



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

JUDGMENT

INTRODUCTION

1. The Plaintiff was represented by the firm of M/S Muthami & Co Advocates. His Complaint dated 3rd October 2014 was filed on 10th November 2014. On 30th April 2015, the said advocates filed a Notice of Motion application dated 23rd April 2015 seeking leave to amend the Complaint. The said application was heard and allowed on 16th September 2015.

2. The Plaintiff's Amended Complaint dated 29th September 2015 was filed on 2nd October 2015. On 11th February 2016, this court directed both parties to file fresh Witness Statements cross-referencing the documents they wished to rely on. The Plaintiff's cross-referenced Witness Statement and paginated List and Bundle of Documents were filed on 2nd October 2015. His Written Submissions in support of his claim were dated and filed on 20th January 2017.

3. The Defendants were represented by the firm of M/S & Co Advocates. Their Statement of Defence and initial Witness Statements were dated 10th December 2014 and filed on 16th December 2014. Their fresh Witness Statements Cross-reference the documents they wished to rely upon were filed on 15th March 2016.

4. This court expunged the 1st Defendant's Witness Statement that was filed on 7th October 2016 as the same was filed without leave of this court. It was filed after the Defendants' counsel had partly Cross-examined the Plaintiff and sought an adjournment to file a Supplementary Bundle of Documents. The Defendants were allowed granted leave to file their Supplementary List and Bundle of Documents purely

in the interests of justice. They filed their Supplementary List and Bundle of Documents on 7th October 2016. Their Written Submissions dated 13th January 2017 were filed on 16th January 2017.

THE PLAINTIFF'S CASE

5. The Plaintiff was the only witness. His testimony was that he was a member of Voi Akamba Welfare Group (hereinafter referred to as "the Welfare Group") in which the 2nd, 3rd and 4th Defendants were the Chairman, Secretary and Treasurer respectively. The said Welfare Group had two (2) departments, one for welfare of the members and the other for investment purposes. However, it was the Plaintiff's averment averred that the entire Group was an unlawful society as contemplated under the Societies Act and urged this court to declare as such.

6. He added that members purchased shares every month and were entitled to take loans based on the shares one had and were repayable with a small interest. The said Welfare Group owned a bar with rooms to rent in Voi town and had also managed to purchase two (2) parcels of land but the said properties were not registered in the name of the Welfare Group despite him having invested heavily in the said Welfare Group.

7. On 18th March 2014, he said that he received a letter from the said Welfare Group purporting to suspend him from the Group for a period of six (6) months on the ground that he had incited members. He stated that the allegations which had been made by the 1st Defendant were false and malicious and were geared to expelling him from the said Welfare Group. When the suspension period was over, he was suspended afresh on account of not giving the name of his next of kin.

8. It was his contention that the said suspension was unconstitutional and against the rules of natural justice as he was never accorded a fair hearing. He said that he lost all his investments due to the said suspension. He therefore sought the following reliefs in his Amended Plaint:-

- 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.**

THE DEFENDANTS' CASE

9. The 2nd Defendant was the Chairman of the said Welfare Group. He was the only witness who testified on behalf of the Defendants herein. The Defendants' case was that the Plaintiff was lawfully suspended from the Welfare Group and because his said suspension had been lifted, his claim had been overtaken by events.

10. It pointed out that it still regarded the Plaintiff as a member of the said Welfare Group but it was agreeable to the Plaintiff being paid the equivalent of his shares at the current market rate so that his membership to the Group could cease.

