two (2) aforementioned searches from the Ministry of Co-operative Development and Marketing.

53. In that respect, this court is not satisfied that the Appellants demonstrated that the Tribunal erred by basing its decision on the search of 27th October 2009 which evidenced registration of officials of the 8th respondent based on the Consent orders which had been set aside by the court.

54. Having considered the parties' submissions, this court is not persuaded to find that the Tribunal misapprehended the Appellants' case. Having gone through the process regarding how the 1st -7th Respondents ascended to office as officials of the 8th Respondent, in the absence of evidence to the contrary, we find and hold that the aforesaid respondents were lawfully in office as held by the tribunal there being no evidence to prove that their registration was pursuant to the Consent of 15th September 2005 which was later set aside.

55. Although the Appellants did not in their submissions expound on their prayers for account of monies received and assets realised in the period between August 2005 and April 2008 and their prayer for restitution, this court has come to the conclusion that their aforesaid prayers were not merited having found that the 1st -7th Respondents were in office legally in the period in question.

56. In the circumstances foregoing, we find that nothing turns on grounds 2, 3, 4 and 5 of the appeal.

DISPOSITION

57. For the reasons foregoing, the upshot of this court's judgment is that the Appellant's Appeal dated 12th January 2011 and filed on 13th January 2011 is not merited and the same is hereby dismissed. The Appellants shall bear the Respondents' costs of this Appeal.

58. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **19th** day of December 2018.

J. KAMAU

JUDGE

C. GITHUA

JUDGE