



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCC NO. 4 OF 2015

STANLEY NJOKA KENYA1ST PLAINTIFF

CHARLES KATHUNI NGAINE.....2ND PLAINTIFF

ALEXANDER GITIRA.....3RD PLAINTIFF

EPHANTUS RWIGI.....4TH PLAINTIFF

VERSUS

MUIRU FARMERS CO-OPERATIVE SOCIETY LTD.....DEFENDANT

R U L I N G

1. Stanley Njoka Kenya, Charles Kathuni Ngaine, Alexander Gitira and Ephantus Rwiggi (hereinafter "*the Plaintiffs*"), are coffee farmers within the Tharaka Nithi County. At all times material to this suit they were members of **Muiru Farmers Co-operative Society Ltd** (hereinafter "*the Defendant*"), a Co-operative Society incorporated and operating within the provisions of the Co-operative Societies Act, Chapter 490 of the Laws of Kenya (hereinafter "*the Act*"). By virtue of their membership in the Defendant, the Plaintiffs deliver harvested coffee berries to coffee factories affiliated to the Defendant for their livelihood or in furtherance of their economic well being.

2. At its Annual General Meeting held on 29th April, 2015, the Defendant suspended the Plaintiffs from its membership. The Plaintiffs thereafter were barred from delivering their coffee berries to any coffee factories affiliated to the Defendant. Aggrieved by the Defendant's conduct, the Plaintiff's rushed to this court on 19th August, 2015 alleging that the Defendant's said actions were unlawful. That the said acts had exposed them to injury and possible damage. They therefore prayed for a declaration that the purported expulsion of their membership in the Defendant was illegal and therefore null and void and prayed for a permanent injunction against the Defendant from expelling them and declining to receive the Plaintiff's deliveries of coffee berries.

3 Together with the plaint, the Plaintiffs lodged a motion on notice dated 17th August, 2015 seeking a temporary mandatory injunction directed at the Defendant to accept the Plaintiff's deliveries of coffee berries and a temporary injunction to restrain the Defendant from declining to receive the Plaintiffs deliveries of coffee berries. There were no temporary orders that were granted and the application was argued before me on various days and this ruling relate to that application.

4. The application was supported by an undated Affidavit and further Affidavit of Stanley Njoka Kenya sworn on 5th November, 2015. The Plaintiffs contended that they were member Nos. 1413, 4620, 4730 and 4447, respectively in the Defendant; that pursuant to such membership, they deliver coffee berries to

the Defendant's affiliated factories; that at its annual general meeting, the Defendant passed a resolution to expel them from its membership; that the Defendant has since declined to accept any coffee deliveries by the Plaintiffs. The Plaintiffs concluded that the Defendant's action was unprocedural, irregular, illegal, unlawful as their suspension was not the agenda for the meeting. they also contended that their coffee berries was now going to waste with nowhere to deliver them to. In support the application, Mr. Muriithi Learned Counsel for the plaintiffs filed written submissions which he ably hi-lighted. He submitted that the prayer for mandatory injunction had been overtaken; that the Plaintiffs had established a prima facie case with a probability of success in the manner set out in **Mrao Ltd- V- First American Bank Ltd [2003] KLR 125**. That the continued going to waste of the Plaintiff's produce constituted an irreparable damage under the second limb of **Giella -v- Cassman Brown [1973] EA 359**. Counsel concluded that the balance of convenience tilts favour of granting the orders sought as the Plaintiff's continue to be saddled with coffee produce that they have nowhere else to dispose off to. He urged that the application be granted.

5. The Defendant opposed the application through a Preliminary Objection and the Replying Affidavit of Japheth Mutegi Nyaga sworn on 8th September, 2015. It was contended that the Plaintiffs were properly suspended in the Defendant's general meeting of 29th April, 2015; that they were farmer officials of the Defendant but had been removed from positions of leadership; that since their aforesaid removal the Plaintiffs had continuously engaged themselves in acts of sabotage against the Defendant amounting to acting against the interest of the Defendant. That on 25th January, 2015, the Plaintiffs had held a meeting where they incited the members against the Management Committee of the Defendant. That the suspension was in accordance with Article 47 (d) of its bylaws. That the Plaintiffs were present at the meeting but had declined to defend themselves. The Defendant produced Affidavits by some of its members who attended the meeting which supported the position taken by the Defendant.

