REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 25 OF 2020

JOHN MARINGA...APPELLANT

VERSUS

HARAMBEE SACCO SOCIETY LTD...................................RESPONDENT

(Being an Appeal and the Ruling and Order from the Co-operative Tribunal Case No.47 of 2020 delivered on 25th June, 2020 by the Honourable Chairman B. Kimemia)

****

J U D G M E N T

1. This appeal arises from the ruling and order of the ***Co-operative Tribunal Nairobi, Case No. 47/20*** where the appellant was the Claimant against Harambee Sacco Society Limited. The appellant had filed an application in the Tribunal dated 10th February 2020 wherein he was seeking orders that;

(a) A temporary injunction be issued against the respondent allowing the appellant to continue serving as the duly elected chairman pending the hearing and determination of the matter.

(b) He was also seeking an order that the tribunal do issue an injunction compelling the Respondent to halt, stop and/or suspend the by elections for the position of Harambee Sacco Kirinyaga Branch Chairman.

(c) That the Tribunal be pleased to issue an order compelling the respondent to halt, stop and or suspend any discussion and/or publications of any matter pertaining the Kirinyaga Branch Chairman elections until this matter is heard and determined.

(d) That the Tribunal be pleased to issue an order directing the respondent to pay the Chairman his delegates' allowance.

(e) That the Tribunal be pleased to issue an order directing the Chairman and the Chief Executive Officer of the respondent to see to it that the orders are enforced.

(f) Costs be provided for.

2. The Tribunal in a ruling dated 25th June 2020 held that the claimant's application dated 10th February 2020 has not met the requisite thresh hold for the grant of the prayers sought on account of his study leave. The application was disallowed with costs. The applicant has raised the following grounds in Memorandum of Appeal dated 6th July 2020.

1. That the learned Chairman of Co-operative Tribunal erred in law and in fact in disregarding the principles of law to be considered for the grant of injunction orders as set out in the celebrated cases of Giella -v- Cassman Brown & Company Ltd (1973) EA 358.

2. That the learned Chairman of Co-operative Tribunal erred in law and in fact in disregarding and/or failing to consider the purport of a prima facie case as was espoused in the case of Mrao Ltd vs First American Bank of Kenya and 2 others, (2003) KLR 125.

3. That the learned Chairman of the Co-operative Tribunal misdirected herself on the application and interpretation of clause 39.6(iii) of the by-laws thereby stretching its construal beyond the intended scope.

4. That the Chairman of the Co-operative Tribunal erred in law and in fact by delving into the substantive issues of evidence at

an interim stage, contrary to the principle enunciated in American Cyanamid Co (No.1) vs Ethicon Ltd [1075] UKHL 1.

5. That the learned Chairman of the Co-operative Tribunal erred in law and in fact by purporting to argue the Respondent's case on its behalf, thereby violating the principles of natural justice.

6.That the learned Chairman of the Co-operative Tribunal erred in law and in fact by finding that the Appellant had not made out a case for grant of the injunctive orders.

7. That the learned Chairman of Co-operative Tribunal erred in law and in fact by finding the Appellant had not made out a case for grant of the injunctive orders.

8. That the learned Chairman of the Co-operative Tribunal misdirected herself on the fact and the law and based her findings on wrong and irrelevant considerations.

9. That in all circumstances of the case, the findings of learned Chairman of the Co-operative Tribunal is totally in supportive in law.

10. That the learned Chairman of the Co-operative Tribunal erred in law and in fact in placing reliance on extraneous evidence and matters in arriving at his decision.

11. That the learned Chairman of the Co-operative Tribunal was openly biased in favor of the Respondent.

12. That in all the circumstances of the case, the learned Chairman of the Co-operative Tribunal failed to do justice before the Appellants.

The appellant prays that the appeal be allowed, the ruling be set aside and he be awarded costs.

The respondent opposed the appeal. The appellant had filed a Notice of Motion seeking orders for stay of execution of the ruling of the Tribunal pending the hearing and determination of the appeal. The applicantion was however withdrawn and parties agreed to proceed with the main appeal. The parties also agreed to canvass the appeal by way of written submissions.

3. The brief background of this appeal is that vide a letter dated 31st December 2019 a circular/programme of the electoral zones (Branch) Elections was released by the National Chairman of the respondent directing that fresh elections be conducted for each branch for the respective positions. It also outlined the requirements to be met. The appellant underwent vetting against the conditions precedent set out in Clause 39.7 of the respondents by-laws and was found yet and cleared to contest the post of chairman Kirinyaga Branch. The elections were conducted on 16th January 2020 and the appellant was duly elected by the delegates of Kirinyaga Branch with 33 votes against his opponent who garnered 21 votes. The appellant was declared the successful candidate by the Sub-County Co-operative officer.

4. The respondent wrote a letter dated 31st January 2020 to its Kirinyaga Branch members advising them to conduct a by election in relation to the positions of Chairman, Secretary and Treasurer as they were not eligible to be elected. With reference to the appellant it was alleged that he had been transferred from Kirinyaga County.

