



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

Civil Case 204 of 2006

- 1. JOHNSON KURIA NJEHIA**
- 2. SAMWEL MWANGALA MUZUNGU**
- 3. PETER GABRIEL KITATU..... PLAINTIFFS**

- Versus -

- 1. EVERLYN MNGODA**
- 2. KENYA UNION OF SAVINGS & CREDIT CO-OPERATIVES LTD.**
- 3. BANDARI SAVINGS & CREDIT CO-OPERATIVE
SOCIETY LIMITED.....
DEFENDANTS**

Coram: Before Hon. Justice L. Njagi

Mr. Songoro for the three Plaintiffs

Mr. Njoroge for 4th & 5th Plaintiffs

Mr. Mabeya for 1st Defendant

Mrs. Namachanja for 3rd Defendant

Mr. Munyithya for 4th Defendant

Mr. Ndegwa for 5th Defendant

Mrs. Anne Omondi in person

Court clerk – Kinyua

R U L I N G

The applicants/plaintiffs have moved the court by an amended notice of motion dated 7th September, 2006, brought under sections 3A, 63 (c) and (e) of the Civil Procedure Act, Cap 21 Laws of Kenya, Order XXXIX rules 2 and 2A (1) of the Civil Procedure Rules, and article 30(a) of the by-laws of Bandari

Savings and Credit Co-operative Society Limited for an order -

That the defendants be restrained whether by themselves, their servants, representatives or agents from holding the special general meeting scheduled for 9th September 2006 or from conducting elections of the Management Committee and supervisory committee or by any of the delegates of the 4th defendants, whether elected on 5th and 6th September, 2006 or otherwise, pending the hearing and determination of this suit.

The application is supported by the annexed affidavit of Peter Gabriel Kitatu, the third plaintiff/applicant, and is based on four grounds. The first two grounds are that the 4th defendant held delegates elections on 5th and 6th September, 2006, and secondly, that the 2nd defendant, acting through the 1st defendant, as the presiding officer disenfranchised the pensioners' members eligible to vote, totaling 1517 from electing their delegates on those dates. The third ground is that there is scheduled a special General Meeting on 9th September, 2006 whereby the delegates elected on 5th and 6th September, 2006 will elect the Management Committee (which is the governing authority) and the Supervisory Committee (which is the compliance/internal control and oversight organ) of Bandari Savings & Credit Co-operative Society Limited. Lastly, the fourth ground is that by denying 1517 members to elect delegates, the pensioners members were denied a right to be represented by 61 delegates in the Special General Meeting for purposes of electing members of the Management Committee and Supervisory Committee.

The application is strenuously contested. By a replying affidavit sworn on 18th September, 2006, Patrick O. Makanyengo, the District Co-operative Officer, Mombasa, avers that in obedience to the orders of the court for the 4th defendant to issue notices of elections of delegates, he issued those notices in accordance with the required legal procedures to all members and departments without discrimination, and that the elections were duly held. In a further replying affidavit sworn on 19th September, 2006, Mr. Makanyengo, retracted the contents of paragraph 4 of his affidavit sworn the previous day and stated that exhibit "PGK5" did not originate from him or his office. In her replying affidavit, the first defendant/respondent, Evelyn Mugoda, deposes that she was appointed by the 2nd defendant to act as the Returning Officer in the elections of the 4th defendant. She states that she conducted the elections on 5th and 6th September, 2006, in accordance with the by-laws of the 4th defendant and the court order of 1st August, 2006. She denies having denied anyone a chance to vote. What she and her presiding officers did was to take a list of all the members present at a given section, made them vote, and the results thereof signed by the presiding officer.