6. Mr. Mbaya, Learned Counsel for the Defendant submitted that, there was evidence that the conduct of the Applicants was properly discussed at the Defendant's general meeting; that the decision made by the Defendant was in accordance with its by-laws; that in the premises, no prima facie case had been established. Counsel submitted that there was no evidence that the Plaintiffs will suffer any damage which was irreparable as the Defendant was financially stable and therefore capable of meeting any claim for compensation of damage. On the balance of convenience, counsel urged that since the actions of the Plaintiffs were against the interests of the Defendant's larger membership, no injunction should be issued. Counsel urged that the application be dismissed.

7. The first issue for determination is the Preliminary Objection raised by the Defendant. In its notice dated 3rd March, 2016, the Defendant raised four (4) grounds of objection. Although Mr. Mbaya did not argue the first three (3) but only argued the one on jurisdiction, this court will nevertheless deal with all of them as the Applicant's Counsel did address them. The first objection was that the plaint is fatally defective for being supported by an invalid Verifying Affidavit. As already stated, it was not shown how the Verifying Affidavit is invalid. But as pointed out by counsel for the Applicants, the Verifying Affidavit was undated. To this courts mind, that is a mere irregularity which is curable under Order 2 Rule 15 of the Civil Procedure Rules as well as Article 159 (2) (d) of the Constitution. That omission would have been material if it was an issue as to when the Verifying Affidavit was sworn. That irregularity is curable by either allowing the deponent to withdraw the same and take it back to the Commissioner for Oaths before whom it was sworn for purposes of dating or to order the deponent to file a compliant Verifying Affidavit. However, I am minded as in the case of **Microsoft Corporation -v- Mitsumi Computer Garage Ltd & Anor Milimani HCC No. 810 of 2001 (UR)** to strike out the Verifying Affidavit on record and order that the Applicants do file and serve a compliant Verifying Affidavit within seven (7) days of the date hereof.

8. The other two (2) objections were that, the suit does not disclose any cause of action against the Defendant and that the plaint is defective in form and substance. On the issue of the plaint disclosing no cause of action, a cause of action is disclosed when a party to a suit alleges the existence of either a legal or equitable right which he/she alleges to have been breached, invaded or is threatened to be breached or invaded by a Defendant. That by such breach or invasion or the threat thereof will lead to loss and damage. In the instant case, Paragraphs 4 to 10 of the plaint alleges that the Plaintiffs are coffee farmers

who have been rightful members of the Defendant; that such membership entitle them to deliver to the Defendant coffee berries; that the Defendant has irregularly and unlawfully terminated or suspended the plaintiff's said membership in the Defendant and have barred the Plaintiffs from delivering their coffee berries to factories affiliated to it. That the said actions had led the Plaintiffs to suffer loss and damage. To my mind the said pleading discloses that there exists a legal and/or equitable right of association of the Plaintiffs from which certain benefits enure to them. By alleging the unlawful or irregular interference with that right by the Defendant, in my view, the plaint thereby discloses a cause of action against the Defendant.

9. As regards the ground that the suit is incurably defective in form and substance, there was nothing that was advanced to prove that ground. Having carefully looked at the plaint and the application, I form the opinion that there is no defect in substance in the plaint dated 17th August, 2015. The two grounds therefore fail.

10. The final ground of objection which was exhaustively argued was that this court lacks jurisdiction to entertain the suit by dint of section 76 of the Act. It was contended that the dispute between the Plaintiffs and the Defendant was a dispute that by virtue of the section 76 of the Act should have been referred to the Cooperatives Tribunal. Mr. Mbaya learned counsel for the Defendant further submitted that since the Defendant was in liquidation and no leave was obtained to commence the present proceedings, the suit is a non starter. Counsel referred the court to Minute No.04/2015 of the minutes produced as "JMM1" to show that the liquidation process was ongoing. He therefore submitted that either way, the suit herein was a non- starter. Mr. Murithi for the Plaintiffs submitted that the dispute between the parties did not fall under section 76 of the Act and that the entity that was under liquidation was an entity known as Chuka Farmers Cooperative Society Limited and not the Defendant.

