



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

MILIMANI LAW COURTS

Civil Appeal 11 of 2004

JACKSON NGUGI.....1ST APPELLANT
PETER NJOROGE.....2ND APPELLANT
LIVINGSTONE NGUGI.....3RD APPELLANT
FRANCIS MWANGI.....4TH APPELLANT

VERSUS

JACKSON KURIA.....1ST RESPONDENT
EVANSON MWAURA.....2ND RESPONDENT
WILLIAM NG'ANG'A.....3RD RESPONDENT
BERNARD GATHIMBA.....4TH RESPONDENT
PETER MBURU.....5TH RESPONDENT
DUNCAN KARIUKI.....6TH RESPONDENT
NJOROGE GICHUNA.....7TH RESPONDENT
WILSON KIARIE.....8TH RESPONDENT
DANIEL NJOROGE.....9TH RESPONDENT
MBURU MESHACK.....10TH RESPONDENT
NJUGUNA KAMAU.....11TH RESPONDENT
ALEX MBUGUA KAGICHU.....12TH RESPONDENT

MWANGI KAMAU.....	13TH RESPONDENT
FRANCIS MAINA.....	14TH RESPONDENT
JOHN MUIRURI.....	15TH RESPONDENT
IBRAHIM MWANGI.....	16TH RESPONDENT
JOHNSON KAGUTHI.....	17TH RESPONDENT
DANSON NDUNGU.....	18TH RESPONDENT
GITAU NG'ANG'A.....	19TH RESPONDENT
DISTRICT CO-OPERATIVE OFFICER MARAGWA.....	20TH RESPONDENT
KARUHIU UThERI FARMERS CO-OP SOCIETY.....	21ST RESPONDENT

(An appeal from the judgment of the Co-operative Tribunal (Mbogo C.G. Chairman, Mrs. E. Mureithi, Member, Ms. Murage, Member) sitting at Nairobi in Tribunal Case No. 75 of 2001 dated 3rd October 2003)

J U D G M E N T

1. This is an appeal which arises from a claim which was filed in the Co-operative Tribunal. Originally there were 5 claimants, but the claim was subsequently amended leaving only four claimants that is, Jackson Ngugi, Peter Njoroge, Livingstone Ngugi, Francis Mwangi (hereinafter referred to as the 1st, 2nd, 3rd and 4th appellants, respectively). Karuhiu Utheri Farmers Co-operative Society, hereinafter referred to as the Society, was originally one of the Claimants. However, following an objection which was raised by the respondents, the Society was struck out as a Claimant hence the amendment which left only the four appellants and included the Society as the 21st respondent.
2. The 1st, 2nd, 3rd, and 4th appellants claimed to be the Chairman, Vice Chairman, Treasurer, and Honorary Secretary, respectively of the Society. Their claim was against 1st to 19th respondents who were members of the Society, the 20th respondent, who is the District Co-operative Officer, Maragwa, and the 21st respondent who is the Society.
3. The appellants claim as stated in their statement of claim was as follows: The 1st to 19th respondents who were minority members of the Society, in an effort to illegally and forcefully take over the leadership of the Society, requisitioned special general meetings alleging mismanagement of the Society and loss of funds. Meetings were held in September, October, November and December, 2000 but the allegations were found to be without any merits. Another general meeting was called for 31st January, 2001 during which meeting, the 1st respondent disrupted the proceedings, and with the assistant of 7th, 8th, 9th, 10th, 11th and 12th respondents, violently broke up the meeting by throwing stones.
4. On 1st February, 2001 the 1st, 6th and 12th respondents and about 20 of their supporters invaded the

Society's factory chased away the employees, closed down the factory, and placed a vigilante group under the leadership of the 10th and 19th respondents, as a result of which the Society's factory ceased to function and members of the Society suffered losses. On the 8th February, 2001, the 20th respondent (the District Co-operative Officer, Maragwa) purported to convene a special general meeting, under Rule 25(4) of the Co-operative Societies Rules.

5. The meeting was purportedly postponed to 26th February, 2001. The agenda for the meeting was stated as, to debate;

(a) The alleged mismanagement of the finances of the Society

(b) Any other business.

6. On 26th February, 2001 the 20th respondent presided over the meeting of the Society. The purported meeting ended up being a kangaroo Court in which the 1st to 4th appellants were convicted of imaginary charges. The following resolutions were put to vote:

(a) That the management committee made up of 1st to 4th appellants be dissolved immediately and elections be held to fill the vacancies created;

(b) That the enquiry into the affairs of the Society be conducted.

