



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 4 OF 2015

BERNARD MUGO.....1ST PLAINTIFF
NYAGA MWARA.....2ND PLAINTIFF
JOSEPH IRERI.....3RD PLAINTIFF
BENJAMIN MUGO.....4TH PLAINTIFF
HARUN NJAGI.....5TH PLAINTIFF
NYAGA NAMU.....6TH PLAINTIFF
IRERI GACHUNGI.....7TH PLAINTIFF
SABASTIAN NJIIRI.....8TH PLAINTIFF
DAVID NYAGA NTHANJU.....9TH PLAINTIFF

VERSUS

KAGAARI SOUTH FARMERS CO-OP SOCIETY LTD...1ST DEFENDANT
MICHAEL M. MUGUSHU.....2ND DEFENDANT
JAMES NAMU NJERU.....3RD DEFENDANT
CYRUS NTHIGA.....4TH DEFENDANT
NAHASON NYAGA.....5TH DEFENDANT

RULING

1. This is the application dated 13/4/2015 and filed on 14/4/2015 seeking *interalia* that the court grants an order compelling the respondents to take delivery of coffee beans from the applicants pending hearing and determination of the applicants suit. They also seek that the court issues an order compelling the respondents to provide the applicants with copies of the minutes and resolutions passed in the AGM held on 12/3/2015.
2. The application is supported by the affidavit of Lemmy Gitonga Maina in which he states that he has

the authority of the second to ninth plaintiffs/applicants to swear the affidavit. It is stated that on 25/2/2015 the 2nd respondent posted on the 1st defendant's notice board a notice calling for an AGM which was to be held on 12/3/15. The agenda of the meeting was clearly set in the notice. The applicants attended the meeting and were surprised when a special resolution seeking to suspend them from membership was proposed by the 5th defendant. Efforts to get an explanation on why they should be suspended were futile. The resolution was passed and the applicants were barred from delivering coffee beans at the 1st defendant's factory for three years.

3. The applicant's efforts to get the minutes of the said meeting were also unsuccessful. According to them, the resolution was illegal having been passed in a meeting not properly convened. The resolution was not circulated together with the notice as required by the law. It is argued that the rules of natural justice were not observed and further that the applicants will suffer irreparable economic loss due to the three years suspension and before this case is heard and determined.

4. The respondents in the replying affidavit state that they raised a preliminary objection which was determined in the applicant's favour. The deponent stated that he had the authority of other respondents to swear the affidavit and attached the said affidavits. The 2nd respondent wrote to the 1st respondent on 23/1/2014 in his capacity as the chairman of Thayu Urimiri Wa Kahua Self Help Group asking for minutes of the AGM

5. that respondent further stated that on 11/7/2014, the 1st applicant wrote to the Commissioner of Cooperative Development requesting permission to build a coffee factory. On 22/10/2014 the Embu Nyangi Ndiiriri Group of Elders under the instructions of the 1st and 4th applicants wrote to the District Land Registrar, Embu restricting the 1st respondent from dealing with its land. On 23/01/2015 the 2nd applicant posing as the chairman of Thayu Urimiri Wa Kua Self Help Group wrote to the Kenya Police at Runyenjes asking to hold a meeting of coffee farmers.

6. The 2nd applicant also wrote to the OCS Runyenjes on 30/1/15 and 6/2/15 in his capacity as the chairman of Thayu Urimiri Wa Kahua Self Help Group. The 1st respondent states that applicants were suspended for going against the 1st respondents core values.

7. The applicants argued that on 25/2/2015 the 2nd respondent posted a notice to all members on its notice board of an AGM which was supposed to be held on 12/3/15 and which notice included the agenda of the meeting save for the one for suspending the applicants. During the meeting the motion to suspend the applicants for the reasons not explained was introduced and passed. The applicants' efforts to get the reasons for the intended suspension were fruitless and eventually the proposal was passed into a special resolution by a majority vote.

8. The 1, 2, and 3rd respondents have since enforced the resolution in total disregard to the economic loss the applicants are likely to suffer by barring them from delivering their coffee beans at the 1st respondent's factory for three years without any explanation or chance to be heard.

9. It is further argued that the meeting was not convened in accordance to section 27(4) of the Cooperative Societies Act as the notice was put up on 25/2/2015 and was supposed to be held on 12/3/2015 which was after 14 days. The notice was only displayed at the 1st respondent's notice board. It is clear that the notice period was less than the statutory period and hence the proceedings were null and void.

10. The respondents failed to include as an agenda for the convened meeting a motion for the expulsion of the applicants. For any a matter to be discussed at a general meeting of a cooperative society, it must be presented to the members in a manner prescribed in section 27(5) of the Cooperative Societies Act. The same is captured under section 27(h) of the Kagaari South Farmers Cooperative Society Limited By Laws. The notice also fell short of the provisions of section 27(6)(b) of the Cooperative Society Act as the issue of suspension was only raised at the floor of the meeting.