11. In his further Affidavit sworn on 6th June, 2016, Charles Kathuni Ngaine produced as "**CKN 1**" minutes of a meeting of the Chuka Farmers Cooperative Society Limited held on 26th June, 1997. That meeting resolved in a minute No. 5/97 to split the said society into five entities, namely, Ndagani Farmers Co-operative Society Ltd, Kiang'onde Farmers Cooperative Society Ltd, Gitareni Farmers Co-operative Society Ltd, Kirubia Farmers Co-operative Society Ltd and Muiru Farmers Co- operative Society Ltd. From the said resolution, the Defendant was one of the entities that came into existence from the dissolution of the said Chuka Farmers Co- operative Society Ltd. Indeed the By-laws of Defendant produced as Exhibit "**JMM3**" shows that the Defendant is registered as an independent entity under CS No. 8267. In the resolution of 26th June, 1997, it was clear that each of the five (5) entities was to have its own members derived from Chuka Farmers Co-operative Society Ltd. The Defendant was allocated a total of 1,809 members.

12. On the other hand, the Defendant in the Supplementary Affidavit of Japheth Mutegi Nyaga sworn on 9th May, 2016 contended that the Defendant was a member of the aforesaid Chuka Farmers Co-operative Society Ltd; that since the latter was currently under and/ or in liquidation, all the defendant's assets and liabilities are under the liquidator. Several correspondence, including, ("**JNM 1**"), (b) (c) (d) (e) and (f), were produced. All of them refer to Chuka Farmers Co-operative Society Ltd being in liquidation. In his Replying Affidavit and supplementary Affidavit sworn on 8th September, 2015 and 9th May, 2016, respectively, Mr. Japheth Mutegi Nyaga swore the same as the chairman of the Defendant. The Defendant filed its defence on 27th November, 2015 wherein it admitted its description as contained in the plaint. Nowhere therein did it indicate that it was under liquidation.

13. From the foregoing, this court's opinion is that; **CHUKA FARMERS CO- OPERATIVE SOCIETY LTD**, registered under the relevant laws as entity No. 0245 was an entity comprising of individual members running into thousands; that sometimes in 1997, it entered into voluntary liquidation whereby five (5) other entities were created therefrom based on locations of the members whereby the Defendant was one of them with 1,809 members. There was no evidence that the Defendant was under liquidation as it was still being run by a Management Committee. That is why the deponent of the two Affidavits in opposition to the application were sworn by Japhet Mutegi Nyaga, the chairman and not the liquidator or any of his agents. Accordingly, the court holds on a prima facie basis that it is Chuka Farmers Co-operative Society Ltd that is under liquidation and not the Defendant; that the Defendant is an

independent entity from the said Chuka Farmers Co- operative Society Ltd and is itself not under any sort of liquidation as alleged by the Defendant.

14. The other issue is that the court lacks jurisdiction by dint of section 76 of the Act. That section provides as follows:-

"76 (1) If any dispute concerning the business of a co-operative society arises-

- a) among members, past members and persons claiming through members, past members and deceased members; or***
- b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or***
- c) between the society and any other co-operative society, it shall be referred to the Tribunal.***

(2) A dispute for the purpose of this section shall include-

- a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or***
- b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;***
- c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority." (Ephasis supplied)***

15. From the foregoing, the operative words in the section are in my view, "***any dispute, concerning the business of a Co-operative Society..... a dispute shall include a claim by the Co-operative Society for any debt or demand due.....***" In this regard, for a dispute under the Act to fall under the said Section, it must be that which concerns the business of the society and must relate to or concern a debt or claim by the co-operative society against a member or vice versa or a claim by a society against a refusal to grant or a revocation of licence from the authority. The question therefore is, what is the business of the Defendant? Does the present dispute fall within the parameters of Section 76?

