



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU**

**Civil Appeal 23 of 2005**

DAVID K. NJOROGE .....1<sup>ST</sup> APPELLANT  
JOHN K. MAINA .....2<sup>ND</sup> APPELLANT  
GEORGE KIMANI.....3<sup>RD</sup> APPELLANT  
ALICE MWIHAKI.....4<sup>TH</sup> APPELLANT  
ISAAC KIMANI.....5<sup>TH</sup> APPELLANT  
HARRISON GITAU.....6<sup>TH</sup> APPELLANT

VERSUS

RICHARD GICHANGI.....1<sup>ST</sup> RESPONDENT  
ELIZABETH MUITERU.....2<sup>ND</sup> RESPONDENT  
STEPHEN KIMEMIA.....3<sup>RD</sup> RESPONDENT  
GILBERT OTIENO.....4<sup>TH</sup> RESPONDENT

**(An Appeal from the Judgment of Hon. S. M. Muketi, Principal Magistrate, in Nakuru  
C.M.C.C.No.2137 OF 2003 dated 14<sup>th</sup> January, 2005)**

**JUDGMENT**

Schools Environment Network (SENVINET) was conceived as an idea in the 1980s and subsequently registered by the 1<sup>st</sup> appellant, David K. Njoroge on 5<sup>th</sup> April, 1994. The main objective of this organization included:

- (a) environmental conservation through afforestation and education
- (b) promotion and support of youth and community health initiatives

At its inception, the 1<sup>st</sup> appellant acted as the organization's chairman, secretary and even treasurer. But with its registration, he retained the position of a coordinator/secretary. The activities of the organization were initiated, coordinated and executed by a steering and executive committee. In accordance with its first constitution of 1994, at clause 2.0 membership to SENVINET was;

**“..... open to all those that are interested in the conservation, promotion and protection of our Environment and more so through schools and to the best of their abilities.”**

For nearly nine (9) years SENVINET was run most efficiently attracting additional members and donors. Its activities also expanded. Things came to a head in 2003 following that year's Annual General Meeting (AGM) held at Hotel Eros, Nakuru on 4<sup>th</sup> March, 2003. At that meeting, the respondents were elected officials of SENVINET. Although the 1<sup>st</sup> appellant participated in the AGM, upon being informed that the respondents were not members of SENVINET and therefore could not vie for any elective posts, he and others challenged the

elections conducted during the aforesaid AGM in Nakuru C.M.C.C.No.1797 of 2003 and obtained restraining orders.

With that order in their pocket, the appellants convened what they referred to as a special members meeting on 5<sup>th</sup> September, 2003 attended by nine (9) persons at which it was resolved that fresh elections of SENVINET officials be and were indeed conducted. The appellants were elected Coordinator, Chairman, Secretary, Treasurer, Member 1 and Member 2, respectively.

The respondents were, no doubt, aggrieved and brought Nakuru CMCC No.2137 of 2003. Rival evidence was adduced by the opposing side, each claiming they were the *bona fide* officials. The other issues raised related to whether the first elections of 4<sup>th</sup> March, 2003 were valid having been conducted under an unregistered constitution which was adopted during that AGM. Conversely questions were raised on the validity of the last elections of 5<sup>th</sup> September, 2003 as it was alleged no notice was issued; that non-members participated in the meeting.

The learned trial magistrate framed the issues thus:

**“The issue (sic) to be determined are, which one is the valid constitution? Is David Njoroge a member of Senvinet? Are (sic) the Richard Gichangi’s Group genuine members of Senvinet? Are they properly elected i.e. rightfully in office?”**

The learned magistrate answered those questions in favour of the respondents.

She found that the new constitution had not come into effect when the AGM was held. In other words, that the AGM was held under the old constitution of 1994. She also found as a fact that membership to SENVINET was open to individuals and further that the election of the respondents was regular. With that, the learned magistrate granted an injunction as prayed.

That decision aggrieved the appellants who have challenged it in this appeal citing eight grounds which were argued as two separate grounds, namely:

- i) that the learned magistrate erred in holding that elections of 4<sup>th</sup> March, 2003 were valid, and
- ii) that the learned magistrate erred in failing to decide whether or not the respondents had capacity to sue the appellants in a representative capacity.

Arguing these grounds, learned counsel for the appellants submitted that the appeal raised the following questions:

- i) which constitution between the two was valid?
- ii) were the respondents members of SENVINET?
- iii) were elections of 4<sup>th</sup> March, 2003 lawful?
- iv) was the special members meeting held on 5<sup>th</sup> September, 2003 regular?

It is in evidence that the proposed/draft SENVINET constitution was part of the agenda for the AGM of 4<sup>th</sup> March, 2003. It is during that meeting that Mr. Waiganjo, advocate took members through the proposed/draft constitution.

It is therefore impracticable that that meeting was convened under that constitution as it had not come into effect. As a matter of fact, a few areas were pointed out for adjustment during that meeting. It had also not been registered with the relevant ministry. To that extent and with respect, I find that the trial magistrate did not err in holding that the original constitution guided the proceedings at the AGM.

