



REPUBLIC OF KENYA

IN THE COURT OF KENYA

AT NYERI

CONSTITUTIONAL APPLICATION NO.N0 1 OF 2012

FRANCIS JAMES NDEGWA.....APPLICANT

-VERSUS-

2NK SACCO LTD.....RESPONDENT

JUDGMENT

On 28th February 2012 the petitioner herein Francis James Ndegwa wrote to the chairman 2NK Sacco Ltd in the following terms:-

Francis J.Ndegwa,

P O Box 5036,

NYERI.

28th February,2012

The Chairman,

2NK SACCO Ltd,

P O Box 12196,

NYERI.

Dear Sir,

RE: MEMBER NUMBER 260-MOTOR VEHICLE KAN 827 AND KAQ 916D

I refer to the above quoted vehicles which have been out of operation due to inevitable respectful obstacles.

The first vehicle KAN 827M was attached on 2nd August , 2006 in Nakuru by 2NK Sacco while still operating in the SACCO routes and then grounded for eight months.

The vehicle was released on 20th March 2007 while in deteriorated mechanical conditions. I repaired the vehicle severally but finally I was compelled to give in and grounded it due to the lack of finance.

The second vehicle KAQ 916D had a case in Kikuyu court and was grounded in Kikuyu police station for four years. The vehicle was released in September 2011.

I have now repaired the two vehicles and they are now serviceable and ready to go back on the road.

In view of the above I request you to give me the mandatory introductory letters so that I can get the TLBs from Kenya Revenue Authority as soon as possible.

Yours faithfully,

F.J.NDEGWA

The 2NK Sacco Society Limited responded through the General Manager vide letter dated 14th March 2012 Ref: 2NK/MEM/03/12 to Francis J.Ndegwa Member No.260.

Our Ref:2NK/MEM/03/12

14th March 2012

Francis J.Ndegwa

M/No.260.

Dear Sir,

RE: SACCO MEMBERSHIP

We refer to your letter dated 28th February 2012 requesting for introductory letters for acquisition of TLB Licences.

As stipulated in our bylaws No.10 (b), you ceased being a member of the Sacco by virtue of default whereby your accrued loan was offset against your shares and the balance loaded onto your guarantors. You also sued the Sacco and the case is ongoing at the Nairobi Tribunal Court. Based on the above two factors, your application was declined per the board resolution on 5th March 2012.

Be therefore advised.

Yours faithfully,

FOR & ON BEHALF OF 2NK SACCO MANAGEMENT,

Anne Kinyua,

General Manager

It is this letter that provoked this petition dated 16th March 2012 and filed on 19th March 2012 filed this petition under certificate of urgency.

In the notice of motion supported by his affidavit sworn on the same date he sought three orders:-

1. *That application be certified urgency.*
2. *That the application be heard exparte*
3. *That 2NK Sacco be ordered to issue me the mandatory introductory letter for acquisition of TLB Licences so as to comply with legal government directives.*

Regarding to the content of the letter from the General Manager, 2NK Sacco Ltd the petitioner set out the grounds for the petition: -

1. THAT the taxes paid are going to waste because the vehicle cannot operate on the roads without TLB.
2. THAT payment of court fees herein be dispensed with.
3. THAT the cost herein be provided for on the ground that:-
 - i) That refusal to issue to the applicant introductory letters is oppressive and punitive.
 - ii) That by-law No.10 (b) cannot apply because the applicant did not voluntarily withdraw his shares from the Sacco.
 - iii) That Sacco took the law into its own hands because attachment of shares was done without any notice and court order.
 - iv) That the Sacco also unlawfully without any notice and court order attached the applicants vehicle KAN 827M and detained it for eight months from 2nd August, 2006 to 19th March 2007 in the Nyeri 2NK Sacco Petrol Station in contravention to the Auctioneers Act Cap.526 Laws of Kenya.

v) That suing the Sacco in court for unlawful action done to the applicant is well within the law and so the Sacco has no legal ground to further violate the applicant's rights because of a case filed against the Sacco.

vi) That Sacco took the shares six years ago and no letter was written to inform the applicant that he ceased to be a member as per by-law No.10 (b) until the Applicant wrote to the Sacco on 28th February, 2012 requesting for the introductory letters.

vii) That the member still hold shares in the 2NK Sacco Investments under the same member Number 260.

4. THAT on 5th March 2012 2NK Sacco Board deliberated on the applicant's letter *ex parte* and passed a resolution to decline to issue an introductory letter to the member.

5. THAT the applicant was judged unheard contrary to Cap 4 article 36(1), (3) a and b of the Constitution of Kenya 2010.

6. THAT there are grounds of expulsion from the society under Sacco by-laws No.11 and none of them affect the applicant.

In the supporting affidavit he deponed that he was still a member of 2NK Sacco Ltd No.260 that the respondent had attached his shares dividends and guarantors shares without notifying him contrary to s.36 of Cap 490 – Cooperative Societies Act to offset his loan and thereafter had attached his motor vehicle KAN 827M contrary to the law and that the respondent was now using were illegalities to justify the Sacco's actions.

