



**Waithaka v Kasina & 2 others (Civil Case E102 of 2024)
[2025] KEHC 1680 (KLR) (Civ) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1680 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE E102 OF 2024

JN MULWA, J

FEBRUARY 6, 2025

BETWEEN

ALBERT GACERU WAITHAKA PLAINTIFF

AND

MBUVI KASINA 1ST DEFENDANT

**BONIFACE MBAI MUNYAO, DAVID MAKOVU MULI & MICHAEL MUTISO
MUNYA (SUED AS THE CURRENT OFFICIALS OF STONY ATHI MEMBERS
ASSOCIATION) 2ND DEFENDANT**

AND

**ATTORNEY GENERAL (SUED ON BEHALF OF REGISTRAR OF
SOCIETIES) RESPONDENT**

RULING

1. The suit herein was simultaneously filed with a Notice of Motion dated 9/05/2024 in which the Plaintiff who is a fully paid-up member of the Stony Athi Members Association (the Association) against the 1st defendant who is also a member of the Association, but not a duly elected official, and the 2nd and 3rd defendants seeking ORDERS-

1. Spent
2. Spent
3. Pending the hearing and determination of the suit, an interlocutory order of injunction be and is hereby issued against the Registrar of Society restraining the registrar of Societies, his/



her employees or persons working on his/her direction from adopting, recognizing and/or implementing the resolutions of the meeting held on 3rd May, 2024

4. Pending the hearing and determination of the suit, an interlocutory order of injunction issued be and is hereby issued restraining the 1st and 2nd defendants, their agents or persons acting on their instructions from presenting the results of the election and the resolutions passed on 3rd may, 2024 to the 3rd Defendant for adoption and implementation.
2. The application is premised on Section 3A and Section 63(C) of the *Civil Procedure Act* (CPA) and Order 40 Rules 1, 2 and 3 of the Civil Procedure Rule 2010 (CPR) alongside grounds stated on its face and supporting affidavit of the applicant/plaintiff sworn on 18/05/2024 and annexures thereto.
3. It is the applicant's case that on 3/05/2024, a Special Annual General Meeting of the Association was called by the 1st defendant through a notice issued on 19/04/2024 in the Nation Daily Newspaper a person who was not the secretary of the Association and therefore not authorized to call for a General Meeting or any other meeting.
4. It is further contended that during the said meeting in which the applicant did not attend, an election of the Association's Officials was conducted in the illegally convened meeting by the 1st defendant contrary to the Association Articles and Constitution.
5. The applicant deposes that the purported illegal meeting was called by a person with no powers or authority to do so and contrary to the Associations Constitution and Article of Association and therefore the elected members from the illegal meeting are not the bonafide officials; including the 1st defendant who was purportedly elected as the Secretary to the Association.
6. Additionally the applicant avers that he was duly denied his right as a member of the association to participate in the election and therefore seeks compensation by way of damages.
Further the applicant avers that the 1st defendant's election is non-compliant and therefore null and void and therefore a proper case for issuance of an order of interlocutory injunction to prevent the illegally elected officials from mis-management of the association.
7. In response to the application, the 2nd Respondent's being the officials of the association filed a replying affidavit sworn by Boniface Mbai Munyao, the Chairman of the Association on 19/07/2024. His deposition is that the impugned meeting was called by a member who was not an official and therefore the resolutions and election therefrom are non-consequential and of no effect.
8. The deponent further avers that the Association moved court vide a case CMCC No. E 1800/2023 but the said case was dismissed on grounds that there was filed and pending determination another case CMCC No. E 6045/2020 pitting the parties on similar issues.
9. Additionally, it is the Chairman's disposition that even if the meeting was as a result of a court order, still it would be illegal as the 1st defendant had no authority to issue the notice convening the meeting and therefore the officials purportedly elected in the said meeting cannot purport to be the duly elected officials of the Association.
10. The 1st defendant did not file any responses to the application under review.
11. The 3rd Respondent (Registrar of Societies filed a replying affidavit sworn by one Maria Goretti Nyariki, the Registrar on 26/07/2024 arguing that the application before the court is an abuse of the court process and enumerated several reasons among them that; the application it is sub-judice there being an existing and pending case vide CMCC No. E6045 of 2020 at Nairobi Commercial Courts, between the same parties on same subject matter; that the election of the officials of the society was



as a result of a Court Order in the stated case issued on 6/02/2024; that the said election was to be supervised by the Registrar, notice of the same having been issued by the 1st defendant and officials duly elected including the 1st defendant as secretary and therefore the said election was above board in terms of and compliant with the Societies Act; and that the applicant has failed to inform the court and has withheld vital information from the court the existence of the case and the orders issued thereof.

12. The 3rd defendant therefore urges the court to dismiss the application with costs.
13. The court has carefully considered the pleadings, the application, affidavits for and against the motion and the submissions filed by the applicant.

Analysis and Determination

14. The current officials of the Stony Athi Members Association as seen from the Registrar of Societies letter dated 8/08/2018 are:

1. Chairman – Boniface Mbai Munyao
2. Secretary – Mbuvi Kasina
3. Treasurer – Muteti Musoma

15. By the Association's Articles and Constitution at Article No. 5, an Annual General Meeting may be called by the Secretary of the Association upon issuing notices convening all members of the committee among other duties.

Article 5 further states duties of each of the duly elected officials of the Association. In addition, a Special General Meeting may be called for any purpose by the committee as specified at Article 8 (c) and (d).

16. An ordinary member of the Association, as is the case of the 1st defendant, has no mandate or authority at all to call or convene a special general meeting or at all.