In the meantime, by an application by a Notice of Motion dated 8th September, 2006, a Mr. Gerald Ojunga and 740 other applicants applied for orders that they be joined as defendants in this suit, and that this suit be consolidated with HCCC No. 157 of 2006 for trial and disposal. The main order which it sought was that the ex-parte order of injunction granted by this court in this matter dated 6/9/2006 prohibiting elections of service bearers and/or convention of the special delegates meeting be stayed, discharged and/or varied and the delegates elected on 5th and 6th September, 2006 be at liberty to hold elections forthwith. The application is supported by the annexed affidavit of Gerald Ojunga, and is predicated on the grounds that this suit is a hoax, and a phoney, and has been instituted at the instance and sponsorship of the Chairman, Treasurer and General manager of the 4th Defendant in a bid to perpetuate their stay in office against the stated wishes of the applicants and the Sacco's membership at large.

In a robust and swift reaction to this application, on 19th September, 2006, the advocates on record for the 4th defendant filed grounds of opposition to this application. These are that:-

- 1. The applicants are members of the 4th defendant and joining them as defendants together with the 4th defendant is unnecessary and a duplication of the same parties.**
- 2. The issues likely to be raised by the applicants can properly and effectively be raised by the 4th**

defendant.

3. By joining the applicants as defendants, it will make the suit more complex and difficult to manage.

4. The application is frivolous, bad in law and the same should be struck out.

On their part, the plaintiffs responded by filing a replying affidavit sworn by Johnson Kuria Njehia, the 1st plaintiff, on 20th September, 2006. In that affidavit, he depones that Mr. Ojunga has no interest in the matter, and that he had no authority of the 740 members he purported to act for. The filing of this replying affidavit was accompanied by the plaintiffs' notice of preliminary objection. The grounds of objection are that:-

1. That the application is an all cure omnibus, containing a multiplicity of prayers all of which could not possibly be decided.

2. That the application was incapable of proper adjudication by the court because each relief sought, apart from being governed by different rules, are also subject to long established and different judicial principles which need to be raised and considered by the court.

3. That none of the prayers sought should be granted as they are part of the omnibus relief sought and are incapable of being isolated and agitated alone.

4. That it is not the practice to seek so many prayers in one application. It is impossible to decide on all of them as there is very likely failure to disclose all material and pertinent facts.

When these matters came before this court on 21st September, 2006, the hearing was stood over to 25th September, 2006, and all parties wishing to apply to be joined in the proceedings were given up till 22/09/2006 to do so.

Meanwhile, Anne Omondi had filed her application on 20th September, 2006, in which she sought to be joined as a defendant or interested party and that this suit be consolidated with HCCC No. 157 of 2006. Mr. Johnson Kuria Njehia responded to this application, and so did David Arika, the Chairman of the 4th defendant.

At the hearing of the application, Mr. Sangoro appeared for the plaintiffs/applicants; Mr. Mabeya for the 1st and 2nd defendants; Mrs. Mary Nyamichaba for the 3rd defendant; Mr. Ndegwa for the 5th defendant; Mrs. Anne Omondi appeared in person as the 6th defendant; and Mr. Gikandi held brief for Mr. Njoroge for the Interested Parties. Each party submitted at length and the court was referred to several authorities. After considering the pleadings and the submissions of all the parties, I note from the very outset that there seems to be a lot of acrimony among the litigants in this matter, and this acrimony is evident even from the pleadings. All this acrimony has been engendered by some goings on in the operations of the Bandari Savings and Credit Co-operative Society Ltd., hereinafter referred to as "the Sacco." Unfortunately, in my view, these round robin accusations at the Sacco do not fall properly within the province of this court as they touch upon and concern the operations of the Sacco. In this regard, it is refreshing to hear the words of section 76 of the Co-operative Societies Act, No. 12 of 1997. It says –

“(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.”

Under section 2 of that Act, Tribunal means the Co-operative Tribunal established under section 77. Any alleged impropriety concerning the Sacco's business, arising either among the members, or between members and the Sacco, its committee or any officer of the Sacco, should therefore be referred to the Tribunal. A lot of venom seems to be directed by some members against some officers of the Sacco. These are not for this court to entertain and determine. They fall more fairly and squarely under the auspices of the Tribunal, from whose orders appeals lie to the High Court. Such disputes should therefore, in the first instance, be kept away from the corridors of the High Court.

