



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PETITION NO 21 OF 2014

**IN THE MATTER OF ARTICLES 22, 23 AND 165 (3) (b) OF THE CONSTITUTION OF KENYA
2010**

AND

**IN THE MATTER OF CONTRAVENTION ARTICLE 10 (1) AND (2), 28, 36, 37, 40, 47 AND 73
OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF CO-OPERATIVE SOCIETIE'S ACT CAP 490 AND THE BY-LAWS OF
OTHAYA FARMERS COOPERATIVE SOCIETY LIMITED**

BETWEEN

JOHN GITHINJI WANGONDU.....1ST PETITIONER/APPLICANT

KARIUKI KIBOI.....2ND PETITIONER/APPLICANT

PHILIPH MAINA KANYORA.....3RD PETITIONER/APPLICANT

CHRISTOPHER GACHOKA KIAGO.....4TH PETITIONER/APPLICANT

DAVID MUCHIRI MATU.....6TH PETITIONER/APPLICANT

EDWARD WACHIRA GITHAMBO.....7TH PETITIONER/APPLICANT

VERSUS

NYERI SOUTH SUB-COUNTY COOPERATIVE OFFICER.....1ST RESPONDENT

NYERI SOUTH SUB-COUNTY ADMINISTRATOR.....2ND RESPONDENT

NYERI COUNTY CO-OPERATIVE COMMISSIONER.....3RD RESPONDENT

NYERI COUNTY EXECUTIVE SECRETARY FOR AGRICULTURE

AND CO-OPERATIVE DEVELOPMENT.....4TH RESPONDENT

JUDGEMENT

By a petition dated 24th September 2014, expressed under the provisions of Articles **10 (1), 22, 28, 36, 37, 40, 47, 73** of the Constitution of Kenya 2010 and the provisions of the Co-operative Societies Act^[1] filed in this court the same day, the Petitioners herein, moved this honourable court seeking the following orders against the respondents:-

- i. A declaration that the petitioners' rights and freedoms under Articles **10 (1), (2), 36,47 and 73** of the Constitution of Kenya 2010 have been violated.*
- ii. A declaration that the petitioners are entitled to participate and to chart the way forward in the destiny of their coffee as provided under Article **40** of the Constitution of Kenya 2010.*
- iii. A declaration that the 1st, 2nd and 3rd Respondents are not fit to public offices as they have failed to abide by Articles **10 (1) and (2), 28, 47 and 73** of the Constitution of Kenya 2010.*
- iv. An order to stop the meeting convened by the Nyeri South Sub-County Co-operative Officer on 27th November 2014, as it is illegally convened.*
- v. Any other orders or directions that this Honourable Court may deem fit to issue to enable members of Othaya Farmers' Co-operative Society Ltd to run the affairs of their Society.*
- vi. Costs of this Petition to be provided for by the Respondents.*

The petition is signed by the first Petitioner on behalf of the others and is supported by the affidavit annexed thereto sworn by the first petitioner. The Petitioners case is that:-

- i. They are coffee growers within Nyeri Sub- County and that they institute these proceedings on their own behalf and on behalf of all coffee growers in Nyeri Sub -County and all coffee stakeholders in Kenya under the provisions of Article 22 (2) of the Constitution of Kenya 2010.*
- ii. The 1st Respondent, the Nyeri Co-operative officer allegedly wrote a letter dated 11th November 2014 concerning to a meeting of 24th November 2014 relating to elections of 7 members of the management committee for 6 factories which directive is said to have been contrary to his earlier directive that Kagere Factory elects one member where as in the second letter he proposed that the said society shares one committee member with another factory called Kamako, a decision that confused the members.*
- iii. Further, the 1st Respondent is also accused of directing that Othaya Farmers' Co-operative elects 7 and not 13 committee members has been the case.*
- iv. It is the petitioners' case that the acts complained of above contravene the Society's By-Laws, The Co-operative Societies act and Articles 10 & 36 of the Constitution.*
- v. The second Respondent, the Nyeri Sub-County Administrator is accused of authoring an unsigned letter stamped 6.11.2014 inviting members to attend meetings at factory level but later referred them to general meetings.*
- vi. It's the Petitioners case the activities complained of violate the provisions of the constitution namely Articles 28, 36 & 37.*
- vii. The third Respondent, the Nyeri County Co-operative Officer is accused of conduct which the Petitioners view as contravening Articles 10, 28, 47 and 73 of the constitution in that he is accused*

of failing to attend to their grievances, a behaviour not expected of him, hence unfit to serve as a public officer.