LEGAL ANALYSIS

11. The Joint Statement of Agreed Issues was filed on 15th March 2016. The parties identified the

following issues for determination by this court:-

- a. **Whether the action of the defendants in suspending the plaintiff was in accordance with the Welfare's Constitution and therefore lawful?**
- b. **Whether the plaintiff had lost all his investments in the group in view of the suspension?**
- c. **Whether the Voi Akamba Welfare Group was a lawful entity?**
- d. **Whether the Voi Akamba Welfare Group should be wound up in view of the matters raised by the plaintiff?**
- e. **Whether the properties owned by the Group are in the name of the Group?**
- f. **Whether the plaintiff was entitled to any of the orders sought?**

12. This court found it prudent to address each of the said issues under the separate issues shown hereunder.

I. THE PLAINTIFF'S SUSPENSION FROM THE WELFARE GROUP

13. During his Cross-examination, the Plaintiff admitted that suspension was one of the three (3) steps in accordance with Article 13 of the Welfare Group's Constitution that could be taken against a member who had been accused of inciting members. He was, however, emphatic that he was never given a warning letter or accorded an opportunity to defend himself against the 1st Defendant's allegations that he wanted to destroy the Welfare Group prior to being issued with the letter dated 18th March 2014 suspending him.

14. He added that in any event, the allegations were made during the meeting for purchasing shares and not in an Annual General Meeting (AGM) as was required in the Welfare Group's Constitution. He also pointed out that he was suspended a second time because of what the officials termed as failure to give the Welfare Group of the details of his next of kin.

15. On being Cross-examined, the 2nd Defendant averred that every group had to have rules for discipline and that in their Welfare Group, incitement, which was specifically stated in their Constitution, was treated more seriously than misappropriation of monies.

17. He contended that he was informed by the 1st Defendant that the Plaintiff had told him that they did not have title deeds to the properties and that within a short time, the Welfare Group would have no money. He stated that this was the worst level of incitement because the Plaintiff was very well aware of the processes as he was an Executive member of the Group.

17. He admitted that by the time they went for the meeting on 16th March 2014, they did not have title deeds to the properties but they had carried the Deed Plans to show the members during the meeting to purchase shares. He added that the meeting at which the Plaintiff's allegations of incitement were discussed was during a meeting to purchase shares and was not during the AGM and consequently, he had been accorded adequate opportunity to defend himself from the accusations of incitement of members.

18. He stated that the Plaintiff was still a member of the Welfare Group but if he chose to cease being a member of the said Group, he could be given his shares at the current market value.

19. The Defendants reiterated the 2nd Defendant's evidence in their submission to demonstrate that it acted lawfully when it suspended the Plaintiff from the membership of the Welfare Group. It contended that the Welfare Group was run on good faith and any rumour on its financial instability could destabilise

members who could either refuse to invest in the Welfare Group or could withdraw from its membership altogether.

20. They referred this court to the Welfare Group's Constitution that provided that a member who incited others would be expelled and his shares floated to members for sale of his shares. It was their contention that the Plaintiff was given an opportunity to be heard on 16th March 2014 and since he was merely suspended and his shares not floated for sale to other members, he could not purport that he was never given a fair hearing.

21. This court had looked at Article 13.0 (f) of the Constitution of the Welfare Group and noted that the same provided as follows:-

“Any person who incites members should be expelled from the welfare and investment with immediate effects (sic) and shares floated to members for selling.”

22. Article 13.0 (c) of the Constitution of the said Welfare Group further stipulated that:-

Any member found to have violated the Constitution or any by-laws of the Unity group may be subjected to the following discipline procedure by the Groups Annual general Meeting-

i. He/She shall be served with a maximum of two (2) warnings.

ii. He/She may be suspended for a period not exceeding two years.

iii. He/Shebe(sic)stripped off membership in case of gross misconduct.

23. This court therefore considered the aforesaid provisions against the backdrop of the letter dated 18th March 2014 that purported to suspend the Plaintiff from the membership of the Welfare Group with a view to establishing whether or not the said suspension was lawful.

24. Notably, the reason given for the Plaintiff's suspension was as follows:-

“It was reported by Francis Kitongu during buying shares dated 16th March 2014 (sic)that you met him and convinced him to believe that after completion of building second floor (plaza) there might be no money so there will be need for balancing financial statements before continuing with construction. It was clearly indicated in the external auditors report dated 17th November 2013 that the financial statements of the same balanced and we will be undertaking our external audit every year to prove the proper usage of member's (sic) money. Being one of the members who have served the Chama as a leader with enough knowledge on our constitution the member was very shocked and he had to report the case... Remember you are supposed to repay your loan as scheduled.”