11. The applicants argue that they were not given a chance to respond to any accusations leveled against them which is against the principles of natural justice and Article 47 of the Constitution. This renders the resolution to suspend the applicants invalid and is therefore a nullity. The applicants prayer to be allowed to take coffee to the 1st defendant is a temporary mandatory injunction governed by the principles in the case of ***Giella Vs Cassman Brown***.

12. The applicants have demonstrated a *prima facie* case with a probability of success. The balance of convenience lies on the applicants side as the respondents are not likely to suffer any prejudice if they are to accept the applicants deliveries in the factory.

13. The applicants urge the court to compel the respondents to furnish the applicants with minutes and adopted resolutions of the AGM held on 12/3/2015 as Article 35(1)(b) of the Constitution provides that every citizen has the right of access to information held by another person and which may be required for exercise or protection of any right or fundamental freedom. Although the applicants cited several authorities, they did not attach them in their submissions.

14. The respondents submitted that the 1st applicant did not attach the authority of the other applicants in writing, signed and filed as required by Order 1 Rule 13(2) of the Civil Procedure Rules. By Law number 9(j) provides that membership to the society shall cease with effect from the date of a member registering, opening or becoming a member/shareholder in an organization carrying out the same business as the society.

15. The respondents claim that the following actions by the applicants signified that the members had ceased to be members of the society:-

- . *A self help group was formed by the name Thayu Urimiri Wa Kaua Self Help Group attached as exhibit 1 of the respondents affidavit.*
- . *The applicants wrote to the Commissioner of Cooperative Development as proved by exhibit 2 in the respondents affidavit seeking to start Kithunguthia Coffee Factory.*
- . *A caution was placed against the 1st respondent's land preventing its officials and members from executing their mandate as granted by the members and frustrating the objects of the 1st respondent.*

16. The respondent further contends that the applicants having left voluntarily, cannot be heard to say that they were denied an opportunity to be heard before their expulsion. On expulsion of members from the society, By Law No. 10(c) provides that the cooperative committee may subject to confirmation of the next AGM expel a member. It is further argued that the notice period was more than adequate as there were sixteen days in between.

17. Agenda number 7 of the meeting notice pertained to any other business and as such the applicants cannot allege that their suspension was not an agenda of the meeting. Under Any Other Business, the respondents could slot in any other business affecting 1st respondent such as the applicants conduct. The 1st respondent contends that it should not be compelled to accept coffee from the applicants who ceased to be its members.

18. On suffering irreparable loss the applicants are the author of their own misfortunes and should not complain. Equity will not aid a wrong doer benefit from his wrongful act. The respondent further stated that the applicants having voluntarily ceased to be members of the society are not entitled to any documents from the society including the minutes of the AGM.

19. The applicants in their further submissions argued that failure to file a written authority by the 2nd-9th applicants did not render the pleadings incompetent as far as the 2-9th applicants are concerned. The applicant cited and attached the case of ***MUSA IBUSA & 7 OTHERS VS MORVEN DEVELOPERS***

LIMITED & 2 OTHERS ELC CIVIL SUIT 483 OF 2012 where the court cited Article 159(2) of the Constitution which enjoins the court to dispense justice without undue regard to procedural technicalities.

20. The applicant also relied on the case of **KUTIMA INVESTMENTS LIMITED VS MUTHONI KIHARA & ANOTHER CIVIL APPEAL 117 OF 2005** where the court of appeal citing Madan J.A in **D.T DOBIE & CO. LTD VS MUCHINA [1982-88] 1KLR** that the court should aim at sustaining rather than terminating the suit. On whether the applicants had a registered a cooperative society, the applicants submitted that there was no evidence availed to show that that the applicants established any coffee factory.

21. The court proceeds to deal with the issue of whether the failure to attach a signed authority is fatal to the case. In the case of **WILSON MBITHI MUNGUTI KABUTI & 5 OTHERS VS PATRICK MAKAU KINGOLA & ANOTHER [2013] eKLR** the court cited the court of appeal decision in **JOSEPH KAMAU MUSA & OTHERS VS ERIC CO. LTD AND OTHERS [2006] eKLR** where the applicant stated in the affidavit that he had authority to make the affidavit on behalf of others.

22. The court held that ‘ ‘our understanding of the averment is that the first applicant was saying he had instructions from other applicants to swear the affidavit on their behalf. If the first applicant had instructions to swear on behalf of the other applicants, then clearly he had authority to swear on behalf of the others for how else could they instruct him and yet at the same time not authorize him to act on their behalf?’ ’

23. In view of the above Court of Appeal decision and the fact that the 1st applicant stated in paragraph one of the supporting affidavit that he has authority and consent of the 2nd to 9th applicant to swear the affidavit. The respondents argument that the affidavit is not proper cannot stand the test laid down in the **WILSON MBITHI case (supra)**. However, the authority was later filed and is now a part of the court record.

24. The other issue is whether the AGM of 12th March was convened legally. According to annexure BM2 of the supporting affidavit the notice of the AGM dated 25/2/15 indicated that the AGM would be held on 12/3/15 at 10.00am.

25. Section 27(4) of the Cooperative Societies Act provides that;

A general meeting of a co-operative society shall be convened by giving at least fifteen days written notice to the members.