There are absolutely no allegations in the Petition or the affidavit against the 4th Respondent and it's not clear why the 4th Respondent was sued in this Petition and I find it fit to take the earliest opportunity possible to dismiss the case against him even before I consider the allegations against the rest of the Respondents.

The Petition was accompanied by a Chamber Summons seeking interim orders pending the determination of this Petition, but the said application was withdrawn on 9.3.15.

On 11.5.2015, the Respondents counsel filed the affidavit of Wambui Kimathi in response to the Petition in which the allegations in the Petition were vehemently denied. Briefly, the contents of the said Affidavit are:-

i. That the Petition is misconceived and incompetent.

ii. That the elections of 27th November 2014 were done pursuant to a resolution by the members passed in a special general meeting held on 10th and 11th November 2014.

iii. That none of the Petitioners' Constitutional rights has been violated.

iv. That the meeting of 27th November 2014 took place hence the reliefs sought herein have been over taken by events.

v. That the applicants are subject to a surcharge order under the Act hence they are unfit to be management committee members. Copies of letters dated 6.10.2004 addressed to the first and second Petitioners confirming this averment were attached.

vi. That the dispute herein falls under the provisions of section 76 of the Act, hence outside the jurisdiction of this court

In their reply to the replying Affidavit, the Petitioners raised the following issues; that the deponent is not a party to these proceedings hence incompetent to swear an affidavit in these proceedings, that the allegation that the general meeting took place is misleading, since no notice of the general meeting was issued and or the said meeting was improperly convened, that during the alleged meeting an improper decision was made reducing the number of committee members to 7 from 13.

On 15.7.2015, the parties herein got directions that this case be determined by way of written submissions and pursuant thereto, both parties filed submissions.

In their submissions, the Petitioners counsel stated that the Petition is founded on Article **22** and **40 {1}** of the Constitution, the Co-operative Societies Act and the By-laws and that Article **40** of the Constitution gives every person the right to own property either individually or in association with others. Thus, the actions by the Respondents complained of in this Petition have interfered with their rights to own property and that they are mainly pursuing prayers **{b}**, **{c}** & **{d}** of the petition which affect their property rights. Counsel further questioned the legality of the meeting in question and insisted that the Petition is a constitutional application and not a dispute under the Act. As for the alleged surcharge order, counsel submitted that the same was quashed by the High Court in HCC Misc App No. **23** of **2005**.

Counsel for the Respondents denied any violation of Petitioners' rights under Article **10 {1}**, **{2}**, **73**, **36** and **47** of the Constitution and that they have sued the wrong parties as the dispute is basically between members of a co-operative society, hence should have been filed in the Co-operative Tribunal. The respondents also submitted that the Petitioners should have sued the management committee and submitted that none of the prayers was available to the Petitioners under the circumstances.

I have carefully analysed and considered the Petition and the affidavits filed by both parties in this case. I have also considered the rival the submissions filed for both parties. I have examined the sections of the law referred to by both parties and the relevant authorities and generally the law applicable in cases of this nature and I now make the following findings.

It is my considered opinion the issues for determination are:-

- i. *Whether the petitioners fundamental rights and freedoms under articles 10 (1) and 2, 28, 36, 37 40, 47 and 73 of the constitution of Kenya 2010 have been violated or threatened.*
- ii. *Whether the petitioners are entitled to the reliefs sought in the petition.*
- iii. *Whether this suit offends the provisions of Section 76 the Co-operative Societies Act.*

In addressing issue number one above, it's important to point out that this will involve interpreting the relevant provisions of the Constitution that are alleged to have been violated. In this regard it's important to bear in mind the relevant guiding principles. In this connection, I find useful guidance in the case of *The Institute of Social Accountability & others vs The National Assembly & Others*^[2] cited by the Respondents' counsel whereby the court stated as follows:-

- i. *Under Article 259 of the constitution, the court is enjoined to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. In exercising its judicial authority, this court is obliged under Article 159 (2) (e) of the constitution to protect and promote the purposes and principles of the constitution.*
- ii. *The constitution should be given a purposive, liberal interpretation.*
- iii. *That the provisions of the constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other.*^[3]

I stand guided by the above principles and bear in mind the words in the Namibian case of *State vs Acheson*^[4] ‘.....The spirit of the constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.’

