



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Society & another v Kamami & 9 others (Civil Appeal E017 of 2023)
[2024] KEHC 14039 (KLR) (Civ) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14039 (KLR)

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

CIVIL

CIVIL APPEAL E017 OF 2023

MA OTIENO, J

NOVEMBER 7, 2024

BETWEEN

KYANJAU HOUSING COOPERATIVE SOCIETY 1ST APPELLANT

MICHAEL NJUGUNA NJONGE 2ND APPELLANT

AND

BERNADETTE NJERI KAMAMI 1ST RESPONDENT

MARTIN IGECHA KAMAMI 2ND RESPONDENT

TABITHA WAIRIMU KAMAMI 3RD RESPONDENT

PATRICK MWEGA KAMAMI 4TH RESPONDENT

PETER NJUNG'WA KAMAMI 5TH RESPONDENT

CHRISTOPHER KINUTHIA KAMAMI 6TH RESPONDENT

ANDREW WAMBURU KAMAMI 7TH RESPONDENT

REDEMPTA WAMBUI KAMAMI 8TH RESPONDENT

SABINA WANJIKU KAMAMI 9TH RESPONDENT

PERPETUA WANJIKU KAMAMI 10TH RESPONDENT

(Being an appeal from the Judgment and decree of the Co-operative Tribunal at Nairobi delivered on 15th December 2022 in the Cooperative Tribunal Case No. 346 of 2019)



JUDGMENT

Introduction

1. This Appeal is from the Judgment of the Co-operative Tribunal dated 15th December 2022 in the Nairobi Cooperative Tribunal Case No. 346 of 2019 where the Tribunal delivered its judgment in favour of the Respondents and reversed their expulsion from the membership of the 1st Appellant Cooperative Society.
2. The main complaint by the Respondents (who are all said to be members of the same family) in their Statement of Claim dated 26th June 2019 at the Tribunal was that being members of the 1st Appellant and having joined the society at various points, they were all unlawfully removed from the 1st Appellant's membership on 20/04/2019 during the Society's AGM. That their removal from the 1st Appellant's membership was orchestrated by the 2nd Appellant who at the time was the 1st Appellant's Chairman.
3. The Respondents therefore vide their Statement of Claim dated 29th June 2019 sought as against the Appellants the following orders from the Tribunal; -
 - i. A declaration that the remarks by the 2nd Appellant on 20/04/2019 were illegal null and void and to be expunged from the records of the 1st Appellant.
 - ii. A declaration that the Respondents herein are legitimate members of the 1st Appellant entitled to all rights and privileges of the 1st Appellant.
 - iii. That a perpetual order of protection does issue to protect the rights and privileges of the Respondents in the 1st Appellant.
 - iv. Payment of all dividends due to the Respondents with interest from the date of declaration of the dividends
 - v. General damages for maltreatment and cruelty
 - vi. Costs of the suit and interest
 - vii. Any other orders in the interest of justice
4. On 29th March 2023, the Tribunal rendered its judgment in favour of the Respondents and found the Respondents to be legitimate members of the 1st Appellant and are therefore entitled to all rights and privileges accruing therefrom. The Tribunal also issued the following orders in favour of the Respondents; -
 - i. A declaration that the remarks of the 2nd Respondent on the 20/04/2019 were illegal. null and void and to be expunged from the records of the 1st respondent.
 - ii. Payment of all the dividends due to the Respondents within 30 days from the day of the Tribunal's Judgment.
 - iii. Costs and Interest of the suit



