



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 596 OF 2015

VIOLET KADESA OGANI.....APPELLANT

VERSUS

DAVID S MATEGWA

DAVID KANGOGO

AMOS TINGOS

JOHN MICHAEL MUGO

JEREMAIA LOKOKEN

JOAKIMS AWUONDO

BENJAMIN TALAM

ANDREW KOECH

JULIET WAMBUI JUMA

ERIC KAMAITHA

JOHN OKUMU

ERIC TUMWET

SOLOMON A ANGUTSA.....RESPONDENTS

(Being an appeal from the ruling and orders delivered on 30th June, 2014 by the Honourable Co-operative Tribunal at Nairobi Tribunal Case No. 147 of 2014).

JUDGMENT

1. The Appellant vide the application dated 3rd April, 2014 sought orders that **pending hearing and determination of this claim a temporary injunction be issued restraining the Respondents, their servants or agents, advocates or auctioneers or any other person acting for and or on their behalf from doing the following acts or any of them, that is to say from further holding themselves as elected officials of Kenya Police Sacco Society Ltd, relying and executing the Audited Reports presented to the Annual Delegates Meeting of 28th March, 2014 or otherwise howsoever interfering with the affairs and day to day management of Kenya Police Sacco Society Ltd and from holding any board meeting, paying themselves from the society's fund or using the society's assets including motor vehicles and offices.**

2. The application was premised on the following grounds:

- a) **That, Respondents have contravened mandatory provisions of the Co-operative Societies Act, the Sacco Societies Act and the by-Laws under the Kenya Police Sacco Society Ltd and hence have no locus to hold out as office bearers.**
- b) **That, some branch delegates were hand-picked by the current office bearers for personal gains contrary to mandatory provisions of Article 30(1)(i) of the Kenya Police Sacco Society Ltd which requires that delegates who are the three branch officials Shall be elected at the grass-root i.e. Chairman, Secretary and member and shall form the supreme authority of the Sacco vested in a delegates meeting.**
- c) **That the assets of the Kenya Police Sacco Society Ltd are now exposed to misuse , misappropriation destruction, sale or damage if this tribunal fails to intervene now.**
- d) **That, even the Audited Accounts of the society were neither published, displayed nor distributed 14 days prior to the Annual Delegates Meeting.**
- e) **That, the claimant and members of the society at large will suffer greater prejudice if the orders sought are not granted.**
- f) **That, it is in the interest of justice that the orders sought are granted.**

3. It was averred in the affidavit in support of the application that the Appellant is a member of Kenya Police Sacco Society Ltd (hereinafter SACCO) and a member of the Police Sacco Credit Committee from the Dog Unit. That the Appellant is therefore eligible to vote, be voted for and to attend the Annual Delegates Meeting. It is stated that on the 5th March, 2014, the Sacco issued an Annual Delegates Meeting Notice for a meeting to be held at Pan African Hotel on 28th March, 2014. That part of the Agenda was presentation of the Audited Accounts for the year 2013 and elections.

4. The Appellant's complaint was that some delegates who participated in the elections from the branches were hand-picked and not elected. That section 35(1)(f) of the Sacco By Laws which provides that no person shall be eligible as a member of the Board of Directors unless he holds a deposit of less than Ksh.500,000/= for the last six months was not complied with. It was further averred that section 35(2) of the By Laws which was amended in the year 2013 was not complied with as the Rank balance was not taken into account during the election of the members of the Board of Directors.

5. The Appellant further stated that the Respondents action, motive and intention was selfish, arbitrary, unlawful and illegal and would expose the Sacco to loss, destruction and damage.

6. In opposition to the application, the Respondents filed a replying affidavit sworn by David. S. Mategwa the National Chairman of the Sacco at the material time. It was stated that in filing the application, the Appellant was motivated by selfish agenda and perpetuating half-truths after losing in the elections in question. That there is no substantive evidence in support of the allegations that delegates were hand-picked. That the Sacco's head office does not participate in the election of delegates which process is undertaken at the branch levels as per the Sacco procedures.

7. It is contended that Section 35.1 of the Sacco By Laws had a typographical error which was corrected as per the Resolution adopted in the meeting of 12th April, 2013 to read that no person shall be eligible as a member of the Board of Directors if one does not have deposits above Ksh.500,000/= for the last six months. That there is no Section 35 (2) of the Sacco By Laws as amended in the year 2013.

8. It is further contended that the office holders of the Sacco were validly elected and that the Sacco's Audited Accounts were published before the elections. It was deponed that granting the orders sought would grind the Sacco to a halt and thereby occasion substantial injustice.