Having said that much, I must also hasten to add that at the same time, the grant of injunctions is the preserve of the court and not the Tribunal. A party wishing to forestall the doing of any act which he considers inimical to his interests has unlimited access to the court. It was in that spirit that the applicants herein filed their application under a certificate of urgency, seeking restraining orders against the defendants, and this court granted a temporary injunction pending the hearing inter partes of the application. Having heard the matter inter partes, the issue is whether those orders should be allowed to continue or whether they should be vacated. In the celebrated case of **GIELLA v. CASSMAN BROWN & CO. LTD.** [1973] EA 358, Spry, V.P. of the then Court of Appeal for East Africa said at p. 360 –

“The conditions for the grant of an interlocutory injunction are now well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience.”

Taking the first condition into consideration, what are the applicants' chances of success? As I understand it, their case is that given that they are all about 1517 retirees and/or pensioners, and that article 30 of the Sacco's by laws allows for each delegate to represent 25 members, they reason, therefore, that they should have been allowed to elect their own 61 delegates who would then champion their sectarian interests in the Sacco. This is indeed a very attractive argument. However, when looked at critically, it is also flawed. The Co-operative Societies Act, the rules made thereunder, and even the by laws of the Sacco, do not provide for classes, categories or sections of members. One of the cardinal principles upon which co-operative societies run is open membership and democratic control. Unlike a commercial enterprise, like a company, in which there may be classes of shares conferring on the holders certain rights which may not be enjoyed by all the other members, in a co-operative society, all the shares confer the same and equal rights on all the members. In the case of a primary society, such as Bandari Sacco Ltd., one member enjoys one vote irrespective of his or her standing in the society. This principle ensures that there is parity among all the members and, by extension, this parity ensures that all members are equal and that no members are more equal than others.

Section 13 of the Co-operative Societies Act is very clear. It states –

“The by-laws of a co-operative society shall, when registered, bind the co-operative society and the members thereof to the same extent as if they were signed by each member and contained covenants on the part of each member ... to observe all the provisions of the by-laws.”

The juridical meaning of this section is that once registered, the by-laws of a co-operative society bind the society and the members in their capacity as members, and not in any other capacity. But the applicants in this matter have not come to court just as plain members. Instead, they have come wearing a second hat – the hat of retirees or pensioners, which is not worn by the other members. By so doing, they are seeking to promote their sectarian interests within the society, which co-operative law does not allow as it could be self destructive to a society

Article 30(a) of the Bandari Sacco by-laws provides as follows:-

“Delegates shall be elected at departmental/sectional level. Each delegate shall represent 25

members ...”

Pensioners are members of the Sacco just like the other members. There is no provision anywhere in the by-laws of the Sacco that such pensioners are to constitute a section or department unto themselves. When they come to vote, therefore, they should vote in their respective sections or departments as they existed when they retired. As members of the Sacco, their interests are identical to those of the other members, and any attempt by the pensioners to detach themselves from the other members in a bid to pursue some sectarian interests personal to themselves would be an affront to the principles of voluntary and open membership and democratic control which are some of the pillars upon which the co-operative movement is founded. Indeed they have no locus to do so. I find, therefore, that the applicants have not established a prima facie case with a probability of success.

Turning to the second condition, I will say candidly that the applicants have not established what irreparable loss or damage they will suffer if they cannot elect their own 61 delegates and, by extension, if the injunction sought is not granted. Therefore they have not satisfied that condition.

Being of the above persuasion, I need not consider the third condition. But if I had to do so, I would find that the balance of convenience lies in favour of the Sacco continuing to conduct their elections, but to do so in strict compliance with the law.

For these reasons, the application by amended chamber summons dated 7th September, 2006 is dismissed with costs. I also direct that this case be and is hereby consolidated with HCCC No. 157 of 2006, and that further proceedings in this suit be and are hereby stayed until further order.

The ex-parte orders given in this matter by this court on 6th September are hereby discharged. The Sacco is at liberty to proceed with their elections in strict compliance with law. It is so ordered.

Dated and delivered at Mombasa this 4th day of September, 2006.

L. NJAGI

JUDGE