That the respondent could not hold the fact that he had sued them at Cooperative Tribunal against him because it was within his rights to do so. That the alleged expulsion was contrary to the by-laws No.11.

By a replying affidavit sworn on 11th June 2012 Anne Kinyua, the general manager of the respondent deponed how the petitioner had ceased being a member of the Sacco- that he had filed a matter 252/2009 before the Co-operative Tribunal. She annexed a copy of the statement of claim where he sought orders *inter alia*:-

1. Reinstatement of membership and also reinstatement of his shares.
2. Payment of dividends plus interest.

The basis for the claim was that the 2NK Sacco Ltd had attached his shares and motor vehicle Reg. No. KAN 827M.

In a Replying affidavit sworn on 19th June 2012 the petitioner deponed that Anne Kinyua had no *locus standi* to swear the said affidavit as the by-laws of 2NK Sacco Ltd did not provide for an employee to represent it in court.

That the said General Manager was dragging issues before the tribunal to his matter. He went on to reiterate that he was still a bona fide member of the Sacco – that he still held his share certificate as member No.260. That the respondent had no proof that he had defaulted in repaying his loan and that he could not have ceased being a member without the respondent following the bylaws related to loan defaulting.

On 5th June 2018, the petitioner filed another application vide chamber summons under Order 1 rule 14, s.3 (a), Article 25 (c) of the Constitution and all enabling provisions of the law.

In the chamber summons he brought to the attention of the court the fact that he had bought some shares from one of the members of 2NK Sacco, that he had been paid dividends in 2014, 2015, 2016 and 2017 that he held share certificates for 2 passenger motor vehicle KCL 563 and KCM 212, operating under 2NK Sacco, and Petrol tanker KAT 698C. That it is the 2NK Sacco Ltd that registered 2NK Holding and Investment Group Ltd on 8th January 2013. That members of the original 2NK Sacco were all transferred to this new outfit as well as 2NK Investment Cooperative Society Ltd.

In the said chamber summons he sought orders: -

“That in the interest of justice relying on the fact and the law this court to **“declare the applicant a bona fide Member No.260 of 2NK Sacco Ltd and order the Sacco to compensate him accordingly”**.”

The order for compensation was sought on the basis that the 2 motor vehicles KAN 827 M and KAQ 716D were grounded at home from January 2012 and were “now damaged and rotten beyond repairs”.

In his oral testimony given on 14th April 2018 Francis James Ndegwa reiterated the content of the supporting affidavit to his petitioner sworn on 16th March 2012 and that of 5th June 2018. He testified that he could only be expelled from the 2NK Sacco through bylaw No.11 of the Sacco. That no such expulsion had taken place as required by the bylaws. That there was no evidence that he had ceased to be a member of the 2NK Sacco.

On cross-examination he confirmed that there was 2NK Sacco, 2NK Investment Holdings and 2NK Investment Cooperative Society Ltd. He confirmed that the shares he bought were 2NK Investment Sacco Ltd.

That he had been receiving dividends from 2NK Investment Sacco through the Sacco Fosa.

That the case No.252/2009 at the Cooperative Tribunal was for reinstatement as a member of 2NK Sacco that his claim was dismissed by the tribunal. He stated that he had filed an appeal in the Court of Appeal. He also confirmed that 2NK Sacco membership required one be an owner of an operating matatu registered in his name. He confirmed that there was no matatu registered in his name in the Sacco.

The Respondent called one Anne Nyambura who confirmed that the petitioner was no longer a member of 2NK Sacco because he had no operating matatu and his shares had been applied to the loan he had defaulted in paying. Several by laws of the Society were put to her in relation to the process of dealing with a loan defaulter. She could not confirm whether all of them had been complied with.

The petitioner filed submissions. There were no submissions by the respondent.

He maintained that the Petition was ne defended and he was entitled to judgment against the respondent.

He lay down what he referred to as 'FIRM LEGAL GROUNDS TO SUPPORT MEMBERSHIP NO. 260 in 2NK SACCO LIMITED'.

He went on to refer to By law no 11 on the expulsion from the Society; By law 10 on cessation of membership, By law 49 on the process of dealing with loan defaulters, s. 36 of the Cooperative Societies Act Chapter 490 – on the issue of illegal attachment of his shares.

He argued that the fact that he still held share certificates for two matatus and a petrol tanker operating in 2NK Sacco, receiving of dividends , his purchase of shares from another member on 4th September 2013 .

He also attacked the manner in which counsel for the respondent was appointed as being contrary to "CPA (Cap 21) Order 9 R1 R4 SUBR2 and R6 ", and the manner in which Anne Nyambura Kinyua appeared as a witness for the respondent as being contrary to " CPA (Cap 21) ORDER 9 R 2C R.4 SUBR2 AND R6". He argued that neither of them had the locus standi to appear in these proceedings.

