



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CIVIL SUIT NO. 01 OF 2018**

1. SAMWEL MARAK.....1<sup>ST</sup> PLAINTIFF/APPLICANT
2. ZABLON CHANGE.....2<sup>ND</sup> PLAINTIFF/APPLICANT
3. JOSIAH OYARO.....3<sup>RD</sup> PLAINTIFF/APPLICANT
4. DAVID NYARIBO.....4<sup>TH</sup> PLAINTIFF/APPLICANT
5. ALFRED NYAIRO.....5<sup>TH</sup> PLAINTIFF/APPLICANT
6. ZACHARY ONDARA.....6<sup>TH</sup> PLAINTIFF/APPLICANT
7. SAMWEL MOSE.....7<sup>TH</sup> PLAINTIFF/APPLICANT

**VERSUS**

**THE COMMISSIONER OF CO-OPERATIVES.....DEFENDANT/RESPONDENT**

**AND**

1. JOSEPHAT MOCHOMBA ONCHIRI.....1<sup>ST</sup> INTERESTED PARTY/APPLICANT
2. JEMIMA BONARERI ABINCHA.....2<sup>ND</sup> INTERESTED PARTY/APPLICANT
3. JAMES OMWANSA NDEMO.....3<sup>RD</sup> INTERESTED PARTY/APPLICANT
4. JAMES OBIERO MOINDI.....4<sup>TH</sup> INTERESTED PARTY/APPLICANT
5. JOHN BITENGO MAYORA.....5<sup>TH</sup> INTERESTED PARTY/APPLICANT
6. NYABOMITE FARMERS CO-OPERATIVE  
SOCIETY LIMITED.....6<sup>TH</sup> INTERESTED PARTY/APPLICANT

**RULING**

This ruling pertains to two applications. The first is the Interested Parties Notice of Motion dated 7<sup>th</sup> November 2018. The same seeks the following orders: -

“1. (Spent)

2. (Spent)

3. THAT pending the hearing and determination of the Application, the Honourable Court be pleased to recall, review and/or set aside its Ruling and all consequential orders made on 25<sup>th</sup> October 2018 and the ‘*status quo ante*’ the Ruling of

25<sup>th</sup> October, 2018 be maintained.

4. THAT pending the hearing and determination of the Application and/or further orders, the Plaintiffs/Respondents be restrained by a temporary injunction from assuming office in the management of the affairs of the 6<sup>th</sup> Interested Party herein.
5. THAT pending the hearing and determination of the suit or until further orders the Plaintiff/Respondents be restrained by an order of injunction from assuming the office as the Management Committee of the 6<sup>th</sup> Interested Party herein.
6. The OCS Nyamira Police Station be ordered to enforce and/or implement the orders of this Honourable Court.
7. THAT the Honourable Court be at liberty to make any such further orders as it thinks fit in the interest of justice.
8. THAT the costs of this Application be provided for.”