17. It is also evident that the Applicant withheld crucial material facts from the court when it moved the court under certificate of urgency, being the existence of a case, similar to the one filed being CMCC ENo.6045/2020 in which several orders issued and pending hearing and determination before the said court which material facts have been brought to this court's attention vide the 3rd defendant's replying affidavit. The court will interrogate the said case as shall be seen below.

18. Issues for Determination

1. Whether this suit is sub-judice in view of the alleged existing suit vide CMCC No. 6045/2020 -Mbuvi Kasina & Another v. Boniface Mbai Munyao & 3 Others.
2. Whether the Applicant/Plaintiff has met the threshold for grant of a temporary order of injunction directed to the 3rd Respondent, Registrar of Societies, and the 1st and 2nd Respondents.
3. Costs

This suit sub-judice?

19. The doctrine of sub-judice is provided at Section 6 of the Civil Procedure Act (CPA) that:

No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between



the same parties, or between the same parties, or between parties under whom they or any of them claim, litigating under the same title where such suit or proceedings in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

20. I have perused and considered the suit in CMCC No. 6045/2020 and the parties therein as stated above. The plaintiff in the said suit, Mbuvi Kasina and Muteti Musomba are the plaintiffs therein. The defendants are the officials of the Association and the Registrar of Societies.
21. The Plaintiff in this suit HCC.No E102/2024 is Albert Gacheru Waithaka. He is not an official of the Association nor a plaintiff in the former suit. The subject matter in the former suit seen from the Amended Plaint amended on 12/10/2021 (originally dated 23/10/2020) was in respect of an election in a general meeting purportedly held on 2/03/2019; the complainants were the Plaintiffs against the officials of the Association. The plaintiff in this suit was not a complainant/Plaintiff therein and the subject matter is different.
22. The Supreme Court in the case of National Commission on Human Rights v. Attorney General; Independent Electoral & Boundaries Commission & 16 others [2020]eKLR defined the term “Sub-judice” as adopted in Black’s Law Dictionary 9th Edition as:-

.....The purpose of the sub-judice rule is to stop the filing of a multiplicity of suit between the same parties or those claiming under them over same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction issuing conflicting decisions over the same subject matter... A party that seeks to invoke the doctrine of sub-judice must therefore establish that one suit was instituted before the other, that both suits are pending before courts of competent jurisdiction and lastly, that the suits are between the same parties or their representatives.
23. Looking at the two suits, it is obvious that the instant suit under review cannot be said to be subjudice.

Threshold for grant of a temporary order of injunction?

24. All material facts in this suit have been stated above and in the parties affidavits.
25. The notice of the impugned meeting of 3/05/2024 was called by the 1st defendant, a party without authority and in contravention of the Association’s Constitution and Articles of Association.
26. On the material date of the notices and meeting, the 1st defendant was not the Secretary of the Association. The orders of the court in CMCC No. E 6045 of 2020 had a lifespan of 12 months in line with provisions of Order 40 Rule 6 that provides:-

Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.
27. The 1st defendant failed to file any response to the application. Nothing has been placed before court to show that the temporary orders of injunction issued in the lower court case were extended, or that the suit was prosecuted and if so the result. Indeed, it is stated that the suit is pending. The said orders lapsed twelve months after their issue by operation of the law. None of the parties in the former suit can therefore continue enjoying the temporary orders of injunction including the 1st defendant as ably captured in the case of Maria Lwande & Others v. Registered Trustees of Teleposta Pensions Scheme [2015] eKLR.



28. Riding on the above, was the 1st defendant therefore competent and legally enabled to issue notice for the meeting of 3/05/2024?

At the material time, the duly elected officials of the Association as stated in the 3rd Respondent's CR12 by letter dated 18/8/2018. The 1st defendant was not one of the officials as stated but an ordinary member of the Association.

29. To that end, whatever the 1st defendant did, including issuing the notices convening the 3/05/2024 meeting and the impugned elections are all illegal and of no legal effects or consequences or at all. The officials of the Association currently shall remain as they are as per the current CR12.

Balance of convenience?

30. Between the parties in the suit, it is obvious and without a doubt that the 2nd defendants being the officials of the Association, and the plaintiff/Applicant would suffer more loss damages and prejudice should the orders the applicant seek are denied.

The 1st defendant has not told the court what loss or prejudice he would suffer if he is stripped off the title of Secretary of the Association, having been elected in an illegal meeting of shareholders.

31. The court in the case of Pius Kipchirchir Kogo v. Frank Kimeli Tenai [2018]eKLR rendered that:-

The court should issue an injunction where the balance of convenience is in favour of the plaintiff and not where the balance is in favour of the opposite party.....

32. In this matter, the Plaintiff/Applicant was indeed disenfranchised by the 1st and 2nd defendants by being denied an opportunity to attend the meeting for election of the Associations officials as a member of the same, by the illegal actions of the 1st defendant. The 1st and 2nd defendants would suffer less hardship loss and damage if the orders sought by the Plaintiff/Applicant are disallowed as the blatant illegalities actuated by the 1st defendant would be allowed to reign in the Associations leadership which would be disastrous to the membership of the Association.

33. For the foregoing, the court is persuaded that the Applicant has met the threshold necessary for grant of a temporary order of injunction against all the Respondents/Defendants in terms of prayer numbers 4 and 5, upto and until the suit is heard and determined, compliance of Order 40 Rule 6 being observed.

34. By the nature of the suit and the application, the court finds it prudent to order that each party bears its own costs of the application.

DELIVERED SIGNED AND DATED AT NAIROBI THIS 6TH DAY OF FEBRUARY 2025.

JANET MULWA

JUDGE