9. The Tribunal dismissed the application with costs. That is what triggered the filing of this Appeal.

10. The grounds of appeal are as follows:

- 1. That, the honourable tribunal erred in law and in fact and misdirected itself in failing to find that the claimant had established a *prima facie* case against the Respondents with a probability of success and proceeded to make the ruling and orders against the law.**
- 2. That, the honourable tribunal erred in law and in fact, misdirected itself and proceeded to form its own opinion without proof that the claimant has not provided evidence that the delegates had been handpicked.**
- 3. That, the honourable tribunal erred in law and in fact and was wrong in making a finding of fact that the annual delegates were actually elected at the grass-root level.**
- 4. That, the honourable tribunal erred in fact and law and made a fundamental error as such by finding that the Respondents had not violated its own rules and mandatory provisions of Section 55 (3) 59(1)(2)(3), 60 2(g) of the Societies Act and Section 78 (1) of the Co-operative Societies Act Cap 490 Laws of Kenya and Rules 15 and 23(1) of the Co-operative Societies Rules 2004 and Articles 30 1(i),(ii), 35 (1) (f),58 1 (1)(a) and Article 59 (2) (viii) of the Kenya Police Sacco Society Ltd by laws and failed to make a finding of fact and law that the respondents had failed to publish the Societies Audited Statements Accounts for the Annual Delegates Meeting.**

5. That, the honourable tribunal erred in law and in fact and fundamentally misinterpreted Section 28 of the Co-operative Societies Act.

6. That, the honourable tribunal erred in law and in fact and misdirected itself that the orders sought were not properly crafted and failed to appreciate that the claimant and other members of the society were exposed to massive loss and damages and the society's assets and properties are exposed to danger, destruction and loss as a result of the procedural and legal violations of law.

11. The Appeal was canvassed by way of written submissions which I have considered.

12. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated Motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

13. The law on the grant of injunctions was well settled in the case of **Giella v Cassman Brown & Co. (1973) EA**. To succeed, the applicant must establish a *prima facie* case with a probability of success, that irreparable loss that cannot be compensated in monetary terms will be suffered and if in doubt, the court will decide on a balance of convenience.

14. As stated by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**:

“.....a prima facie case” I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

15. On the issue of whether section 35(1)(f) of the Sacco By laws was contravened, there is evidence of correction of the typographical error at the Annual Delegates Meeting of 12th April, 2013 for the said By Law for the minimum deposit held as Ksh.500,000/= for the last six months prior to the elections. The adoption of the Resolution is not controverted. There was no evidence adduced to establish that the said By Law was not complied with.

16. The Appellant argued that By Law 35(2) was not complied with. The copy of the By Laws exhibited herein does not have any such provision. There is no section 35(2) of the said By Laws. This court is therefore persuaded by the contention by the Respondents that the said section 35(2) of the By Laws is non-existent. However, By Law 30 (1) (ii) reflects that office bearers should be elected from all ranks. No evidence was presented to establish non-compliance with this provision.

17. By Law 30 (1) provides that Delegates shall be elected at every division. No sufficient evidence was provided to demonstrate that the delegates who attended the Annual Delegates Meeting were not elected at the grass root level as was alleged. This remains as the Appellant's word against the Respondents. The uncontroverted evidence by the Respondents is that the Appellant participated in the elections and lost and that the Appellant's case is a case of sour grapes. There is no evidence by the Appellant of any complaint during the election process.

18. The Appellant claimed that the Annual Delegates Meeting proceeded without the Annual Accounts having been published 14 days prior to the meeting. The Respondents have exhibited herein the Financial Statements for the year ended 31st December, 2013. The said Statements which reflect that they were prepared by Deloitte and Touche are dated 14th March, 2014 and were made available according to the averments made in the replying affidavit. There is no evidence to rebut the position given that the said Financial Statements were availed.

19. With the foregoing, this court's conclusion is that the Appellant failed to establish a *prima facie* case with a probability of success. The Appellant also failed, *prima facie*, to prove on a balance of probability that she will suffer irreparable loss that cannot be compensated by way of damages.

20. This court is in agreement with the holding by the Tribunal that the orders sought are drastic and if granted will leave the Sacco with a leadership vacuum contrary to Section 28 of the Co-operative Societies Act. There is no prayer in the application for fresh elections to be held. A party is bound by the pleadings. Therefore the balance of convenience does not favour the Appellant who is the only complainant against the mammoth Sacco with so many other members who have not complained herein.

21. The upshot is that this court finds no merits in the Appeal. Consequently, the Appeal is hereby dismissed with costs.

Dated, signed and delivered at Nairobi this 13th day of Nov., 2019

B. THURANIRA JADEN

JUDGE