7. It was contended that the 20th respondent conducted the meeting in a biased manner and deprived the appellants and their supporters an opportunity to defend themselves, or express their views. As a result of which it was resolved that the management committee of the Society as constituted be dissolved and that elections be held on 2nd March, 2001.

8. On 2nd March, 2001, the 20th respondent purported to convene and preside over another meeting wherein elections were carried out as follows:

3rd respondent Chairman

18th respondent Vice chairman

1st respondent Treasurer

6th respondent Honorary secretary

15th respondent Member

9. The appellants sought judgment against the respondent as follows:

(i) A declaration that the purported convening of a meeting of the 21st respondent by the 20th respondent on 8th February, 2001 is and was null and void.

(ii) A declaration that the purported meeting held on March, 26, 2001 and purported resolutions passed at it are null and void.

(iii) A declaration that the purported election of 1st, 3rd, 6th, 15th and 18th respondents as members of the management committee of the 21st respondent is and was null and void.

(iii)b A declaration that the 1st, 2nd, 3rd, and 4th claimants are the lawfully elected members of the management committee of the 21st respondent.

(iii)c An order that the 1st, 3rd, 6th, 15th and 18th respondents do forthwith hand over the management of the 21st respondent to the claimants.

(iv) A permanent injunction to restrain the respondents from breaking their contract with the 21st respondent taking the form of by-laws.

(v) A declaration that the 20th respondent's purported notice of a special general meeting is null and void.

(vi) A declaration that the 1st to 19th respondents' behavior constitutes a good cause for their expulsion from the 21st respondent.

(vii) General damages.

(viii) Costs of this suit.

10. The 1st to 20th respondents filed a joint reply to the appellant's statement of claim in which they denied the appellant's claim contending that a lawfully convened meeting of the Society was called by the appellants, but the appellants refused to discuss the agenda for the meeting which was the financial mismanagement by the management committee. The respondents contended that it was dissatisfied members of the Society who were disgusted with the conduct of the appellants, who invaded the factory of the Society and closed it down. Following that disagreement, the District Co-operative Officer called a meeting of members on 26th February, 2001.

11. The meeting was attended by a total of 224 members. It was during that meeting that the members resolved that the entire management committee lead by the 1st appellant be dismissed and an enquiry be carried out into their activities while in office. A further meeting was held on 2nd March, 2001 during which new officials were elected. The respondents maintained that the meeting of 26th February, 2001 and 2nd March, 2001 were both regular and lawful meetings conducted in accordance with the Society's bylaws and the Co-operative Societies Act. It was contended that the Society's Coffee factory and offices, were opened, operational and accessible to all members since the new management committee was put in place. The Tribunal was therefore urged to dismiss the appellants' claim.

12. Initially the Society had also been included as one of the Claimants. However, following a preliminary objection which was raised by the respondent's counsel, the Tribunal ruled that the appellants were all former officer bearers of the Society, who were challenging the manner in which they were removed from office, and that they could not therefore purport to commit the Society in lodging their claim before their status was established. The Society was therefore struck out as a claimant but was as aforesaid brought in as a respondent by a subsequent amendment of the claim.

13. On 2nd August, 2002, the appellants through their counsel orally withdrew the claim against the 19th respondent. Following an agreement between the parties' counsel, written submissions were filed and the Tribunal invited to determine the claim based on those submissions.

14. In the written submissions, counsel for the appellants reiterated the appellants' claims as aforesaid maintaining that the appellants were Chairman, Vice Chairman, Treasurer and Honorary Secretary of the Society at the time of filing the claim. It was submitted that the respondents connived and colluded to have the claimants illegally ejected from their positions in the management committee of the Society. It was contended that the respondents having tried unsuccessfully to have the claimants removed through requisitioning of numerous special general meetings, elicited the help of the 20th respondent who misused his position to call a special general meeting of the Society and elections of the Society. It was maintained that the Special Annual General Meeting called by the 20th respondent under Section 25(4) of the Co-operative Societies Rules 1998, was illegal as it was irregularly convened, and was a witch hunt fashioned by the respondents to illegally remove the respondents from office.

15. The appellants particularly took issue with the actions of the respondents during the meeting held on 31st January, 2001 in which violence was allegedly used to intimidate members from supporting the appellants. It was submitted that the actions of the respondents constituted an offence for which they were liable to expulsion from the membership of the Society. It was further submitted that the respondents' actions led to the closure of the Society's factory thereby resulting in losses for which the respondents were liable. The Court was therefore urged to grant the reliefs sought by the appellants in their amended statement of claim.