The Appeal

5. Aggrieved with the decision of the Tribunal, the Appellants, vide their memorandum of appeal dated 12th January 2023 appealed to this court raising eleven (11) grounds of appeal that; -
- i. The Tribunal erred in law in finding that the respondents are bonafide members of the 1st Appellant without carefully scrutinizing the membership documents presented by each of the respondents independently.
 - ii. The Tribunal erred in law and fact by admitting uncertified copies of receipts in the absence of the original clearly violating the provisions of Section 65 & 66 of the *Evidence Act*.
 - iii. The Tribunal erred in law and fact in allowing the production uncertified copies of receipts without the consent of the parties in production of the same or by calling their makers.
 - iv. The Tribunal erred in law and fact by finding that the 7th Respondent was a bonafide member of the 1st Appellant while he does not feature anywhere in the members register.
 - v. The Tribunal erred in law and fact by failing to clearly peruse the registers availed before the tribunal to establish which parties were missing from the register.
 - vi. The Tribunal erred in law and fact by determining the case as a group whereas each claimant individually gave instructions on the same and each claimant's case ought to have been determined on its merits and not collectively.
 - vii. The Tribunal erred in law and fact by disregarding the documentary evidence brought by the appellants herein and the strong response to the statement of claim which ended up being unsubstantiated.
 - viii. The Tribunal erred in law and fact by finding that the claimants are entitled to all the withheld dividends since 2019 yet no proof of payment of dividends and the rates was ever produced.
 - ix. The Tribunal erred in law and fact by finding that the 2nd Appellant's remarks on the 20/04/2019 were illegal, null and void and that should be expunged from the records of the 1st Appellant yet no specific remarks regarding any of the claimants were pinpointed in the minutes thus making it an unenforceable declaration.
 - x. The Tribunal erred in law and fact in finding the 2nd Appellant liable yet he had been sued in person without appreciating that the 1st Appellant is a body corporate with capacity to sue and be sued in its name and the 2nd Appellant being the chairman enjoys protection by virtue of the office he holds and as per the perpetual succession nature of the same.
 - xi. The Tribunal erred in law and fact by failing to address themselves to the counterclaim dated 30th July 2019 yet the same was never defended and or responded to.
6. The appeal was canvassed by way of written submissions. The Appellants' submissions are dated 29th November 2023 while that of the Respondents is dated 8th April 2024.

Appellants' Submissions

7. On the question whether the Respondents are bonafide members of the 1st Appellant, the Appellants submitted that the Tribunal erred in failing to appreciate that no evidence was availed by the Respondents in support of their claim of being members of the 1st Appellant.



8. The Appellants further submitted that the finding by the Tribunal was against evidence on record and particularly, the Respondents' own admission at trial that the names of five of them, being the 5th, 6th, 7th, 9th and 10th Respondents were not in the membership register of the 1st Appellant.
9. The Appellants asserted that, the Respondents did not produce any membership certificates nor receipts for payment for acquisition of membership. The Appellants argued that the claim by the Respondents that some of them acquired shares through transmission by their parents (deceased father and mother), went against the Respondent's own pleadings and witness statement at trial. According to the Appellants, the Respondents' pleadings before the trial court that they had all acquired membership through subscription and not by way of transmission/transfer.
10. Relying on the decision of Independent Electoral & Boundaries Commission & Anor v Stephen Mutinda Mule & 3 Others [2014] eKLR, the Appellants submitted that the Respondents having not pleaded that they acquired the shares by of transfer, any evidence and submissions at variance with the pleadings could not be accepted at trial.
11. Further, it was the Appellants' submission that the Tribunal failed to fully interrogate the documents submitted by the Respondents at trial in support their membership claim. In particular, the Appellants pointed out that documents submitted by the 2nd Respondent in support of his membership indicated that he was only 16 years and therefore below the legal age of 18 years prescribed under Section 14(a) of the *Co-operative Societies Act*.
12. Finally, the Appellants submitted that the tribunal erred in failing to interrogate each and every Appellant individually on their respective membership claims. According to the Appellants, despite the fact that the Respondents were alleged to be members of one family, their respective claims to membership was individual and not collective.

Respondents' submissions

13. On their part, the Respondents supported the finding by the Tribunal and asserted that they were indeed members of the 1st Appellant. The Respondents submitted that they were members of the 1st Appellant's predecessor, Kyanjau Farming Cooperative Society Limited which ceased to exist following the incorporation of the Kyanjau Housing Cooperative Society Limited, the 1st Appellant herein in the year 2000.
14. The Respondents further submitted that contrary to the Appellants arguments, all the Respondents produced their respective share certificates and payment receipts as proof of their membership to the 1st Appellant. That share Certificates were all issued under the hand of the officials of the 1st Appellant.
15. According to the Respondents, having produced their respective share certificates and payment receipts in relation thereto, they had fully discharged the burden of proof placed on them by the law to the required standards and therefore, the evidentiary burden then shifted to the Appellants, who were thereafter required to adduce any evidence rebutting the Respondents' position.
16. The Respondents submitted that the Appellants failed to adduce any evidence controverting the Respondents' evidence at the Tribunal. That further, the Appellants also failed to comply with the Tribunal's own direction to have the Appellants file the membership register with the Tribunal.
17. It is the Respondents' position in this appeal that the 1st Appellant being the custodian of the members' register cannot legitimately claim that the Respondents were not in the register, particularly after failing to avail the file a copy of the register with the Tribunal as had been directed.