He was pursuing PHD Course outside the county in Hungary from 1st September 2018 to 31st December 2022. That the appellant had a case with the society.

5. The appellant moved to the Tribunal and filed the claim seeking an order of injunction to suspend the implementation of that letter.

The appellant was elected while on study leave. The fact that the appellant was on study leave as at the time of his election was not one of the grounds on which a member may be barred from contesting for any position as per the respondent's by-laws. Neither the appellants opponent nor any number of the respondents branch oppose the election of the appellant as Chairman elect of the branch.

6. The appellant submits that the only issue for determination is whether the appeal is meritorious. The appellant submits that the principles for consideration in granting of a temporary injunction were settled in the case of ***Giella -v- Cassman Brown & Co.Ltd (1973) E.A 358***. These are ;

(a) The applicant must show a prima facie case with a probability of success.

(b) That the applicant may suffer irreparable loss.

(c) The court is in doubt, it will decide the application on a balance of convenience.

The appellant submits that he satisfied the conditions precedent for the grant of a temporary injunction. He relies on the case of ***Moses G. Muhia Njoroge & 2 others -V-Jane W. Lesaloi & 5 Others (2014) eKLR*** and **Mrao -V- First American Bank of Kenya Ltd & 2 Others (2003) KLR** ***12*** which demystified what amounts to *prima facie case*. That the appellant demonstrated that he had a legal right which had been infringed and needed protection in line with order **40 Rule 2(1) of the Civil Procedure** ***Rules***. He relies on ***Kenleb Conn Ltd -v- New Gatitu Service Station and another (1990) eKLR.***

It is submitted that the Tribunal failed to consider the evidence presented and misdirected itself on the interpretation and construal of **Clause 39.6 (111)** of the by-laws. She prays that the appeal be allowed.

7. For the respondent it is submitted that the Tribunal addressed itself on the principles for the grant of injunctive orders. The Respondent submits that the contention that Tribunal determined substantive issues at an interim stage carries no water and the appeal should fail.

I have considered the grounds of appeal, the submissions and the ruling of the Tribunal. The issues which arise for determination are:-

(a) Whether the tribunal mis-interpreted Clause 39.6(iii) of the By- Laws of Harambee Co-operative Savings and Credit Society Limited

(b) Whether the principles for the grant of temporary injunction were established.

(c) Whether appellants appeal is meritorious

(a) <u>Whether the Clause 39.6 (iii) was mis-interpreted:</u>

“ *The By-Law states:*

Election and tenure of Delegates.

(iii) Every member shall belong to one electoral zone, based on his place of employment or business, from which he will participate in elections. It is the delegate’s responsibility to inform the board of any change of electoral zone/employment.

This By-Law is meant to regulate the election of a delegate and requires that the delegate belongs to one zone from which he will participate in the elections. The Tribunal at page 138 of the record of Appeal stated that-

We thus find that on the material placed before us, the claimant’s current work station is Kirinyaga Sub-County“ (sic) .

So as a matter of fact and law relating to the election tenure of the delegates the Tribunal established that the appellants place of employment was Kirinyaga. A person could be in employment or doing business, the by law does not restrict eligibility to employment only. If I were to take the literal interpretation of the clause, the appellant did meet the pre-requisite for election as a delegate in Kirinyaga Electoral zone. The Tribunal misinterpreted the clause by considering the pursuit of studies as a bar to eligibility. The Tribunal having found that the appellants place of employment is Kirinyaga, made a self contradictory finding that the appellant was in Kenya to persue his PHD studies and not for any other purpose. See page 140 of the record. The Tribunal misinterpreted the rule as it has not stated that one can only be in the electoral zone by virtue of employment, it also recognizes that a person can be in the zone doing business. The word business is wide and encompasses many things. As for the study leave, material was placed before the Tribunal that the appellant was in the country for two years. It is not expected that as a delegate he is permanently confined in the electoral zone. The intention of the rule is basically to ensure that the delegate resides in the electoral zone so that he is within reach of his constituents. It was extraneous for the Tribunal to rule that the appellant was at the whims of the University in Hungary when such evidence was not before it.

The tribunal after finding as a matter of fact that the applicant was Eligible erred by delving into matters of evidence at the interlocutory stage. It is trite law that substantive issues cannot be dealt with at interlocutory stage as that denies a party an opportunity to be heard and puts the court in a situation where it determines the suit without the benefit of detailed arguments and informed the consideration of the evidence. In the case cited by the appellant ***<u>American Cyramid Co. (No-1-) -V- Ethicon Ltd (1975) UK HL -1-</u>*** the court held the view that court’s role and by extension, Tribunal while considering an application for interim orders does not extend to interrogating the substantive issues of evidence. It was stated:-

“It is not part of the court’s functions at this stage of the litigation to try to resolve conflict of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”

The best approach is for the court to weigh the propositions by both Sides without a determination of matters of facts.