The next issue falling for determination is who is eligible for elections as an official of SENVINET? The definition of a member under the original constitution as reproduced in the preceding paragraphs was wide enough to include individual membership. In addition, one qualified to be a member by paying subscription fees and being interested in the objects of the organization namely – conservation, promotion and protection of the environment. The Constitution makes reference to “*registered member*” implying the existence of some form of a record. The appellants relied on two lists of the membership of SENVINET. The first list relates to March, 1998 comprising twenty nine (29) members and another one for 5<sup>th</sup> September, 2003 again with twenty nine (29) members.

Five out of the twenty nine (29) in the first list (Benson Mwangi, J. Gitonga, Anastasia Aoko, a Mr. Wanjui and a Mr. Pula) are not in the second list. The new names in the second list which are not in the first list are Jane Macan, Stephen Njoroge, Fredrick Mbutia, Simon Kabata and Francis Kariuki.

The appellants are also relying on a letter dated 19<sup>th</sup> August, 2003 from the District Social Development Officer, Nakuru District Ministry of Gender, Sports, Culture and Social Services, addressed to the 1<sup>st</sup> appellant confirming that the respondents are not in their (Ministry’s) record.

It is apparent that the original Constitution did not limit (at least the upper limit) the number of members as is indeed confirmed by yet another list of 25 members annexed to the original constitution. **P.W.3, Charles Olango Onyancha**, the District Social Development Officer testified that he attended the AGM of 4<sup>th</sup> March, 2002 and confirmed that eighty two (82) members attended, representing 42 schools. This position was also confirmed by **P.W.4 James Njuguna** who clarified that of the 42 schools, 33 were Primary Schools representatives. **P.W.5, Njoroge Gichuhi** put the membership from public primary schools at sixty (60). To buttress the question of membership, the 1<sup>st</sup> appellant in his testimony stated thus:

**“Schools have never owned SENVINET at any time. I cannot recall the exact number of members who are teachers, but most of the members are teachers.”**

The foregoing demonstrate that the two lists relied on by the appellants were not exhaustive or conclusive of the entire membership. Secondly, in cross-examination, the 1<sup>st</sup> appellant conceded, upon being shown receipt No.44 of 30<sup>th</sup> May, 1996 for Kshs.2000/= that it was registration fees for the 1<sup>st</sup> respondent, in fulfillment of clause 2.1 of the 1994 Constitution.

Finally, on the question of membership, it is not denied that the 1<sup>st</sup> appellant fully participated in the AGM of 4<sup>th</sup> March, 2003. The minutes of that gathering are clear that he gave a congratulatory speech to the elected officials. After the elections, he and the other members reassembled for the selection of nominated members of SENVINET. The 1<sup>st</sup> appellant, in addition, attended a 4-day induction retreat for the newly elected officials in Naivasha. The 1<sup>st</sup> appellant also confirmed that he knew the respondents but maintained they were not members.

It is as baffling as it is incredible that persons well-known to the 1<sup>st</sup> appellant could offer themselves for elections without any objection being raised if indeed they were not members! The 1<sup>st</sup> appellant further said that he was alerted about the disqualification of the respondents on account of membership by one of the founder members by the name John Maina. That does not explain two things; being the coordinator and secretary

of SENVINET, who, in his own testimony stated that he kept all the records of the organization and being the most experienced founder member, how was it possible he had to be alerted about the anomaly by Maina? Secondly, if he was alerted during the AGM, why did he participate in it throughout and continued to participate in the induction retreat days later? It took the appellants nearly six (6) months to challenge the elections in court.

The question may be repeated: why after being involved in the AGM, elections and induction did the 1<sup>st</sup> appellant change his mind and refuse to co-operate with the newly elected officials? I can only guess the answer as it is only him who knows the reason. It is the unanimous verdict of all the witnesses that SENVINET was the brain child of the 1<sup>st</sup> appellant. He conceived the idea, built it up in his mind as early as in the 1980s, registered it and single handedly recruited members. He watched it grow to what it was in 2003 when this controversy cropped up.

The AGM of 4<sup>th</sup> March, 2003, it appears to me, saw SENVINET slip through the 1<sup>st</sup> appellant's fingers and he thought he would salvage it. That is the background that the dispute must be seen.

Regarding the Special Members Meeting of 5<sup>th</sup> August, 2003, I can only add that the meeting was irregularly held. No notice to the members was issued as required by the constitution of the organization. It was also attended by non-members of SENVINET.

Finally, learned counsel for the appellants indicated from the bar that the outcome of this appeal will serve no useful purpose as the substratum is no more. It is indeed sad that such an idea should be killed by greed. For what it is worth, I dismiss the appeal with costs and allow the respondents' suit in Nakuru CMCC No.2137 of 2003 also with costs.

**Dated, Signed and Delivered at Nakuru this 20<sup>th</sup> day of June, 2010.**

**W. OUKO**  
**JUDGE**