18. That in any event, evidence on record shows that the 1st Appellant's membership register had been a subject of police investigations and that no fraud on the part of the Respondents had been established.
19. The Respondents therefore urged this court to dismiss the Appeal with costs in their favour.

Analysis and determination

20. This is an appeal emanating from the Co-operative Tribunal pursuant to section 81 of the Cooperative [Societies Act](#) which provides as follows; -

“ 81. Appeal to High Court

1. Any party to the proceedings before the Tribunal who is aggrieved by any order of the Tribunal may, within thirty days of such order, appeal against such order to the High Court:

Provided that the High Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

2. Upon the hearing of an appeal under this section, the High Court may—
 - a. confirm, set aside or vary the order in question;
 - b. remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;
 - c. exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or
 - d. make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.
3. The decision of the High Court on any appeal shall be final.

21. I have considered this appeal, the Judgment of the Tribunal, the record of proceedings and the parties' submissions in this appeal, as well as the authorities relied on. Despite the fact that the Appellant has raised eleven (11) grounds of appeal, I believe that the only issue for determination in this appeal is whether, based on the evidence adduced at trial, the Respondents are bonafide members of the 1st Appellant.
22. All the other issues raised by the Appellants is their submissions such as whether the 2nd Appellant, being the 1st Appellant's chairman made any remarks concerning the Respondents' membership during the Appellant's AGM of 20th April 2019, are in my view secondary.
23. It is trite law that pursuant to Section 107(1) of the [Evidence Act](#), Cap 80 Laws of Kenya the legal burden of proof on a claimant. On the other hand, the evidential burden of proof is imposed under



section 109 and 112 of the same Act on both parties. In *Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, where the Court of Appeal stated that: -

“As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”

24. The Respondents, being the Claimants at the Tribunal, had the duty and responsibility to persuade the learned Tribunal that their claim for membership of the 1st Appellant was merited by adducing sufficient evidence to support their claim to the required standard, that is, on a balance probability.
25. As indicated above, the main dispute stems from the alleged removal of the Respondents from the membership of the 1st Appellant. The 2nd Appellant was merely sued in his capacity as the chairman to the 1st Appellant and also on account of the remarks he allegedly made against the Respondents during the 1st Appellant’s AGM of 20th April 2019.
26. From the record, I note that in support of their Statement of Claim dated 26th June 2019, the Respondents attached copies of their respective membership certificates, all issued and signed by the officials of the 1st Appellant. I also note that the Respondents’ witness, Mr. Martin Igecha Kimani testified before the Tribunal on 15th March 2021 as CW1 and adopted his witness statement dated 26th June 2019 as his evidence in chief. The witness also produced as exhibit (Claimant’s Exhibit 1) the documents in his list of documents dated 26th September 2019.
27. Mr. Kimani told the Tribunal that prior to the 1st Respondent’s AGM of 20th April 2019 when they were ejected from the membership of the 1st Appellant, all the Respondents in their respective individual capacities were members of the 1st Appellant and that they had been making the necessary payments and even received their respective dividends from the 1st Appellant. It was further the Respondents’ evidence that they were simply ejected from the 1st Appellant’s membership without being given any letter detailing reasons for the removal. According to the Respondents, the action against them was purely due to leadership wrangle in the Society.
28. In cross-examination Mr. Kimani further told the Tribunal that he became a member of the 1st Respondent on 12th June 1974 after paying the requisite entrance fee. That he was 16 years when he joined. He also testified and explained to the Tribunal how the other Respondents became members.
29. Mr. Kimani admitted in cross-examination that when he inspected the 1st Appellant’s register of membership, the names of five of the Respondents (being 9th, 5th, 6th, 7th, 9th, & 10th Respondents) were missing from the register. He however asserted that the five Respondents were members of the Society and produced in evidence their membership certificates and receipts issued under the hand of the officials of the 1st Appellant.
30. According to the witness, it was the responsibility of the Appellants in their capacity as the custodians of the register to update the same. To demonstrate the laxity and or neglect on the part of the Appellants to update the register, Mr. Kimani told the Tribunal that his father and mother (all deceased) were still in the register of the 1st Appellant as members despite having transferred/transmitted their respective shares to their successors.
31. For the Appellants. Mr. Michael Njuguna Njoroge (the 2nd Appellant) testified on 6th June 2022 and adopted his witness statement of 30th July 2019 as his evidence in chief. He told the Tribunal that



he became a member of the 1st Appellant in 2005 and that he was subsequently elected as the 1st Appellant's chairman in 2013.