In my view, the disposition of Constitutional questions must be formidable in terms of some Constitutional principles that transcend the case at hand and must be applicable to all comparable cases. Court decisions cannot be *had hoc*. They must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the instant case.^[5] The privy council in the case of *Minister for Home Affairs and Another vs Fischer*^[6] while interpreting the Constitution of Bermuda stated that:-

“a constitutional order is a document sui generis to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation... It is important to give full recognition and effect to those fundamental rights and freedoms.....”

Lord Wilberforce, while delivering the considered opinion of the court in the above case observed:-

“A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms.....”

The recognition of the sanctity of the Constitution and its special character calling for special rules of interpretation was captured in the decision of the High Court of Kenya in the case of *Anthony Ritho Mwangi and another vs The Attorney General*^[7] while **Ringera J** put it more succinctly in *Njoya and Others vs Attorney General*^[8] when he observed that the Constitution is a living document and not like an Act of Parliament when he observed that:-

“the Constitution is the supreme law of the land; it’s is a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles”

The law is very clear with regard to what a party alleging violation of his or her constitutional rights needs to present to the court. As was held in the case of *Anarita Karimi Njeru vr R*^[9] which was further amplified in the decision of the Court in *Trusted Society of Human Rights Alliance vs Attorney General & Others*,^[10] in a constitutional Petition alleging violation of constitutional rights, the petitioner has an obligation to show, with a reasonable degree of precision, what provision of the constitution has been violated with regard to her/him as well as the manner of such violation. It’s not enough to make an allegation without supporting evidence

My discernment from the foregoing jurisprudence is that in interpreting the Constitution, the court should attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms.

The applicants seek a declaration that their rights under Articles **10 {1}, {2}, 36, 47** and **73** have been violated and that the Respondents are not fit to run public offices under Article **10 {1} and {2}, 28, 47** and **73** of the Constitution.

Article **73** of the Constitution under the chapter on Leadership and Integrity spells out the Responsibilities of leadership. Other than the allegation that the Petitioners went to the offices on the third Respondent and were kept waiting for **2** hours and **15** minutes for “*apparent no reason*” and were later on told to get out of the office as he would not attend to them, there are no details as to why the Petitioners think there was no reason for the delay or why they think he was the one with a solution to their problem. There is no single allegation of misconduct within the meaning of Article **73 {1} {a} {i}** to **{iv}** of the Constitution. Indeed there are no allegations against any of the Respondents as to why they the 3rd Respondent fails the Leadership and Integrity test provided under chapter 6 of the Constitution and there is no basis at all upon which the court can arrive at a finding that they are not fit to occupy public offices.

Article **10** of the Constitution deals National Values and Principles of governance. I have carefully searched for any allegations in the Petitions to support the fact that the Respondents have breached the National Values or Principles of National Governance and I could not find any in the Petition. Thus, the said Article though cited, no allegations have been brought out to support any violation regarding to Article **10** at all. Similarly, I find nothing in the Petition that can be said to constitute a breach of Articles **28, 36, 37, 40,** and **47** of the Constitution. The mere mention of the Articles is not enough. The Petitioners are under duty to provide details/ particulars of the alleged breach.

The Petitioners have not in my view given details or grounds of the alleged violation of the above articles. They rushed to court alleging breach of their fundamental rights but they have failed to particularize the breach or give details. The conditions upon which a court can intervene are lacking in the present case. More important still, they have not proved any threat to their rights. I find that the allegations of violation of Constitutional rights are too generalized. A court can only resolve a violation or infringement that has been clearly pleaded or stated. This was the holding of the court in the case of **John Kimanu vs Town Clerk, Kangema**^[11] where the court citing **SWN vs GMK**^[12] made the following observations:-

“Our Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must state the provisions of the Constitution allegedly infringed in relation to them, the manner of infringement and the nature and extent of that infringement. The reason for this requirement is twofold. First the respondent must be I a

position to know the case to be met so as to prepare and respond to the allegations appropriately. Secondly, the jurisdiction granted by Section 84 of the Constitution is a special jurisdiction to enforce specific rights which are defined by each section of the bill of rights. It is not a general jurisdiction to enforce all rights known to men but specific rights defined and protected by the constitution. It is not sufficient to rely on a broad notion of unconstitutionality but, rather point to a specific provision of the Constitution that has been abridged”

