



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**PETITION NO. 1 OF 2015**

**IN THE MATTER OF ARTICLES 19, 20, 21, 23 (30, 40 AND 165 CONSTITUTION OF KENYA  
2010**

**AND**

**IN THE MATTER OF VIOLATION OF INFRINGEMENT AND VIOLATION OF THE RIGHTS  
OF THE PETITIONER**

**AND**

**IN THE MATTER OF COOPERATIVE SOCIETIES ACT**

**AND**

**IN THE MATTER OF COOPERATIVE SOCIETIES RULES, 2004**

**AND**

**IN THE MATTER OF COMMITTEE MEMBER OF BISEMBE FARMERS CO-OPERATIVE  
SOCIETY**

**AND**

**IN THE MATTER OF CONSTITUTION OF KENYA [SUPERVISORY JURISDICTION AND  
PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL]  
HIGH COURT PRACTICE AND PROCEDURE RULES**

**AND**

**IN THE MATTER OF SECTION 19 [6<sup>TH</sup> SCHEDULE] OF CONSTITUTION 2010**

**BETWEEN**

**BENSON KAMANDA**

**JEREMIAH ARANI RAYORI**

**JAMES WYCLIFFE OERI MIRERI .....PETITIONERS**

**MUSA NDUBI KIREKI**

**LUKA MOSAIGA NYANGA**

**AND**

**BISEMBE FARMERS CO-OPERATIVE SOCIETY LTD... RESPONDENT**

**JUDGMENT**

By a petition dated 16th September, 2015 the petitioners sought the following prayers: -

- (a) A declaration that the meeting to be held on 17th September 2015 infringes the right of the petitioners.**
- (b) That an interior committee to be formed to audit the committee**
- (c) That election of new members to be held after the audit**
- (d) Costs be award to the petitioners**
- (e) Any other relief this court may deem fit to grant.**

The petition was supported by a verifying affidavit. The grounds on the face of the petition are as follows:

- That the petitioner are members of the respondent
- That their numbers with the respondent are as follows:-
  - (a) Benson Kamanda Makori - 3483**
  - (b) James Wycliffe oeri Mireri - 3514**
  - (c) Musa Ndubi Kireki 3836**
  - (d) Luka Mosaiga Nyangaga - 1334**
  - (e) Jeremiah Arani Rayori - 4370**
- That committee members sold their coffee and paid them Kshs. 20 per kilo
- That the said petitioners being dissatisfied went to the miller and were informed that the coffee went for Kshs.35 per kilo
- That the petitioners called for a special meeting on 13<sup>th</sup> August 2015 but it was cancelled for security reasons.
- That another meeting was called on 28<sup>th</sup> August 2015 but it never took off.
- That again the committee has called a meeting on 17<sup>th</sup> September 2015.
- That the petitioners want the meeting stopped and an interim office be there to audit the books before a meeting is called as there is fraud
- That the petitioners have written to receive authorities but no response
- That the said committee have been in office since 2004 are not accounting for the farmers

proceeds and no election has ever been called.

- That the result of the respondents action is that the rights of the petitioners have been infringed and violated as per the co-operative Societies Act and rule made there under.

The respondent on its part in opposing the above petition filed a reply to the petition dated 1<sup>st</sup> October 2010. In the said respondent has acknowledged that though the coffee may have been sold at Kshs.30 per kilo and payment made at Kshs. 20 per kilo that issue is not within its docket since that is an issue that ought to be raised with the entire committee members who have been directly sued for them to be able to respond to those issues. Furthermore, the respondent has contended that nothing has been said to confirm that the millers provided that information of payment as alleged.

The respondent further contended that the meetings that were called for and never took off were the preserve of the entire committee which has not been enjoined as parties in this case. The

respondents has further deponed that the petitioners demonstrated the audit books they were referring to and same will lead to fraud. The respondent has further contended that it is unclear what the petitioners were referring to as more than 300 farmers being dissatisfied and have not gone a step further to say with what they are being dissatisfied . Lastly the respondent has contended that he has never infringed/violated any of the petitioners rights as the petitioners have not specified any specific provisions of the co-operative society act and rules which have been violated.

The matter then proceeded by way of viva voce evidence.

**PW1** was **Benson Kamanda Makori** a farmer from Ekerenyo. He told the court he was a coffee Number 3483 and he always took his coffee at the respondents society. That they were paid Kshs. 20 per kg but were later paid 31.50 after a complaint from the respondent. That on 13th August 2015 they called for a meeting and asked for a special general meeting at the respondent's compound but were locked out. That they then went to the Deputy Commissioners of Nyamira North but he was absent. That on 17th September 2015 the respondents chairman called for a meeting and the farmers argued and signed but they were dissatisfied.