16. For the respondents it was submitted that the Society was beleaguered with problems from the year 2000. It was submitted that despite various requisitions by the members of the Society for special general meetings, to discuss specific issues, meetings were called with agendas which were different from those in the requisitions. It was contended that the chaos experienced during the meeting of 31st January, 2001 was not unforeseeable, given the frustrations and dissatisfaction of members. It was however maintained that there was no evidence in support of the appellants' allegations that the chaos were occasioned by the respondents.

17. It was submitted that the 20th respondent properly convened a meeting of the Society under Rule 25(4) of the Co-operative Society Rules which empowered him to convene the meeting. It was argued that since the claim against the District Co-operative Officer was withdrawn, no allegations of misconduct on his part could be entertained. It was further maintained that the special general meeting of 26th February, 2001, and 2nd March, 2001 were lawful as they were convened in accordance with the Society's bylaws. It was pointed out that appropriate returns of the meeting held on 2nd March, 2001 were duly filed with the Registrar of the Co-operative Society and therefore the new officials were properly in office; and replaced the appellants, who were all properly removed on 26th February, 2001.

18. With regard to the issue of expulsion of members from the Society, it was submitted that that was a power vested in the management committee or the general meeting only, by virtue of the Society's by-laws and therefore the issue was not properly before the Court. Finally, it was submitted that there were no appropriate pleadings in support of any tort, upon which a claim of general damages could arise. It was maintained that the appellant had not established any civil wrong against the respondents. The Court was therefore urged to dismiss the appellants' claim.

19. In its judgment the Tribunal dismissed the appellants' claim holding that the meeting of 26th February, 2001 was properly convened by the District Co-operative Officer under powers conferred by Rule 25(4) of the Co-operative Society Rules of 1998, and that the supreme organ of the Society was the general meeting of members during which every member had a right to attend and vote on all matters.

20. Being aggrieved by that judgment, the appellants have lodged this appeal raising 14 grounds set out in their memorandum of appeal as follows:

(i) The Honourable Tribunal erred in ignoring the evidence of the illegality of the meeting held on 26th February, 2001.

(ii) The Honourable Tribunal erred in holding that the Special General Meeting held on 26th February, 2001 was lawful.

(iii) The Honourable Tribunal erred in holding that the resolutions passed during the Special General Meeting held on 26th February 2001 were legal.

(iv) The Honourable Tribunal erred in holding that the notice issued by the 20th respondent to convene the meeting held on 26th February, 2001 was valid.

(v) The Honourable Tribunal erred in holding that the purported meeting held on 3rd March 2001 and purported resolutions passed are legal.

(vi) The Honourable Tribunal erred by not taking into account relevant facts and events leading up to the meeting held on 26th February, 2001.

(vii) The Honourable Tribunal erred in not taking into account the powers vested in the 20th respondent under the Co-operative Societies Act 1997 and when the same can be invoked.

(viii) The Honourable Tribunal erred in not holding that the first to 19th respondents had committed a trespass to land on the 21st respondent's property.

(ix) The Honourable Tribunal erred in holding that the 20th respondent was not in breach of the provisions of the Co-operative Societies Act.

(x) The Honourable Tribunal erred in holding that the meeting of 26th February 2001 was properly constituted despite the fact that it was attended by persons who are not members of the Society who purported to transact the business of the Society.

(xi) The Honourable Tribunal erred in failing to hold that the property rights of the 21st respondent had been violated by the 1st to 19th respondents.

(xii) The Honourable Tribunal erred in ordering that the appellants herein meet the respondents' costs as the action had been commenced by the appellants in their capacity as Management Committee of the 21st respondent.

(xiii) The Honourable Tribunal erred in failing to take into consideration the evidence presented by the claimants in the suit and decided the case on a balance of convenience.

(xiv) The Honourable Tribunal erred in making an order for costs to be borne by the appellants herein as at the time of filing the claim in the Tribunal the appellants were acting on behalf of the 21st respondent within the meaning of the rule in *Foss v Harbottle (1843) 2 Hare 461*.

21. During the hearing of the appeal, the appellants who were all appearing in person maintained that the Tribunal did not properly consider their claim, that they were illegally removed from their positions. They contended that the Tribunal failed to consider the circumstances which transpired on 31st January, 2001, and that the Tribunal wrongly relied on Section 25(4) of the Co-operative Societies Rules, without considering other appropriate provisions of the law. For instance, Section 76 of the Co-operative Societies Act requires disputes to be referred to the Tribunal, and Rule 29 (3)(a) of the Co-operative Societies Rules, which requires at least $\frac{3}{4}$ of members present at the meeting to vote in favour of the removal of the members of the management committee.