The said application is premised on following grounds: -

- “1. THAT the Plaintiffs/Respondents filed the suit and application and obtained orders affecting the Interested Parties without enjoining them as parties in the proceedings and the subject inquiry was conducted by the Commissioner of Co-operatives on behalf and for the benefit of the 6<sup>th</sup> Interested Party which was not enjoined as a party in the proceedings herein.
2. THAT the Plaintiffs/Respondents filed the application dated 15<sup>th</sup> October, 2018 and obtained *ex parte* orders without material disclosure of facts and hence misled the Honourable Court that the Defendant/Respondent is in the Management of the 6<sup>th</sup> Interested Party which is not the case.
3. THAT the Plaintiffs/Respondents failed to disclosure to the Honourable Court that there are legitimate office bearers consisting of the 1<sup>st</sup> – 5<sup>th</sup> Interested Parties who were legally and procedurally elected into office during the Special General Meeting on 11<sup>th</sup> October 2018 when the inquiry report was read and adopted by members and hence there is no vacuum in the Management of the affairs of 6<sup>th</sup> Interested Party.
4. THAT the Plaintiff/Respondents failed to disclose to the Honourable Court that the Defendant/Respondent had read the inquiry report and the same was overwhelmingly adopted by the members, effectively dissolving the tenure of office of the Plaintiffs/Respondents.
5. THAT the Honourable Court was misled to issue a mandatory injunction to reinstate the Plaintiffs into the Management of the 6<sup>th</sup> Defendant without setting down the suit for full hearing and the orders issued by the Honourable Court on 25<sup>th</sup> October 2018 had been overtaken by events.
6. THAT the Plaintiffs/Respondent misled the Honourable Court to hear the application and issue orders without jurisdiction. The issues in the case revolves on “*co-operative disputes*” within the meaning of Section 76 as read with Section 73 and 74 of the Co-operative Society Act. The removal of the Plaintiffs from the office is protected by Section 73 of the Co-operatives Act and the remedy for such removal is to appeal to the Co-operative Tribunal under Section 74 of the Co-operative Societies Act.
7. THAT the Honourable Court was misled to create an office comprising two parallel Management Committee Members contrary to the clear provisions of Co-operative Societies Act, Rules and By-Laws of the 6<sup>th</sup> Respondent.
8. THAT the Honourable Court was misled to reinstate the Plaintiffs into office when they were Surcharged by the Commissioner for Co-operatives contrary to the provisions of the Co-operative Societies Act Rules and By-Laws.
9. THAT the Ruling of 25<sup>th</sup> October, 2018 consists of errors on the fact of it which ought to be reviewed and/or set aside by this Honourable Court.”

The application dated 7<sup>th</sup> November 2018 is supported by the affidavit of Josephat Mochomba Onchiri sworn on even date. The deponent of the affidavit reiterates the grounds on the face of the application and urges this court to grant the orders sought.

The second application is the Notice of Motion dated 23<sup>rd</sup> November 2018 in which the plaintiffs in the main suit seek orders as follows: -

“1. (Spent)

2. THAT the Honourable Court be pleased to cite the Defendants/Respondent COMMISSIONER OF CO-OPERATIVES for contempt of Court for disregarding and/or disobeying the lawful Court Order given by this Honourable Court on the 1<sup>st</sup> day of November 2018 requiring the Defendant/Respondent not remove the Applicants from Office.

**3. THAT consequent to prayer 2 herein above being granted the Defendant/Respondent be punished and/or committed to civil jail for a duration not exceeding (6) six months and/or such other shorter duration as the Honourable Court may deem fit and expedient.**

**4. THAT costs of this Application be borne by the Defendant/Respondent.**

**5. THAT such further and/or Orders be made as the Court may deem fit and expedient.**

The said application is premised on the following grounds: -

**“1. THAT the Defendant/Respondent has disobeyed and/or disregards the lawful Court Orders made on 1<sup>st</sup> November 2018.**

**2. THAT the Defendant/Respondent’s conduct towards the disobedience is wanting and uncalled for.**

**3. THAT the conduct of the Defendant/Respondent if left unpunished would bring the authority and dignity of this Honourable Court into disrepute.**

**4. THAT all requisite requirements such as penal notice was complied with in the Order.**

**5. THAT the said Order issued on 1<sup>st</sup> November 2018 was duly endorsed with a penal notice and the same served personally upon the Defendant/Respondent.**

**6. THAT the Court Orders ought to be obeyed at all times unless set aside, varied and/or nullified.**

**7. THAT the conduct of the Defendant/Respondent is bound to set a dangerous precedent that is likely to prejudice the general administration of justice and the Court’s integrity.**

**8. THAT it is in the interest of justice that the Application herein be allowed to be example to others who have same attitude and bad faith.”**

The Notice of Motion by the plaintiffs is supported by the affidavit of Samwel Marak sworn on 23<sup>rd</sup> November 2018. Both applications are vehemently opposed.