See ***<u>Mbuthia -v- Jimba Credit Finance Corporation & Another 1988 KLR 1</u>***

I do not agree with the respondent’s submission on the issue that the Tribunal holding that the appellant is not in active duty and therefore not eligible to contest is in line with the By-Laws. This cannot be supported as that was a matter of fact which the Tribunal could not give a determination without hearing the evidence and secondly it was not one of the considerations for eligibility under the said By-Law. The Tribunal had made a determination that the appellant was eligible. His ability to perform his obligation was not properly considered.

I find that the Tribunal mis-interpreted the By-Law on eligibility and considered extraneous matters which were not provided in the By-Law and the matters were to be exhaustively considered at the main trial.

8. **b) <u>whether the principles for granting an inter-locutory injunction were established</u>**.

It has been well articulated by both the parties that the principles for granting of interlocutory injunctions are well laid out in the case of **Giella -v- Casman Brown** (Supra). The applicant must show that he has a prima facie case with a probability of success. Secondly he must show that he is likely to suffer irreparable loss which may not be compensated by an award of damages. Finally where the court is in doubt, it will determine the case on a balance of convenience. The appellant was seeking an order of injunction to stop the by-elections of Kirinyaga Branch and for him to continue serving as the chairman pending the hearing and determination of the claim.

On the first issue, a prima facie case has been defined n in the Blacks Law Dictionary 9th Edition at Page 1310 as follows:-

> ***"The establishment of a legally required rebuttable presumption; a party's production of enough evidence to allow the fact trier to infer the fact at issue and rule in the party's favours."***

In the case of ***Mrao Ltd -V- First American Bank of Kenya Ltd & 2 Others (2003) KLR.*** The Court of Appeal stated:

> ***"In civil cases a prima facie case is a case in which on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is a standard which is higher that arguable case. The appellant cited Court of Appeal decision in*** Moses C. Muhia Njoroge & 2 Ohers (Supra) ***which authorities referred to the above case on determination of a prima facie case."***

The appellant was supposed to demonstrate that he has a legal or equitable right which required to be protected by way of injunction as provided under **Order 40 rule 2(1) of the Civil Procedure Rules.** It is the contention by the applicant that he contested for the election of Chairman of the respondent Kirinyaga Branch in the elections conducted on 16th January 2016. The respondent purported to nullify the elections and to order a by-election to fill the appellant's position. The appellant was cleared to run for the position of Chairman and he emerged the winner. There is a presumption that he was lawfully elected unless the contrary was proved.

By seeking to nullify the election without giving him an opportunity to be heard the respondent` infringed on his right. The matters raised in the letter dated 31st January 2020 were considered by the Tribunal and it found hat he was eligible in view of his current work station.

9. It is trite that in an application for interlocutory injunction the *onus* is on the applicant to satisfy the court that he is entitled to the injunction sought. An injunction being an equitable and a discretionary remedy is granted on the basis of evidence and sound legal principles. A party is supposed to make full disclosure of all relevant mattes to enable the just and informed determination of the application. The appellant laid all the matters before the Tribunal. It in turn considered all the issues raised by the respondent and found in favour of the appellant. These are:-

(a) On the issue of transfer it found his work station was Kirinyaga County.

(b) On the issue of pending suit it found that the appellant did not have a case against the Respondent.

10. On the pursuit of studies, the Tribunal fell into err by making conclusions which were not based on material before it and without having heard the evidence exhaustively. The issue was whether the appellant would be able to discharge his duties. The appellant in the supplementary submissions has stated that he is in the country uninterrupted upto 2022. The issue ought to have been determined after hearing, short of that it would amount to having determined the matter at interlocutory stage.

I have said enough, this is a matter which I find that the appellant established a prima facie case with chances of success and ought to have been granted an interlocutory injunction.

On the issue of irreparable loss the appellant had submitted before the Tribunal that his reputation was at stake and his failure to serve members as a delegate could not be quantified. Irreparable loss depends on the circumstances of each case. It has not been given a universal definition. It is loss that cannot be quantified and therefore cannot be compensated by an award of damages. That is why where it is established that irreparable loss is likely, conservatory orders are issued and is a key principle for consideration when granting an injunction. In this case an award damages would not be adequate remedy to compensate the applicant.

On the issue of balance of convenience it is considered where the court is in doubt. It will determine which party will suffer the greater harm by granting or refusing to grant the injunction. In this case the balance of convenience tilts in favour of the applicant who as he demonstrated was validly elected and the Tribunal found in his favour that he was eligible.

Finally, on the merits of the appeal, I find that the Tribunal failed to apply the principles for the grant of injunction as laid down in the case of **Giella- V- Cassman Brown** for the reasons which I have stated above.

I therefor find that the appeal has merits. I allow the appeal and order that the ruling of the ***Co-operative Tribunal in Cause No.47/20*** dated 25th June 2020 is quashed and set aside. It is substituted with an order allowing the appellants application dated 10th February 2020 in terms of prayer 2, 4, and 6 pending the hearing and determination of the matter before the Tribunal.

I award the costs of the appeal to the Applicant.

Dated, signed, and delivered at Keroguya this 5th day of November 2020.

L.W. GITARI

JUDGE

5/11/2020

Ruling read out in the presence of the parties through virtual electronically.

L.W. GITARI

JUDGE

5/11/2020