26. It did appear to this court that the Plaintiff merely expressed an opinion to another member. If at all the Plaintiff stated the above, it was clear that he stated that **there might not be any money** (emphasis court) after the completion of the construction. He did not say that there will be no money after the construction had been completed. Indeed, the Plaintiff's alleged assertion that there would be need for balancing financial statements before continuing with construction was an opinion.

26. Whereas the word “incitement” was not defined in the Constitution of the Welfare Group, it was the view of this court that the Welfare Group took the Plaintiff's contentions, if at all, he uttered the same a tad too far. Finding that such an assertion constituted incitement would be tantamount to gagging members from expressing an opinion that would not be deemed to have been palatable to the office bearers.

27. There was no indication whatsoever that the 1st Defendant acted adversely against the Welfare Group

or that other members of failed to purchase shares or invest in the said Welfare Group after the Plaintiff allegedly uttered the aforesaid words.

28. Going further, it was clear that a member could not be suspended without the matter being discussed during the AGM that had to be constituted in accordance with the Welfare Group's Constitution. Indeed, both the Plaintiff and the 2nd Defendant were clear that the matter was discussed during the purchase of shares and not during an AGM. The nature of the said meeting was evidenced by the Minutes that were adduced in evidence by the Defendants herein that the meeting was one for purchasing shares and was not an AGM.

29. The Welfare Group did not do the Plaintiff a favour by not expelling him or floating his shares for sale to other members of the Welfare Group. Suspension for a period of six (6) months was not provided for in the Welfare Group's Constitution

30. In this respect, this court fully concurred with the Plaintiff that his suspension from the Welfare Group for the alleged incitement and for not giving details of his next of kin were not grounds for suspension irrespective of the fact that the suspension was for shorter period than what had been provided in the Constitution of the Welfare Group. The action taken by the Welfare Group was thus null and void *ab initio*.

31. This court did not, however, agree with the Plaintiff that a member needed to be given at least two (2) warning letters before being suspended for the reason that Article 13 was not clear if the said warning letters were in addition to the other two (2) penalties or they could stand on its own. The entire Article 13 (c) (i), (ii) and (iii) of the Welfare Group's Constitution was ambiguous making it difficult for this court to make out what really was the disciplinary procedure of the said Welfare Group's Constitution.

II. LEGAL STATUS OF THE WELFARE GROUP

32. In his Written Submissions, the Plaintiff contended that the said Welfare Group had over one hundred and eighty (180) members and consequently, the same had to be registered as a society. It was his submission that the Certificate of Registration that was issued under the Ministry of Culture and Social Services and adduced as evidence by the Defendants was not recognised under the law and consequently, the Welfare Group was unlawful under the Act.

33. He relied on the provisions of Section 2 of the Societies Act Cap 10 (sic) (Laws of Kenya) that provides that a Society is “...**a club, company, partnership or other Group of ten or more persons...**”

34. On being Cross-examined, the Plaintiff admitted that the Welfare Group was registered after he was shown a Certificate of Registration and that his prayer for the dissolution of the said Welfare Group was not in line with Article 19 (a) of its Constitution which had an elaborate procedure of dissolving the Welfare Group.

35. Notably, the Defendants did not address their mind to this issue. Whilst this court did not see a copy of the Certificate of Registration so as to make a determination that the Welfare Group was unlawful for not being registered as a society, it sufficed to state that an Group of ten or more persons is not necessarily unlawful merely because it is not registered as a society under the Societies Act Cap 108 (Laws of Kenya).

