



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CIVIL APPEAL 25 OF 2005
ELIZAPHAN NYAGA M'BUNDA
ALIAS NYAGA KAGUNI & 35 OTHERS.....APPELLANTS
VERSUS
FESTUS NDEKE & 9 OTHERS.....RESPONDENTS
(From the decree and orders of J. Omburah,SRM in Meru CMCC No.47 of 2005)

J U D G M E N T

The applicants herein filed Meru CMCC No.47 of 2005 which is still pending.

They, under the said suit, also filed an application seeking injunctive orders pending the hearing and final determination of the suit. The orders sought were in summary, the following-

- (a) That the respondent/defendants be restrained from conducting, interfering, running, managing and/or dealing with the affairs of Magumoni Water Project including operating the project's bank accounts.
- (b) That the District Social Development Officer Meru South, be directed to appoint an Interim Executive Management Committee, to meanwhile, run the affairs of the water project.
- (C) That the court issues such further or better orders as will meet the ends of justice.

The other two prayers are for costs and possible execution of the orders if granted. The application was supported by an affidavit sworn by one of the applicants for himself and on behalf of the others. In the supporting affidavit the deponent, Elizaphan Nyaga M'Bundi stated that the Magumoni Water Project was mandated to hold elections every 3 years and that such elections were due on 26.3.2004 but the respondents failed to hold them. As a result, complained the deponent, the respondents continue holding office irregularly and unlawfully and contrary to the constitution of the project. Similarly, that the respondents continue operating the projects bank accounts irregularly and unlawfully. And for the above reasons M'Bundi believes that there is good reason to restrain the respondents, as prayed. The deponent had also sworn a supplementary affidavit stating that he and the other applicants are genuine members of the project and that the really core issue before the court is the elections and not the misappropriation of funds by the former management committee. He also deponed that contrary to what the respondents averred in their replying affidavit, there were no meeting mandating the present management committee, to postpone elections until the alleged misappropriated funds by the former committee, is fully

investigated and reported. He accordingly averred that the minutes of the current Management Committee showing such, are fake and forged. He concluded that the District Social Development Officer, should be directed by court to call for and supervise fresh elections for the smooth running of the project.

The respondents filed a replying affidavit sworn by one Festus Ndeke the present Chairman of the project, for himself and for the other respondents. He stated that seven of the 36 shown as applicants, are not current members of the project. He said that most of the eleven applicants who brought the suit were members of the former committee and are being investigated. That Magumoni Water Project is a selfhelp group with about 4,000 members. That the applicants had not exhausted the set up machinery for resolving disputes available within the constitution of the project. That the applicants being so few, do not represent the views of the majority members. He also deponed that due to financial losses which occurred during the previous management, mainly composed of the applicants, the Annual General Meeting of members held on 4.11.2004, decided under Min.9/04 that the issue of fresh elections should be deferred until investigations for the lost money be completed. That a select committee had established a loss of Kshs.530,120/= probably caused by the previous Committee and that this might be the cause for postponement of the elections. The deponent also stated that the applicant's facts do not reveal any wrong doing on the part of the respondents to warrant this suit except to confirm the further intentions by the applicants to disrupt the proper and smooth running of the project for their selfish ends. He also stated that changing of the management will not stop payment of established salaries and other emoluments and would therefore bring no saving to the project. He concluded that the present committee has not refused to call for elections and that the court if it so finds necessary may order the District Social Development Officer to call for and supervise fresh elections.

The trial court considered all the probable evidence before it and decided that the injunctive prayers sought cannot be granted. He dismissed the application with costs. The aggrieved applicants filed this appeal.

I have carefully considered the grounds of appeal after carefully perusing the material which were before the trial Magistrate. I find that the respondents are a Water Project run by voluntary members. The project has a constitution whose rules guide the smooth running. The appellants did not point out that the respondents are running the project contrary to the rules of the project. Their complaint was grounded on the failure of the Managing Committee from calling elections within a period of three years. They did not establish the date of the previous elections to show that three years have passed before another elections would be called. Mr. Mwanzia expressly admitted this failure. It is not surprising therefore that the trial Magistrate seized on this important fact and ruled that the appellants had failed to establish a prima facie case as required in such cases. Furthermore the trial Magistrate relied on the fact that the majority of the members in the Annual General Meeting had under minutes 9 of 2004 and 12 of 2004, deliberately postponed any elections until a standing committee had established the cause and the persons who caused the loss of over Kshs.530,000/= which event apparently took place when several of the applicants were in the management committee. The applicants denied that the minutes of the A.G.M were genuine and that had the trial Magistrate perused the supplementary affidavit, he would have agreed that the minutes postponing the project elections were not genuine.

I have considered this argument. It is unfortunate that the trial Magistrate failed to notice that a supplementary affidavit derogating the minutes had indeed been filed. I cannot guess what effect the supplementary affidavit would have had on the trial Magistrate had he read it. This court as a first court of appeal which has a right to peruse all the evidence and make its own independent decision, has however, carefully read the said supplementary affidavit filed by the appellants in further support of the application before the lower court. I find no striking evidence in it that would really have influenced the trial court to arrive at a different decision other than that one it arrived at. All that was new in it is to deny that the A.G.M minutes Nos. 9/04 and 12/04 were genuine. Having considered the said further affidavit therefore, I have come to the conclusion that on a prima facie basis, the minutes aforementioned are credible and this court accepts them, also at least for the purpose of the original application and this appeal. I would accordingly rule that the contents of the supplementary affidavit aforementioned would not make much difference to the conclusion reached by the trial Magistrate.

The trial Magistrate also came to the conclusion that the applicants failed to demonstrate that they would suffer any damage or loss if the restraining orders were not granted to them. I entirely agree with his conclusion on the point. Infact, not granting the injunctive order would lead to preservation of the continued operation of the project. The present Management would therefore continue provision of water to the 4000 members of the project who include the applicant/appellants herein. And finally this court finds that the balance of convenience would be in favour of maintaining a status quo until the suit is heard and decided. The conclusions I have reached herein arise from the fact that the appellants failed to prove before the trial court, that the principles to establish in order to be granted an injunction as were prayed by the appellants herein, were not established as laid down in Giella case. This court therefore finds no reasons to interfere with the decision of the trial court as this appeal has no merit. The appeal is accordingly dismissed with costs to the respondents.

Orders accordingly.

DATED AND DELIVERED AT MERU THIS 21ST DAY OF SEPTEMBER, 2005

D. A. ONYANCHA

JUDGE