In response to the application by the Interested Parties there is a replying affidavit sworn by Samwel Marak. The same is not dated but was filed on 14<sup>th</sup> November 2018. In the affidavit he deposes inter alia that his committee was legally in place; that it is the one that called the impugned Annual General Meeting in which it is purported there was a resolution that an inquiry be done following allegations that the management committee had embezzled the society’s funds; that the report read on 11<sup>th</sup> October 2018 which is the subject of the suit in fact vindicated his committee; that whereas the Commissioner of Co-operatives is empowered by law to remove the management committee of the society after due inquiry, there has been no inquiry in regard to the management committee he chairs to warrant removal and the current caretaker committee put in place by the defendant is illegal. Further he deposes that the defendant chose not to defend these proceedings because he very well knew that the actions of his office were illegal. The deponent contends that to allow the application would be tantamount to legalizing an illegality.

The defendant who is represented by Senior Litigation Counsel S. O. Nyauma, office of the Attorney General opposed the plaintiffs’ application to cite him for contempt of court. No grounds of opposition or replying affidavit were filed although leave to extend time for doing so was granted to Mr. Nyauma. He did however file written submissions. The two applications were argued together by way of written submissions.

I have carefully considered the applications and the rival submissions including the authorities cited by counsel. I note however that the application by the Interested Parties has been overtaken by events. In paragraph 6 of his affidavit Josephat Mochoma Onchiri deposes that the caretaker committee, upon whose authority he has sworn the affidavit, was to remain in office for a period not exceeding three months from 11<sup>th</sup> October 2018. That period lapsed on 10<sup>th</sup> January 2019. This court cannot therefore grant the prayers sought in the notice of motion dated 7<sup>th</sup> November as it would do so in vain.

As for the application seeking to cite the defendant for contempt, the same is not opposed because despite seeking an adjournment which this court granted so as to file a response, Mr. Nyauma who is acting for the defendant neither filed a replying affidavit nor grounds of opposition. It is worth noting that the defendant (The Commissioner for Co-operatives) likewise did not oppose the plaintiffs’ application for a temporary injunction although he was duly served with the plaint as well as the Notice of Motion.

In his submissions Mr. Nyauma’s main argument is that this court had no jurisdiction to grant the injunction sought by the plaintiffs as this being a matter concerning the business of a co-operative society it is subject to **Section 76 of the Co-operative Societies Act** which vests jurisdiction in the Co-operative Tribunal with this court only having appellate jurisdiction. It is his argument that as the said Act has prescribed a clear procedure for redress that procedure should be strictly followed. To support his argument, he has cited several cases all of persuasive authority.

As I have stated, the defendant did not oppose the application and as he has not purged the contempt of which he is accused, he ideally has

no right of audience. Be that as it may I have considered the arguments put forth by his advocate. I have also considered the submissions by counsel for the plaintiffs. As I have stated elsewhere, the term of the persons the defendant is accused of putting in charge of the society thereby “illegally” ousting the plaintiffs has come to an end. In my view that renders the actions complained of no longer operational and it is not therefore necessary to grant the orders sought by the plaintiffs as the effect would in my view only result in protracting this matter. Secondly, although strictly speaking this is not one of the cases that must be referred to the Co-operative Tribunal under **Section 76 of the Co-operative Societies Act**, it is clear from the cases cited by Mr. Nyauma that the trend by the courts is to consider all such matters as disputes concerning the business of a co-operative society and hence refer them to the Tribunal. Moreover, **Article 159 (c) of the Constitution** promotes and encourages parties to explore alternative methods of dispute resolution. It is in that spirit that this court shall refer this dispute to the Co-operative Tribunal for hearing and disposal. However and for the avoidance of doubt the orders granted to the plaintiffs by this court shall remain in force unless set aside by the consent of the parties or the Co-operative Tribunal.

The costs of the applications and the suit shall abide the orders of the Co-operative Tribunal. It is so ordered.

**Signed, dated and delivered in at Nyamira this 14<sup>th</sup> day of February 2019.**

**E. N. MAINA**

**JUDGE**