



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NAKURU**

**CIVIL APPEAL NO. 92 OF 2017**

**AGGREY AMBENJE WALL.....APPELLANT**

**VERSUS**

**CHARLES OMONDI AGORO.....1<sup>ST</sup> RESPONDENT**

**BILHA MUTOLA LITUNDA.....2<sup>ND</sup> RESPONDENT**

**MARTHA A. AWINO.....3<sup>RD</sup> RESPONDENT**

**(Suing for and on behalf of WENSCO SELF HELP GROUP)**

***(Being an Appeal against the decision and judgement/decree of Hon. L Gicheha; Senior Principal Magistrate delivered on the 12<sup>th</sup> July 2017 in Nakuru CMCC No. 584 of 2016)***

**JUDGMENT**

**BACKGROUND**

1. The respondents herein filed a suit through plaint dated 5<sup>th</sup> of May 2016. He sought a permanent injunction to restrain the appellant from purporting to be the **Chairman** of the **Wensco Self Help Group** and from interfering with the Group of elected officials plus costs of the suit and interests.
2. The Appellant entered appearance and filed a statement of defence dated 26<sup>th</sup> of May 2016, where he stated that he was properly in office having not surrendered any documents to the respondents. He further stated that the proceeding brought by the Respondents were a cover up whose main aim was to grab the parcels of land No. **Kampi ya Moto/ Menegai Block 1/ 1388 and 1399 (Mangu)**; and that there had been no elections and therefore the Respondents did not have *locus standi* to deal with any matter concerning Wensco Self Help Group.
3. After hearing the parties, the trial magistrate made the following findings:-
  - a. That the Certificate of Registration issued on 14<sup>th</sup> of January 2010 was the genuine one.
  - b. That the takeover by the respondents was with the blessings and approval of the members; and the appellant would have filed suit to stop the respondents from taking over if the takeover was unlawful
  - c. The elections held by the members of that original group and the defendant were expelled;
  - d. That the fact that the respondents registered the self-help group afresh does not change the fact that the office bearers were elected by 2/3 of the members and by his conduct the appellant accepted the decision of the members; conduct referred to being failing to challenge the election or fight his expulsion through resolution passed on the 1<sup>st</sup> of November 2015.
  - e. That Appellant's acceptance is demonstrated agreement dated 30<sup>th</sup> of September 2015 which parties produced by consent; in the consent the appellant undertook to pay kshs.2,150,000 by instalments.
4. The Appellant being aggrieved by the decision of the **Hon. L. Gicheha, SPM** has preferred this appeal on the following grounds:-
  - i. The Learned Trial Magistrate erred in law and fact by out rightly being biased against the Defendant by not considering the evidence on record as tendered

- ii. The Learned Trial Magistrate erred in law and fact by not considering the issues for determination as pleaded before the Court.
- iii. The Learned Trial Magistrate erred in law and fact by turning a blind eye to the evidence and submission of the defendant
- iv. The Learned Trial Magistrate erred in law and fact by not considering the law that governs Self Help Groups more especially the Constitution of the Group
- v. The Learned Trial Magistrate through her judgement has perfected illegal activities of the plaintiffs through the judicial system
- vi. The Learned Trial Magistrate erred in law and fact by assuming that there were elections conducted in accordance to the provisions governing the Self Help Group while there were none
- vii. The Learned Trial Magistrate erred in law and fact by not appreciating that there are two (2) distinct groups operating in similar names contrary to the express provision of the law.
- viii. The Learned Trial Magistrate erred in law and fact by giving out a Certificate of Registration to non-members of the disputed Self Help Group or without following the procedure.
- ix. The Learned Trial Magistrate erred in law and fact by turning a blind eye to the fate of the members and contributions of the purchase price of the project in dispute
- x. The Learned Trial Magistrate failed to determine who are the actual members of the group for the disputed projects **Kampi ya Moto/ Menegai Block 1/ 1388 and 1399 (Mangu)** who actually paid over Kshs 12,000,000.
- xi. The Learned Trial Magistrate failed to appreciate and interpret the evidence as tendered before Court more especially officer from the Ministry of Social Services on behalf of the Plaintiff.