22. The appellants submitted that the number of members who voted for the removal of the management committee was less than the required $\frac{3}{4}$ of the members present. It was further contended that the District Co-operative Officer ignored his powers under Section 58 of the Co-operative Societies Act under which the Registrar has powers to investigate and table his findings and recommendations to a general meeting of the Society. The appellants contended that in this case, no investigations were done nor were any recommendations given. The appellants complained that the Tribunal did not give time for the adduction of evidence in support of their claim for damages and that they were therefore denied an opportunity to call any evidence.

23. In her submissions, counsel for the respondents maintained that the meeting of 26th February, 2001 was convened by the DCO, pursuant to Rule 25(4) of the Co-operative Societies Rules, 1998. Miss Mwangi maintained that the appellants moved to the Tribunal under a misapprehension of the law believing that the DCO did not have powers to call the meeting. She therefore maintained that the Tribunal was right in dismissing the appellants' claim. Miss Mwangi submitted that the appellants denied themselves a chance to make any allegations against the DCO the moment they removed him from being

a party to the proceedings by withdrawing the claim against him.

24. Miss Mwangi further submitted that the appellants not having appealed against the ruling of the Tribunal delivered on 18th January, 2001 in which the Tribunal struck out the Society as a Claimant, the appellants could not claim that they were protecting the Society. She maintained that the Tribunal arrived at a proper decision given the claim and the submissions made before it. She therefore urged the Court to dismiss the appeal.

25. In response to the submissions made by Miss Mwangi, the appellants insisted that the Tribunal was wrong in not finding that the DCO ignored the relevant rules and relied only on Rule 25(4) of the Co-operative Societies Rules.

26. We have carefully reconsidered and evaluated all the proceedings of the Tribunal including the bundle of documents which were filed as well as the submissions. We take note of the fact that at the time the appellants' cause of action arose in the year 2001, the applicable law to the affairs of the Co-operative Societies was 'The Co-operative Societies Act, 1997', which has since been repealed and the Co-operative Societies Rules 1998 which has also since been replaced. For that reason, we shall consider the appeal in the light of the law as it was then.

27. The appellants' main complaint to the Tribunal was that they were irregularly removed from office. It is not disputed that the meeting of 26th February, 2001, which resulted in a resolution being passed for the appellants to be removed from the office, was convened by the DCO pursuant to Rule 25(4) of the Co-operative Societies Rules, 1998, which states as follows:

25(4). *The Registrar or his representative may at any time convene a special general meeting of a society and may also direct what matter shall be discussed in the meeting."*

28. A Registrar is defined under the Co-operative Societies Act, No. 12 of 1997, (pursuant to which the Co-operative Societies Rules, 1998 were made), as Registrar of Co-operative Societies appointed under Section 3 of the Act, and includes the Deputy Registrar of Co-operative Societies and such other officers as are appointed under that section. The powers vested under Rule 25(4) of the Co-operative Societies Rules, 1998 therefore also vest on the District Co-operative Officer such as the 20th respondent, who had delegated powers from the Registrar.

29. The DCO therefore, had powers under the above rule to convene the meeting of the Society. In convening the meeting, Rule 25(4) of the Co-operative Societies Rules gave the DCO the absolute discretion to direct the agenda for the meeting. The application of Rule 25(8)(a) and (b) of the Co-operative Societies Rules, 1998 which relates to the attendance of the auditor at the general meeting was therefore not mandatory with regard to the meeting convened by the DCO. Nor was it necessary for the DCO to conduct an inquiry into the affairs of the Co-operative before convening the special general meeting. Indeed, Section 58 of the Co-operative Societies Act No.12 of 1997 provides for the holding of an inquiry where such a resolution is passed by 1/3 of the members present at a meeting of the Society. The DCO in compliance with this provision put to vote during the special general meeting of 26th February, 2001 such a resolution for an inquiry to be carried out.

30. With regard to the resolution to have the appellants removed from office, Rule 29(2) of the Co-operative Societies Rules, 1998, provides *inter alia*, that members of the committee shall be removed only by a decision of the majority of members of the Society present and voting at a general meeting. Rule 29(3)(a) of the Co-operative Societies Rules 1998 provides that a duly convened special general meeting may by a $\frac{3}{4}$ majority of the members present, vote out the entire committee.