16. Under Article 5 of the Defendants By-laws, its objects are specifically stated to be "***... to promote the economic interests and general welfare of its members in accordance with the co-operative principles and values...***" These are particularised in sub-articles (a) to (e) of Article 5 aforesaid. In none of the sub articles (a) to (e) is suspension and or expulsion of members set out or referred to. The issue of suspension and expulsion is set out in Articles 10 and 47 of the By- laws. To my mind, that which is outside the main objects of the society cannot be said to be the "***business of a Co- operative Society***" in terms of Section 76 of the Act. It follows therefore that, in so far as disciplining of members is outside the purview of Article 5, it cannot be said to be the business of the Defendant. It is clear from the plaint that the dispute the subject of the suit is the suspension and therefore the disciplining of the Plaintiffs under Article 47 (in terms of the resolution made on 29th June, 2015.) Accordingly, since the dispute is about the disciplining of the Plaintiffs under Article 47 of the Defendant's By-laws, that is a dispute that does not concern the usual business of the Defendant and it is well outside the purview of Section 76 of the Act.

17. In any event, the Plaintiffs produced evidence to show that the tribunal that is empowered to adjudicate upon the disputes under Section 76 of the Act, was not in operation as at the time they approached this court. Suppose the dispute was under Section 76 of the Act, were the Plaintiffs expected to wait until that tribunal was operationalised before taking action?. I do not think so. Article 159 in my

view allows this court to exercise its jurisdiction for the benefit of such litigants. Such litigants cannot wait until the bureaucracy that is attendant in appointment of the members or the chair of such a tribunal acts before they can seek redress for a grievance that is urgent such as the one facing the Plaintiffs. In my view, the High Court has the power to step in and fill the lacuna. It is not and could not have been the intention of Kenyans in enacting the Constitution and the legislature in enacting the Co-operative Societies Act, that in the event of a lacunae leading to the absence of a platform where an aggrieved party is to air his grievances and seek redress, that he has to wait until the powers that be take their good time to reconstitute such forums before an aggrieved party can seek redress. The High Court in my view can and indeed should step in to fill that lacunae. Of course there cannot be a wrong without a remedy and more so, when the wrong is a continuing one. Accordingly, I hold that the High Court was the proper forum for the dispute between the parties herein.

18. Accordingly, I find the preliminary objection to be without merit and the same is dismissed with costs to the Plaintiffs. Let me now turn to the main application.

19. The Plaintiffs contention is that the issue of their disciplining was not in the agenda; that it was sneaked in irregularly at the close of the Defendant's general meeting; that they were therefore not given any opportunity to defend the allegations made against them. In their view therefore, their suspension from the Defendant was irregular and unlawful. On its part, the Defendant contended that the issue of the Plaintiff's conduct was discussed at the general meeting; that the Plaintiffs were given an opportunity to defend themselves but chose not to and that the suspension was therefore regular, lawful and in accordance with the Defendant's By-law No. 47.

20. In their further supporting Affidavit sworn by Stanley Njoka Kenya on 5th November, 2015, the Plaintiffs produced as exhibit "SNK 1" the Notice dated 14th April, 2015 that called for the Defendant's general meeting of 29th April, 2015. The Notice which was signed by the chairman of the Defendant read as follows:-

"This is to inform all the society members that our annual general meeting has been scheduled for 29/4/2015 exactly at 10.00 a.m. at the society headquarters.

The agendas for the day will be:-

- Opening of meeting,***
- Reading and opening of the previous minutes,***
- matters arising from the minutes,***
- Matters arising from the minutes,***
- Chairman's report,***
- supervisory committee report.***
- Financial statements 2013/2014,***
- Appointment of auditor for 2015,***
- Financial estimates for the 2015,***
- Fixing of the society's borrowing powers,***
- General finance,***

- **Supervisory Committee,**

- **A.O.B"**

From the foregoing, the last agenda before AOB was the Supervisory Committee.