He further stated that the committee of the farmers was chosen in 2004 by their constitution and they have not had any elections since then, that as farmers they called for a special general meeting for the miller to tell them how much they sold coffee, why they paid them only once and that they asked for new elections for committee members.

He further stated that the respondents produced an agreement between the respondent and the miller [CMC Miler],the said agreement dated 30<sup>th</sup> September 2015and for the Respondent the members were:-

- **Ezekiel Nyambi - Chairman**
- **Patrick Mayoma - Treasurer**
- **Jeremiaha Misembe - Director**

For the miller it was Boniface, Juma, Wekesa and 9 workers and the miller. That there was a meeting for 20th September 2014, minutes were confirmed but there was no date and 5 managers signed.

He thus wanted the present committee to be removed, election heard and audit be conducted on the coffee sales.

He also stated that the work of the committee is to oversee coffee, to know the price and to advise. He also stated that the committee should be made to pay costs.

On cross-examination he told the court that it is the sole responsibility of the committee to pay.

This marked the close of petitioners case.

**DWI** was **Ezekiel Daniel Nyaribo** a committee member and chairman of the respondent. He stated that **PW1** was elected with him in 2004; they remained in office until 2009 when they left. Hence, he denied the fact that they have been in office irregularly. He acknowledged that there was no election last year [April 2015] and denied the contention that there had been no election since 2004. He produced P. Exhibit 1 minutes dated 24<sup>th</sup> June 2016 to confirm the fact that there is no period they failed to conduct elections. He further told the court that he had no capacity to determine the prices as the determination of the price is the preserve of the marketer and the miller hence he denied that they paid the farmers less than it was required. [PAGE 7]

On the issue of the marketer he said that the marketer sells coffee to the option in Nairobi and after selling the coffee, he pays the miller and the miller in turn pays the farmer through the bank. That later the management will pay what is in the bank to the farmers through the committee and the secretary at the rate of 20% to the operations and 80% to the farmers. He also told the court that the money came with documentation to prove and ascertain the correctness. With regard to the auditor's report he stated that the last time the auditing exercise was carried out was 2015 and he produced the audit report for 2014 as **exhibit No. 2** and revised report as **exhibit No.3**.

**DW2** was **Jeremiah Nyangau Masese** the Chief Executive Officer of the respondent. He told the court that according to the constitution elections are held yearly in a 1/3 formula basis, he said a part of the committee members are elected from time in a rotational basis. He further stated that in the event that farmers did not have confidence in the people elected they may decline dramatically to participate in their elections but once they elected office bearers voluntarily, then it was a clear indication that they exercised their democratic right. Hence, elections were conducted in 2014 therefore the present committee is in office legally.

He further stated that every 30th of September of every year auditing is done when the financial year ends. He said that the next audit report was read in February, 2016 and that an audit report can be read between September and February of the next year.

**DW3** was **Catherine Nyamoita Nyambogo** a farmer and committee member of the respondent. She told the court that she had never given her name to the list of the unsatisfied farmers and on that list her National identity card number was missing out and her signature was forged. She further stated that the list indicated many other people who died years back but who are ironically reflected as having been among those who are said to have been unsatisfied. She thus contended that the list as drawn and presented was a false document which does not carry any probative value to assist the court and on being cross-examined she still confirmed that the list did not reflect her National identity card number.

She further told the court that she had been committee member of the society and this was her second time of her to serve as such a committee member. She further stated that on the issue of the procedure of grading coffee, selling it through the miller and marketer she confirmed that those are the preserves of the committee members. This marked the close of the defence case and parties were then directed to file written submissions.

When the above matter came before ne on on 13/7/2016 both parties had duly filed their written submissions which have read.

Having considered the above petition, verifying affidavit, the affidavit in reply, the oral evidence and the written submissions the following issues present themselves for determination:

- 1. Is the above petition by the petitioner fatally defective for lack of a supporting affidavit?**
- 2. Has the petitioner proved its case on a balance of probability?**

With regard to the first issue of determination it is not possible for this court to fully determine the merits

of petitioner's case since the petition was not supported by a supporting affidavit save for the verifying affidavit that merely confirms the correctness of the such a of the averments contained in the petition contrary to **Rule 13 of the Gicheru Rules**. The petitioner did not swear a supporting affidavit in support of the grounds contained in the petition which brings me to the question of whether this petition can stand in the absence of a supporting affidavit.