32. It was further the 2nd Appellant's testimony that when he took over the leadership of the society in 2013, the society was marred with a lot of irregularities regarding membership and that many claimed to be members while in fact they were not. That in view of the irregularities, it was resolved that a scrutiny of the register of members be undertaken and that that is how the Respondents' questionable membership was discovered. He asserted that this is the reason the Respondents were eventually removed from the membership of the 1st Appellant.
33. I have carefully reviewed the evidence submitted at trial by both parties. I note that all the Respondents produced in evidence their respective membership certificates and payments receipts issued under the hand of the 1st Appellant's officials. From the evidence tendered at trial, it is clear that the 1st, 2nd, 3rd, 4th, and 8th Respondents have their names recorded in the 1st Appellant's Register. This court cannot therefore understand the reason for their removal from the membership of the 1st Appellant. None was provided by the Appellants before the Tribunal.
34. As for the 5th, 6th, 7th, 9th and 10th Respondents, despite the fact that their names were not found by in the society's register, I note that they all produced as evidence before the Tribunal, their respective membership certificates and payment receipts issued under the hand of the officials of the 1st Appellant. Again, no evidence was produced on behalf of the Appellants before the Tribunal to the effect that the receipts and certificates were forgeries.
35. Further, I note from the evidence submitted before the Tribunal that the police (DCI) had been invited by the Appellants to investigate the possibility of fraudulent membership claim but no report was tabled before the Tribunal implicating the 5th, 6th, 7th, 9th and 10th Respondents. There was therefore no basis for the Appellants to claim that the Respondents' membership to the society had been fraudulently acquired.
36. The fact that the Appellants failed to file with the Tribunal a copy of their register of members despite the Tribunal's clear direction in that regard, in my view, only helps to lend credence to the Respondents' argument that their removal from the membership of the society was baseless and only motivated by internal wrangles with the society's leadership.
37. It is trite law that membership certificate, just like a certificate of title, is prima facie evidence that the holder thereof had acquired proper title to the underlying asset or property. That that title can only be challenged on account of fraud, with the onus being on the person disputing the same to lead evidence to the contrary. See the Court of Appeal (Ouko, (P), Karanja & Sichale, JJ. A) decision in the case of Raphael Kimani Mwangi v Chairman, Treasurer and Secretary Kware Mukuru Kwa Njenga Jua Kali Association & 2 others [2020] eKLR where the court stated as follows; -

“The inverse was that the 3rd respondent produced all documentary evidence traceable to the association and therefore established prima facie evidence that she had acquired a proper title to the suit property. That title could only be challenged on account of fraud, with the onus being on the appellant to lead evidence to prove.

It is now well settled that where fraud is pleaded, it must be distinctly proved and the onus of proof is heavier than in ordinary civil cases. In *Vijay Morjaria V. Nansing Darbar & Another* (2000) eKLR, this Court stated that:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course



be set out and then it should be stated that those acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved and it is not allowable to leave fraud to be inferred from the acts”.

38. In the instant case, the Appellants accused the Respondents of fraud but did very little to prove the allegation of fraud on the part of the Respondents. I note from the proceedings that the 1st Appellant society was directed by the Tribunal to file its register of members with the Tribunal prior to the commencement of the hearing of this case by they failed to comply. Further, as indicated above, despite the mention by the Appellant’s counsel that the case was under investigations by the police (DCI) no report was availed at the Tribunal implicating any of the Respondents.
39. From the above analysis and after my careful consideration of this appeal in its entirety, I find no justification to disturb the findings by the Tribunal. The findings by the Tribunal were in my view based on evidence, and a reasonable Tribunal, properly directing itself on the issues, would have arrived at those very findings.
40. I find that the allegations of fraud and forgery on the register of members were general and ambiguous. The failure by the Appellants to file a copy of the register of members at the Tribunal despite express order the Tribunal was a clear indication that 1st Appellant was not very truthful to the Tribunal in its allegations against the Respondents.
41. Further, as I have pointed out above, the 1st Appellant commissioned police to conduct investigations on the allegation but again, no report was availed to the Tribunal, neither was there any evidence adduced by the Appellants at the hearing that the Respondents had in fact been implicated in the alleged fraud.
42. The upshot of my analysis and consideration of this appeal is that it is bereft of any merit and is accordingly dismissed with costs to the Respondents.
43. It so ordered.

SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 7TH DAY OF NOVEMBER 2024.

ADO MOSES

JUDGE

In the presence of

Moses – Court Assistant

Mwangi..... for the Appellant

Tumu..... for the Respondent