#### **APPELLANT'S SUBMISSIONS**

5. The Appellant submitted that the trial magistrate took away the Appellant's certificate and illegally gave it to the Respondent and that she disregarded contributions made by the Appellant's group who paid the loan. Further that the trial magistrate further failed to take into consideration the law governing the Self Help Groups. The Appellant quoted **Section 8** of the **Self Governing Association Bill** that provided for the registration of the self-help group.
6. The Appellant further submitted that the respondents used the appellant's name to register their group did not pay for the loan but grabbed their land after the loan was paid.
7. Appellant added that the respondent failed to submit document showing members' contributions and that they registered a new group, new trustees and used the group name to register the land. He added that the agreement dated 30<sup>th</sup> September 2015 was not by consent.

#### **RESPONDENTS' CASE**

8. In their response, the Respondents submitted that the Appellant is trying to use this case to shield himself from the Respondents' group who are following up their property and money.
9. The respondents submitted that the elections were valid and that the appellant never availed witnesses to support his case; that his claims of assault were not proved. They state that the elections were valid.
10. PW 2 stated that 3 Certificates of Registrations were issued. One was issued at Huduma Centre after the Respondents went to register after the Appellant did not hand over to the Respondents the Group documents. The other was issued to the Appellants after they presented a police abstract and resolutions from the members to replace it. She noted that the members on the list that was presented at that point was different from the one they had used to register the Self Help Group with and a third one given to the Respondents. She recommended that the ones not used to acquire property should be cancelled. She stated that a certificate was only valid for 5 years. She stated that in 2015 she was given minutes to change officials and she did. PW 3 stated that the certificate issued in 2010 was the genuine one

#### **ANALYSIS AND DETERMINATION.**

11. This being the first appellate court, I am required to re-evaluate evidence adduced before the trial court and arrive at an independent determination. This I do knowing that I did not have the privilege of hearing the witnesses first hand and make observation on their demeanour. For this I am inclined to give due allowance.

12. Upon re-evaluating evidence on record, I find the following as issues for determination:-

- i. Which registration certificate is genuine?
- ii. Whether the respondents were lawfully elected.

**i. Which certificate of registration is genuine?**

13. In Kenya, the Ministry of Gender, Children and Social Development does registration of self-help groups. The registration can be done at the sub-county, Social Development Office or Huduma Centre countrywide. The group must have a set of bylaws or constitution governing the running of the group. Groups are required to file yearly returns with the registrar at a fee of kshs 100 failure to file returns the group may be deregistered. Any change in group's officials should be notified to the registrar 14 days signed by 3 officials. The process begins with a number of people who organise themselves in a group. Members then hold a meeting to elect officials then forward. The following are prerequisites for registration:-

- i. Minutes of meeting resolving to registrar and showing elected officials.
- ii. List of all members duly signed with name, position, ID No., and signatures.
- iii. Constitution of the group.
- iv. Registration fee.

14. For renewal of certificate requirements are:-

- i. Application for replacement giving reasons for the request.
- ii. List of all members duly signed.
- iii. Constitution.
- iv. Minutes declaring loss and reasons for replacement.
- v. Police abstract.
- vi. Copy of the original certificate.

15. Evidence on record shows that the respondent presented to court two certificates in the name Wenscon Self-Help Group. PW1 in cross-examination testified that they applied for the second certificate following advice from the relevant ministry following appellant's refusal to hand over original certificate. He said the appellant released the original certificate when he realised it could not serve any purpose as another one had been issued.

16. From evidence of PW2, an officer from the Ministry of Gender, Children and Social Development, the second certificate was issued as a result of non-disclosure of existing conflict to officers at Huduma Centre. Respondents failed to disclose initial registration process and circumstances that led them to apply for registration again.

17. My view is that the respondents should have applied for replacement giving reason for the request or seek court's assistance to compel the appellant to release the certificate.

18. As concerning certificate issued to appellant in the year 2016, evidence adduced by PW2 and PW3 is that the list presented had only two original members while the rest were new members. They stated that the appellant presented a police abstract to show that the original certificate was lost. In their view, the certificate was erroneously issued and therefore not valid.

19. From evidence adduced it comes out clearly that the certificate issued on 4<sup>th</sup> January 2010 was properly issued. Requirements for registration were met.