The constitution of Kenya [Supervisory and Protection of Fundamental Rights and Freedoms of the individual]. High Court practice and **Procedure Rules 2006**, also known as Gicheru Rules state follows:

**Rule 13**

**“The petition under Rule 12 shall be supported by an affidavit”**

**Rule 14**

**“If a party wishes to rely on any documents the document shall be annexed to the supporting affidavit.**

In the instant case, as I have observed in this judgment the petition was filed without the supporting affidavit and the documents attached to the petition were contrary to the provisions of the **Rule 14 of Gicheru Rules** it therefore follows that in terms of **Rule 14 of the Gicheru Rules** the petition contains allegations without the affidavit evidence intended to accompany the petition to support the allegations in the petition and this makes the petition incompetent.

In the case of **Patrick Ochieng Obachi & 6 others -v- Kenya Anti-corruption Commission [2010] eKLR**, the court observed as follows on failure to file a supporting affidavit:

**“that is a fatal technicality as it determines the substance, namely the completeness of the petition. It follows that in terms of rule 14 that petition contains allegations without the affidavit evidence intended to accompany the petition to support allegations in the petition and that makes the petition incompetent.”**

The verifying affidavit annexed to the petition does not meet the mandatory requirements of the Gicheru Rules and the documents filed with the petition are strictly speaking not annexures to any affidavit as the same have not commissioned by the commissioner of oaths as exhibits to any affidavit.

The documents are therefore also not properly presented before the court. Under Order 4 Rule 1 (2) of the Civil Procedure Rules verifying affidavits were intended to accompany complaints in verification of the correctness of the averments contained in the complaint. In my humble view, at no time do the Civil Procedure Rules in the Gicheru Rules provide that petitions be accompanied by verifying affidavit. In this regard therefore, I find that the verifying affidavit filed with the petition is misplaced and of no legal effect whatsoever. I further find that the verifying affidavit and the document attached to the petition have no evidentiary value to this petition.

In the case of **Charles Okello Mwanda -v- Ethics and Anti-corruption Commission and 3 others [2014] eKLR** it was held that the requirement that a petition be accompanied by a supporting affidavit is not a procedural technicality as affidavit contains the evidence a party wishes to rely on in support of his case.

In the end I find that the petition is fatally defective for lack of an affidavit in its support.

My finding above notwithstanding, this court is still minded to determine the merits of this case and if indeed there was a violation of the petitioner's rights by the conduct of the respondent as alleged. The petitioners have contended the committee has been in office since 2004 and are not accounting for the farmers' proceeds and no elections have been called. However, the above contention by the petitioners was thrown out of the window by the testimony of **DW2 Jeremiah Nyangau Masese the Chief**

**Executive officer** of respondent who told the court that according to the respondents constitution elections are held year on a 1/3 formula basis and going by that basis a part of the committee members are elected from time to time on a rotational basis. He further stated that elections were last conducted in 2014 hence the present committee was in office legally. DW2 further told the court that on 30<sup>th</sup> September every year auditing is done and that the next audit report was going to be read in January 2016. He added that an audit report can be read between September and February of the following year. He also named the current auditors as Joshua Monene who had been auditing the respondent for the last two years.

On the petitioners list of unsatisfied farmers DW3 Catherine Nyamoita Nyamboga told this court that she had never given her name to be in the list of the unsatisfied farmers and in that list her National identity card number was missing and her signature had been forged. She further told the court that the said list of unsatisfied farmers indicated many other people who died years back but who were ironically reflected as having been among those who are said to have been unsatisfied. She also told the court that she had been a committed member of the respondent, that this was her second term of service as such a committee member.

The above evidence by the DW2 and DW3 was not rebutted by the oral evidence presented in court by the petitioners. As I had earlier noted in this judgment, the petitioners petition is fatally defective for lack of a supporting affidavit hence this court cannot rely on the documents attached. Be as it may, even without the petitioners annexures the fact remains that from the evidence presented by DW2 and DW3 this court has established that contrary to the allegations against the respondent on the face of the petition, elections were actually held in 2014 contrary to the petitioners allegations that the last elections were held in 2004. In addition to this, there is also evidence by DW2 that the respondents accounts are audited every September or January of every proceeding year. Furthermore, the said list of unsatisfied farmers was also cast into doubt by DW3 who presented evidence before this court that her signature had been forged and that some of the other members in the unsatisfied farmers list had long been deceased.

With the above stated, I hereby dismiss the petitioner's petition dated 16<sup>th</sup> September 2015 with costs to the respondent.

**Dated and delivered at Nyamira this 30<sup>th</sup> day of September 2016**

**C. B. NAGILLAH**

**JUDGE**

**In the presence of:-**

**Nyawencha** for the Appellant/petitioner

**Nyamwange** for the Respondent

**Omayio** - Court Clerk