Section 23 of the Co-operative Societies Rules, 2004 provides that;

The annual general meeting of members of a co-operative society shall be convened each year by the committee or the Registrar or his representative within one month of the date of receipt of the report on the audit of the accounts of the society by the committee:

Provided that—

(i) *the Registrar may at any time after the audit of the accounts has been completed convene an annual general meeting which shall proceed as if it has been convened by the committee.*

(ii) *in either case, at least fifteen clear days notice shall have been given of the intention to hold the meeting.*

26. According to By Law No. 25 of Kagaari South Farmers Cooperative Society Limited the notice for a general meeting should be at least 15 days before the general meeting. The secretary should ensure that an announcement of the meeting is done in public meetings, churches, mosques, markets, schools, posting a notice on the societies notice board and placing an advertisement in local newspapers or news-sheet. The notice shall include a statement of the business to be dealt with by the general meeting.

27. A computation of the days between 25/2/2015 and 12/3/2015 indicates that there were only fourteen clear days in between the date when the notice was issued and when the meeting was to take place. This notice was issued contrary to provisions of Section 23 of the Act.

28. In the case of **MUKA MUKUU FARMERS COOPERATIVE SOCIETY LTD VS THE COMMISSIONER FOR THE COOPERATIVE SOCIETIES [2004] eKLR** the court faulted the fact that the notice period for the special general meeting was less than the mandatory “at least fifteen clear days” provided by the Cooperative Societies Act. The court further faulted the fact that the agenda was vague in that it did not give notice of what was to be discussed.

29. According to the notice dated 25/02/2015 the agenda of the AGM was as follows;

- *Reading and confirmation of previous minutes*
- *Matters arising from the minutes*
- *Chairman’s report*
- *Supervisory committee report*
- *Audited financial report 2013/2014*
- *Selection of 2014/2015 auditor*
- *Any other business*

30. Section 27(5) of the Cooperative Societies Act provides that;

At the annual general meeting of a co-operative society, the members shall

(a) consider and confirm the minutes of the last general meeting;

(b) consider any reports of the Committee or the Commissioner;

(c) consider and adopt audited accounts;

(d) determine the manner in which any available surplus is to be distributed or invested;

(e) elect the co-operative society’s office bearers for the ensuing year;

(f) determine, where necessary, the maximum borrowing power of the society;

(g) appoint an auditor for the ensuing year; and

(h) transact any other general business of the co-operative society of which notice has been given to members in the manner prescribed in the by-laws of the co-operative society

31. By-Law No. 25 of the Kagaari South Farmers Cooperative Society Limited provides that:-

‘..... all notices of the meeting shall include a statement of the business to be dealt with at the meeting.’

32. By-Law No. 27(h) provides that the duties and powers of the general meeting shall be to transact “any other business” of the cooperative society of which notice has been given to members in the manner prescribed in the By-Laws of the Cooperative Society. The respondents allegation that the suspension of the applicants was any other business does not hold water as a notice of the same was still required.

33. In the case of Washington **SILVANUS WASHIALI KHWALE VS DISTRICT COOPERATIVE OFFICER MUMIAS & 5 OTHERS [2014] eKLR** the court held that the meeting that was regularly been convened became irregular when items not on the agenda were introduced and discussed.

34. In the case of **MUKA MUKUU FARMERS COOPERATIVE SOCIETY LTD VS THE COMMISSIONER FOR THE COOPERATIVE SOCIETIES [2004] eKLR (supra)** the court found

that the agenda was vague in that it did not give notice of what was to be discussed.

35. It is clear that the agenda for the expulsion of the applicants was not one of the agendas listed in the notice dated 25/2/2015. In view of the above provisions of the law and case law, it was improper for the subject of expulsion of the applicants to be discussed without being placed in the notice as an agenda.

36. For the court to determine whether the expulsion of the applicants was lawful, it requires that the By laws of the society and the provisions of the Act be read together. However, considering the prayers sought in the plaint, this court would be pre-empting the main issues for determination in this case in an interlocutory application. For this reason, I will not dwell with this issue at this stage.

37. From the foregoing representations by the applicants, this court is convinced that the applicants have shown that they have a *prima facie* in conformity with the principles laid down in the case of **Giella Vs Cassman Brown**. By being blocked from delivering their coffee to the 1st respondent, the applicants have suffered substantial loss and continue to do so.

38. This economic loss is not likely to be compensated in that the product continues going to waste and it is not possible to accurately assess the damage suffered by the applicants from day to day. The respondents are not likely to suffer any loss or disadvantage in accepting the coffee from the applicants who are still their members until the issue of the legality of expulsion is determined.

39. The copies of the minutes and resolution passed in the AGM held on the 12/03/2015 should form part of evidence in this case for either of the parties. The applicants have a right of access to information which is guaranteed by Article 35 of the Constitution. The respondents have a duty to provide the information to the parties who were affected by it.

40. I find the application merited and allow it in terms of prayers (c) and (d) of the application. The respondent has 14 days to comply with the orders and in default the applicants are at liberty to seek legal protection.

41. Costs to the applicants.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF JULY, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

All Applicants