20. PW1 and PW2 confirmed that there are 3 certificates in respect of the group. Certificate issued in 2010 and the other 2 issued to respondents at Huduma Centre in 2015 and to the appellant by the Ministry in 2016 respectively. The last two certificates issued to respondents and appellants were issued following non-disclosure of material facts.

21. PW2 testified that what is required for replacement is police abstract, replacement form and minutes indicating group resolution. She said she compared the list of members given by defendant/appellant and confirmed that apart from him and one Amos Otieno all the other 20 members were new. She said the list is dated 8<sup>th</sup> July 2015. In her opinion, the certificate used to acquire property should not be cancelled. She said that the certificate dated 14<sup>th</sup> January 2010 is meant to last for 5 years up to 2016.

22. Both PW2 and PW3 who are employees of the ministry agree that a group should not be issued 3 certificates. PW3 said the 3<sup>rd</sup> certificate issued to appellant is illegal and that a group should not have 2 certificates.

23. Whereas it may be true that the appellant declined to hand over original certificate to the respondents, it was incumbent upon the respondents to follow the right procedure in either getting the original certificate or its replacement. It is evident that they did not follow that process in getting the 2<sup>nd</sup> certificate and in my view the original certificate remained valid and the two issued after are not valid.

**ii. Whether the officials presented by the respondents were lawfully in office.**

24. PW1 testified that the appellant failed to call for meetings nor pass any information concerning the group to members. He added that the appellant was illegally dealing with the group's property. He testified that members called for a meeting and elected new officials and thereafter presented the list of new officials to the ministry and changed bank signatories by letter dated 9<sup>th</sup> July 2015. Minutes of 6<sup>th</sup> June 2015 showing that new officials were elected were availed to confirm that. The minutes are stamped as approved County Coordinator Social Development Nakuru.

25. He further testified that the appellant handed over to the new officials save for the original certificate of the company. Acknowledgment of debt in clause 4 between the appellant and one Charles Gachigi Muchemi acknowledges Charles Omondi who was elected on 7<sup>th</sup> June 2015 as chairperson.

26. Expulsion of former officials who included the appellant/defendant was resolved in a meeting held on 1<sup>st</sup> November 2015. Communication to the affected members is shown by letter dated 2<sup>nd</sup> November 2015.

27. Joint statement dated 25<sup>th</sup> July 2016 which is on record show list of 34 members at time of registration of the group in 2010. The joint statement indicate that 5 members have voluntarily left, 3 including defendant/appellant were expelled and list 25 active members.

28. In further statement, the appellants/defendants stated that after purchase of Gicheha Farm, the initial members abandoned the group and it was upon him and other officials with new group invested their resources in the second disputed portions. This confirm that the list the appellant presented for issuance of another certificate were new as indicated by PW3. He added that the group became obsolete and they had to source different people to pay for disputed portions.

29. From the foregoing therefore, persons listed as members by appellant in the minutes he presented for replacement of certificate were not the initial members. They however used the name that had been registered by the initial members. My view is that the list of members were for a new group, which should have been registered in another name.

30. From the foregoing, the respondents list of officials presented by the responded were elected by the initial members and were therefore lawfully elected. What should have followed was application for replacement of certificate not fresh registration.

31. From the foregoing I find that the trial magistrate never erred in finding that, the certificate of 14<sup>th</sup> January 2014 was genuine.

32. I however find that the take-over was lawfully as the members followed the right procedure in calling for a meeting, which was followed by election of officials by 2/3<sup>rd</sup> of the initial members of the group. The trial magistrate therefore erred in finding that the takeover was unlawful.

33. The trial magistrate was right in finding that election was done by original members of the group.

**34. FINAL ORDERS**

1. Appellants appeal is dismissed.
2. The genuine registration certificate for Wensco Group is the one issued on 14<sup>th</sup> January 2010.
3. The officials presented to the registrar by the respondents were lawfully elected on 7<sup>th</sup> June 2015 and therefore rightfully in office.
4. Appellant is permanently restrained from interfering with operations of the group.
5. Costs of the appeal to the respondents.

**Judgment dated, signed and delivered at Nakuru this 11<sup>th</sup> day of July 2019.**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

**Schola/Jenifer Court Assistant**

**Mutai holding brief for Machage Counsel for Appellant**

**Gai Counsel for Respondent**