36. Indeed, there are several groups that do not need to be registered as societies. Section 2 of the Societies Act provides that a society does not include amongst other exceptions:-

“any combination or Group which the Minister may, by order, declare not to be a society for the purposes of this Act”

37. Notably, the case of **Daniel K Yego & 3 Others vs Pauline Nekesa Kode [2015] eKLR** that the Plaintiff relied upon was distinguishable from the facts of the case herein as the same related to the

capacity of self-help groups to sue. This court was not therefore persuaded by the Plaintiff's assertions that the Welfare Group ought to be declared unlawful merely because it was not registered as a society as there was a provision of the Minister exempting certain groups of Groups from being registered as societies.

III. WINDING UP OF THE WELFARE GROUP

38. While being Cross-examined, the Plaintiff contended that the Welfare Group ought to be disbanded as it had treated acted unlawfully against him and further because there was a lot of discrimination. In his Written Submissions, he averred that since the Welfare Group was unlawful, then it ought to be wound up and assets divided among the shareholders as per their shareholding.

39. On their part, the Defendants submitted that the Constitution was clear that a member could not move on his own motion to seek dissolution of the Welfare Group merely because he or she had a misunderstanding with the group members. It referred this court to 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.”

40. This court could not agree more with the Defendants that a member cannot seek the dissolution of the Welfare Group merely because he felt that he was wronged by members. Members are bound by their Constitution. Dissolving the Welfare Group by the court would be circumventing the rules members of the Welfare Group had agreed would govern the affairs of their Group. Courts must be very slow to interfere in the affairs of Groups that have their own rules of engagement.

41. This court therefore rejected the Plaintiff's prayer that this court dissolve the Group and assets be distributed amongst the members as the same had no legal basis whatsoever.

IV. REGISTRATION OF ASSETS IN WELFARE GROUP

42. While being Cross-examined, the Plaintiff admitted that he had stated that the assets of the Welfare Group had not been registered in its name but were still in the Vendor's names. On being showed the Title Deed of the two (2) properties that had been purchased which showed that they were in the name of the Welfare Group, he stated that he had not been aware that title deeds had been issued.

43. This court found this issue to have been overtaken by events as the Defendants adduced Title Deeds in court as proof that the assets that had been purchased by the Welfare Group had already been registered in its name. They may not have been registered in the name of the Group by the time the Plaintiff filed suit, but they have now been registered as such.

V. CONSEQUENCES OF THE PLAINTIFF'S SUSPENSION AND HIS CLAIM FOR GENERAL DAMAGES

44. These two (2) issues were dealt together as they were related.

46. In his Cross-examination, the Plaintiff stated that although his suspension from the Welfare Group was lifted, he never went back because he had already filed the present suit. He also stated that he had never furnished the Welfare Group with details of his next of kin as he had been requested. It was his contention that he would rather be paid for his shares as opposed to remaining as a member in the said Welfare Group. On being Re-examined, he stated that the suspension caused him to lose respect, he was unable to purchase shares or take loans.

46. He was categorical that his assertions that the properties were not in the mane of the Welfare Group were not false as the said Titled Deeds were issued in 2016, two (2) years after he filed the present suit. It was his contention that he had merely repeated what the Auditor had stated to the effect that the Welfare

Group was at risk because they did not have title deeds to the properties they had purchased.

47. He submitted that he used to purchase five thousand (5000) shares per month and as at the time he was suspended in 2014, his share stood at one hundred and fifty six thousand and sixty six (156,066) shares. He argued that as per the Valuation Report dated 12th August 2013 by Kalama & Associates, the Welfare Group was worth Kenya Shillings twenty five million two hundred and twenty six thousand five hundred and eighty eight (Kshs 22,226, 588/=) which currently could be Kenya Shillings Thirty Five million (Kshs 35,000,000/=). He therefore urged this court to order that he get his share.

48. He added that his inability to take loans to boost his business at Voi negatively impacted on his business from 2013 and he had missed on benefitting from the burial contributions that the Welfare Group gave to its members in case of death. He therefore urged this court to award him a sum of Kshs 800,000/= general damages.