He urged the court to find , in the interests of justice , and looking at all the facts and the law that he is a bonafide member no. 260 of 2NK Sacco, and entitled to judgment as prayed in the application dated 16th March 2012 , and the Chamber summons dated 5th June 20 eighteen.

I have carefully considered the evidence and submissions.

The issues for determination are whether this application amounts to a constitutional petition to warrant the orders sought, whether this is the right forum for this matter, who should bear the costs.

The petitioner's claim is predicated on his being a bonafide member of the 2NKSacco. Without that membership the petitioner cannot make any demands from or claims against the Sacco, as a member.

The letter he demands in his petition dated 16th March 2012, could only issue if he was a bona fide member of the Sacco, a fact that the Sacco denied. The orders sought in the latter application can also only issue where the petitioner is a member of 2NK Sacco.

If the petitioner is a member of the 2NK Sacco, then the court can proceed to determine whether his rights under Article 36 of the Constitution were violated by the Sacco.

Hence, the petitioner 's expectation is that this court will first find and declare him a bonafide member of 2NK Sacco. The Issue is whether this court can do so. I must deal with the primary issue.

The petitioner through his testimony and submissions raises issues that paint a very clear picture of **an unresolved dispute between him and the Sacco**. The dispute is whether or not he is a member of the Sacco.

This is not an issue that is to be determined by this court. The right forum for it is the Cooperative Disputes Tribunal. Under section 76 it defines the '**Disputes**'

(1) If any dispute concerning the business of a co-operative society arises—

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or

(c) between the society and any other co-operative society, it shall be referred to the Tribunal.

The business of 2NK Sacco is the matatu business. The petitioner's claim is that the Sacco denied him a mandatory document he required obtain TLB licences for his two matatus. That as a member, he was entitled to that document. The Sacco said he had ceased being a member following his default in the payment of some loans. He argues that they did not follow the proper procedures in the recovery of the loan and his removal from membership. This is the dispute. This is also the dispute that was before the Coop Tribunal in case no 252/09. The petitioner claim was that he wanted to 'be reinstated' as a member of the Sacco. By his own admission that claim was dismissed and an appeal is pending before the Court.

My humble view is that in these prevailing circumstances, the petitioner cannot bring the same claim here disguised as a constitutional

petition. The clear dispute is between him and the Sacco and the Sacco's alleged failure to abide by certain laws. That is a matter for the Tribunal and ought to come here on appeal. If an appeal is pending as alleged by him, then this is an abuse of the court process.

This was stated in the case of **Anarita Karimi Njeru v Republic (No.1)- [1979] KLR 154** where the Court stated;

if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

This was reiterated by the Court of appeal in **Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR**

I am in agreement with the findings in **Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another [2018] eKLR** where Justice E C Mwita dealt with a similar situation where he analysed at great length the authorities on what constitutes a 'constitutional petition' and when the filing of the same amounts to an abuse of the court process. I agree with the words of Lord Diplock in **Harrikissoon V Attorney General of Trinidad and Tobago [1980]AC 265** that 'the mere allegation that a human right of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court'

The petition did not fulfil the requirements of a constitutional petition but as I have stated above exhibited the characteristics of a suit in the Cooperative tribunal.

I find illumination on the issue as to whether this is the right forum for the petition in **C O D & another v Nairobi City Water & Sewerage Co. Ltd [2015] eKLR**. Justice JL Onguto dealing with similar issues relied on **in Re Application by Bahadur[1986] LRC (Const) the Court expressed itself as follows at page 307** stating ... *The Supreme Court of India has also held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or as provided under statute.* To support this he quoted the words of the court, which I too adopt:

"The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under the Constitution. This case highlights the un-wisdom of ignoring that advice.... The Constitution sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of the Constitution might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land, it is not, "a general substitute for the normal procedures for invoking judicial control of administrative action." (See Harrikissoon v A-G [1979] 3 WLR 62) (emphasis mine)

The Petitioner raised other issues regarding the 'locus standi' of counsel for the respondent and the witness called by the respondent. In view of my finding that this is the wrong forum for this matter I need not go into those issues.

This petition and the latter application amount to an abuse of the court process. Filing this matter on the same issues as the matter in the tribunal and on appeal cannot be described as anything else. Courts must protect their processes from abuse. See **Governors Balloon Safaris Limited V Attorney General & 2 Others [2014] eKLR** the Court stated that *"it is an abuse of the court process to institute several proceedings in order to challenge the same action and the Court has inherent jurisdiction to prevent such abuse"*

I find therefore that the petition and the chamber summons are not merited and must fail. Each of them is dismissed with costs to the respondent.

Dated, delivered and signed this 9th May 2019 at Nyeri.

Mumbua T Matheka

Judge

In the presence of

Court Assistant: Jerusha

Francis Ndegwa Petitioner

Karweru for respondent

Mr. Ndegwa: I request that I be supplied with the Proceedings and judgment immediately so that I can proceed to the court of appeal.

Court: Proceedings and certified copies of the judgment be supplied to the petitioner on payment of the requisite court fees.

Judge