21. In the minutes for the meeting of 29/4/2015 produced by the Defendant as exhibit "**JMM 1**", after the last agenda being Min 12/2015- Supervisory Committee another agenda appearing as Min 13/2015 suspension of members is seen to have been deliberated and four members, the Plaintiffs herein were suspended after they were found guilty of the allegations levelled against them. Their suspension was under by-law No. 47 (d) of the Defendant. The minutes show that the Plaintiff's refused to defend themselves of the allegations and were suspended accordingly.

22. Under by-law number 25 of the Defendant, the secretary is required to issue a notice convening the general meeting giving at least fifteen (15) days notice. The notice is required to inform all the members of the date, time and the main business of the meeting. The bylaw stipulates, inter alia, that:-

"All notices of the meeting shall include a statement of the business to be dealt with in the meeting."

23. From the foregoing, it is clear that the suspension of the Plaintiffs was not one of the items that was contained in the Notice dated 14th April, 2015 for consideration at the general meeting of 29th April, 2015. Nevertheless, the issue seems to have been raised and discussed at that meeting. I have carefully considered the Defendant's by-laws as well as Section 27 of the Act which provides for the general meetings of all Co-operative Societies. I did not see any provision on how an item not contained in the notice convening the meeting is to be introduced at such a meeting. There being no provision on how an agenda that is not contained in the requisition notice is to be introduced at a general meeting I hold that on a prima facie basis, it would seem that the agenda on the suspension of the Plaintiffs was irregularly introduced and discussed at that meeting. Since the issue of suspension is akin to a disciplinary process, the subjects were supposed to have been notified of the intention to discuss their conduct and the allegations made against them be supplied in good time to enable them prepare their defence. Although they were informed of their "sins" on the floor of the meeting, there was not enough notice or notices at all to enable them effectively defend themselves. The court's view is that, the Defendant did not show whether it was entitled to introduce the agenda at the meeting without having included the same in the notice. Accordingly, there may have been irregularity in the introduction of the agenda and its subsequent discussion.

24. In this regard, under the authority of **Mrao.v. First American Bank Ltd [2003] KLR 125** which defined what a prima facie case, I am satisfied that the Plaintiffs have presented material to this court which on proper direction makes the court to conclude that the plaintiffs right to due process may have been infringed thereby requiring the Defendant for an explanation or rebuttal. A prima facie case has been established.

25. Have the Plaintiff's established that they will suffer irreparable loss which damages cannot compensate? The Defendant's contention is that it has a war chest capable of compensating the Plaintiffs for any losses they may suffer. Firstly, the suspension of the Plaintiffs is peremptorily irregular. The same has infringed the Plaintiff's right to freedom of association, in that, they have been irregularly barred from belonging to the Defendant and cannot associate economically with their erstwhile colleagues, the rest of the Defendant's members. Secondly, it is not in dispute that the Plaintiff's are coffee farmers. They depend on delivery of their coffee berries to coffee factories affiliated to the Defendant. They have now been barred from continuing to do so. It is not known for how long the suspension will remain in force. It is also not clear how much of coffee berries of the Plaintiff's will go to waste. In any event, the introduction of the agenda would seem to have been in breach of section 27 of the Act as to the holding of general meetings. This court has always held the view that, where a party breaches a provision of the law, such party cannot and should not be allowed to chest thump that it is moneyed enough to take care of any loss and damages that can be suffered by the aggrieved party. No amount of money or compensation in

my view can right a breach of law. In this regard, the loss to be suffered is irreparable.

26. As regards the balance of convenience, the same tilts infavour of granting the injunction to enable the Plaintiffs to continue enjoying their livelihood whilst the suit is pending determination.

27. Accordingly, I find that the application is meritorious and the same is allowed in terms of prayer No. 4 of the motion dated 17th August, 2015.

Orders accordingly.

DATED and Delivered at Chuka this 21st day of July, 2016.

A.MABEYA

JUDGE

Ruling read and delivered in open court in the presence of all the parties.

A.MABEYA

JUDGE

21/7/2016