49. On its part, the Defendants argued that they were lenient in the penalty they meted out to him as they merely suspended him and not expelled him and that they did not float his shares for sale to members of the Welfare Group. They blamed him for not having gone back to the Welfare Group after the suspension of six (6) months ended and failing to remit the names of next of kin as he had been requested to do. It was their argument that the Plaintiff could not enjoy the benefits so long as he remained suspended.

50. They therefore urged this court to dismiss the suit with costs to them but that in the event this court was not agreeable to the same, it should order that each party bears its own costs.

51. This court noted that the Plaintiff was suspended for six (6) months albeit, unlawfully. He was informed vide a letter of 20th September 2014 by the Welfare Group that his suspension was over and that he had been restored in the group. However, he did not go back to the group but instead opted to file the present suit.

52. This court would have been interested in seeing documentation that proved the Plaintiff's assertions that he purchased shares on a monthly basis and took loans that he would repay with minimal interest to boost his business at Voi. Unfortunately, he did not provide any evidence to support his assertions.

53. What this court could discern from his suspension letter of 18th March 2014 was that he had been reminded to pay his loan. He failed to adduce any evidence to demonstrate that he was entitled to take another loan while he had a subsisting loan. In addition, although the Welfare Group's acted arbitrarily and without any colour of right in suspending him for failing to provide details of his next of kin, he failed to proffer a plausible explanation why he did not provide the said details.

54. Consequently, in the absence of any evidence to the contrary, this court was not satisfied that the Plaintiff had proven that he had suffered any loss during the six (6) months that he had been suspended or during the additional time he remained suspended due to failure to give details of his next of kin.

55. Having said so, this court was persuaded to find and hold that he had suffered inconvenience for not having been a member of the Welfare Group for the six (6) months period that he had been suspended for incitement. Despite the suspension for failing to provide details of next of kin, this court was of the view that suspension beyond the six (6) months was self-imposed and could not be visited on the said Welfare Group. The Plaintiff could not be compensated for the period he voluntarily stayed away even after being informed by the Welfare Group that he had been restored to the membership.

56. In that regard, this court found no legal justification to award him a sum of Kshs 800,000/= general damages as he had opined. It was the considered view of this court that the Plaintiff could only be paid nominal damages to compensate him for the unlawful actions of the Welfare Group in having suspended him contrary to what the Constitution of the said Welfare Group provided. This court was of the view that a sum of Kshs 20,000/= would be reasonable in the circumstances of the case herein.

57. In arriving at the said figure, this court had due regard to the case of **Nyamogo & Nyamogo**

Advocates v Barclays Bank of Kenya [2015] eKLR where the Court of Appeal considered the case of **Kanji Naran Patel versus Noor Essa and another [1965]EA484** at page 487 paragraph G-I in which it had been stated as follows:-

“Nominal damage is a technical phrase which means that you have negated anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damage does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages but may also be represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances and it certainly does not in the smallest degree suggest that because they are small, they are necessarily nominal damages.

In the earlier case of Beumont versus Great head [1846] 2C.B. 494, Maule, J. [1846] 2C.B. at P.499) spoke of nominal damages as a sum that may be spoken of but that has not existence in point of quantity” and as a “mere peg on which to hang costs.”

58. Turning to the issue of reimbursement of the Plaintiff’s shares at the current market value, 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 the Plaintiff could be paid off. This court concurred that that would be the best course of action as it would be unrealistic to wind up a group merely because the Plaintiff wants out of the arrangement.

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.”

60. As there was a specific procedure of the refund, this court found and held that the Plaintiff and the Defendants ought to be guided by the provisions of Article 17(g) of the Constitution of the Welfare Group.

DISPOSITION

61. Accordingly, having considered the oral and documentary evidence, the Written Submissions by both the Plaintiff and the Defendants and the case law that was relied upon by the Plaintiff, this court hereby enters judgment in favour of the Plaintiff against the Defendants for:-

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.

62. Orders accordingly.

DATED and **DELIVERED** at **VOI** this **30th** day of **March** 2017

J. KAMAU

JUDGE