31. In this case, since the meeting was a special general meeting convened by the DCO, and since the entire management committee was voted out, it was necessary that the resolution be passed by a $\frac{3}{4}$ majority of all the members present. According to the minutes of a special general meeting of 26th February, 2001, which were in the respondent's bundle, 146 members voted in favour of removal of the

entire committee as against 98 members who voted against the removal. Therefore, the percentage of the members who voted in favour of the removal of the committee in regard to the members present was only 59.8% thereby falling below the $\frac{3}{4}$ majority required.

32. Therefore, the information before the Tribunal revealed that the appellants were irregularly removed from office as the resolution to remove them from office, did not have the required majority. This issue was not addressed at all by the Tribunal. It follows that the subsequent meeting of 2nd March, 2001 and the election of new officials were null and void as the removal of the appellants from office upon which the elections were anchored was illegal.

33. It was submitted that the appellants could not complain about any allegation about misconduct against the DCO because the claim against him had been withdrawn. I find that that submission was based on a misconception. The original proceedings of the Tribunal indicate that on 2nd August, 2002, Dr. Kamau Kuria, who was appearing for the appellants withdrew the claim against the 19th respondent. According to both original statement of claim and the amended statement of claim, the 19th respondent was Gitau Ng'ang'a, and not the District Co-operative Officer, Maragwa, who was in fact the 20th respondent. The District Co-operative Officer, Maragwa therefore remained a party to the proceedings.

34. The question which arises is whether in view of the above findings, this Court should declare as sought by the appellants, that the appellants are still the lawfully elected members of the management committee of the Society. Under Rule 29(3) and (4) of the Co-operative Societies Rules, 1998 the members of the committee were to hold office for a period of 3 years, but were eligible for elections. It is now 8 years since the appellants were irregularly removed from office. Their term of office has long since expired. A lot of water has also gone under the bridge, and to order that the appellants go back to assume the management of the Society would only create chaos and confusion. It would therefore be appropriate for members of the Society to carry out fresh elections so that the appellants can have an opportunity of getting a fresh mandate from the general membership. Given the circumstances of this case, it would be prudent to have a neutral person to be in charge of the affairs of the committee during the interim period, pending the elections of the new Society officials.

35. With regard to the alleged misconduct of the respondents at the meeting held on 31st January, 2001, resulting in violence, the alleged loss and damages claimed, it was evident that the facts relating to what transpired at that meeting were substantially in dispute. Nonetheless both the appellants and the respondents through their counsel consented to having the matter disposed of in the Tribunal through written submissions. By opting to go by written submissions, the parties waived their rights to call oral evidence. The appellants' complaint that they were denied an opportunity to call any evidence was therefore not a genuine complaint, as the appellants had an opportunity to call oral evidence but opted not to do so. It was for the appellants to establish their claim with regard to loss and damage by discharging the burden of proof as required under Section 107 of the Evidence Act. The appellants failed in that regard and their claim to damages must therefore fail. Moreover, expulsion of members of the Society is a matter which is within the powers of the management committee of the Society and the general meeting which is the supreme organ of the Society. The Tribunal can only come in after the power given to the Society has been exhausted.

36. The upshot of the above is that we allow the appeal to the extent of setting aside the order of dismissal with regard to orders sought by the appellants, and granting judgment in favour of the appellants to the extent of making the following orders:

(a) A declaration that the resolution passed to remove the management committee of the Society at the special meeting of the Society held on 26th February, 2001 was null and void.

(b) A declaration that the purported election of the 1st, 3rd, 6th, 15th, and 18th respondents as members of the management committee of the Society on 2nd March, 2001 and any other subsequent election is null and void.

(c) An order that the Registrar of the Co-operative Societies do forthwith appoint an interim committee to manage the affairs of the Society and that the 1st, 3rd, 6th, 15th, and 18th respondents or any other officials elected subsequent to the meeting of 2nd March, 2001, do forthwith hand over the management of the Society to the interim committee, and in any case not more than 7 days from the date of formation of the interim committee.

(d) An order that the District Co-operative Officer together with the interim committee appointed by the Registrar of Societies, do convene a special general meeting of the Society for the purposes of holding elections of officials of the Society within 90 days from the date hereof.

(e) The appellants' claims in respect of damages and other declarations not contained herein are dismissed.

(f) Each party shall bear his own costs.

Dated and delivered this 26th day of November, 2009

H. M. OKWENGU

JUDGE

R. SITATI

JUDGE

In the presence of: -

All appellants present in persons

Mrs. Wambugu for the respondent

Eric, court clerks