In the **Ugandan case of Charles Onyango Obbo & another vs A.G.**^[13] it was held that:-

“In other commonwealth jurisdictions who have operated written constitutions for much longer periods than ours, it has been determined that it is the duty of a person who complains that his rights and freedoms have been violated to prove that indeed the state or any other authority has taken an action under the authority of a law or that there is an act or omission by the state which has infringed on any of the rights or freedoms of the petitioner enshrined in the constitution. Once that is established, it is the duty of the state or that other authority which seeks to restrict a guaranteed right or freedom to prove that the restriction is necessary within limits prescribed by the constitution.”

In the present petition the Petitioners have failed to discharge the burden of prove to the required standard. I find that Petition before me to be rather speculative and in a way unclear on manner in which the alleged rights have been violated or threatened.

In my view the key question that emerges for determination is whether or not the petitioners have discharged their burden of proof to the required standard. To my mind the burden of establishing all the allegations rests on the Petitioners who are under an obligation to discharge the burden of proof.

All cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon in Rhesa Shipping Co SA vs Edmunds**^[14] remarked:-

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by **Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd**^[15] :-

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

With the above observation in mind, the starting point is that *whoever desires* any court to give *judgement* as to any legal right or liability, dependant on the existence of fact which he asserts, *must prove* that those facts exist. The *burden of proof* in a suit or proceeding *lies* on that person *who would fail if no evidence at all were given on either side*. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall le on any particular person.

It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed.^[16] As observed above, the Petitioners have made allegations in the Petition; no evidence has been adduced in support of the allegations and above all. The standard of proof in civil and criminal cases is the legal standard to which a party is required to prove his/her case. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of **Miller vs Minister of Pensions**,^[17] **Lord Denning** said the following about the standard of proof in civil cases:-

‘The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability.....if

the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'

In my view the reason for this standard is that in some cases, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim.

The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist. I have carefully considered the Petition before me and the response by the Respondents together with the submissions filed by both parties and I find that the Petitioners have failed to prove their case to the required standard. In fact, other than the allegations in the Petition and the various Articles of the constitution being cited as having been violated, there is no supporting evidence or particulars at all to support the allegation.

The upshot is that the answer to issue number one and two is in the negative.

On the second issue, namely; whether the petitioners are entitled to the reliefs sought in the petition, having answered issues on above in the negative, I find that prayers **{b}**, **{c}**, & **{d}** of the Petition which are the prayers the Petitioners are pursuing the others having been spent cannot be granted since as I have already found, the said reliefs are totally unsupported by the material before the court. Thus, the answer to issue number two is in the negative.

On the third issue “*Whether this suit offends the provisions of Section 76 the Co-operative Societies Act,*” to address the said issue, I find it fit to reproduce the said Section below. Section 76 of the Act provides as follows:-

{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, any 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.

My discernment from the pleadings is that the Petitioners appear to have a problem with the manner in which the Society is being run. The body that runs a society under the Act and the By-Laws is the Management committee. In my view, the right body to sue was the management committee and the right forum to file the suit was the Co-operative Tribunal as provided for under Section 76 cited above not the High Court. Similarly, the Respondents are government officers who have not been shown to be engaged in the management of the society or the making key decisions of the society. In fact the allegations against all the Respondents are fairly frivolous that they cannot sustain the reliefs sought.

I reiterate it could have been prudent for the Petitioners to sue the management committee and adhere to the dispute resolution mechanism stipulated under the co-operative Societies Act bearing in mind that our Courts has severally held that it has no jurisdiction in dispute that fall under the Co-operative Societies Act. This was the holding by the Court of Appeal in *Ernest Muiruri Njoroge & 28 Others vs Kabiru Karanja & 4 others*.^[18] The same position was up held by the court in the case *Narok County Council vs Transmara County Council & Another*^[19] and *Peter Ohata Aram & 3 Others vs CDF Board & Others*^[20] In the latter case Makhandia J held as follows:-

“Statutes such as the Co-operative Societies Act Rent Restriction Act.....Landlord and

Tenant (Shops, Hotels and Catering Establishments) Act which have inbuilt and established dispute resolution mechanisms outside the Constitution were rendered otiose by the stroke of the new Constitution. These acts have been repealed and as long as they are not inconsistent or repugnant to the Constitution, they continue to apply and should be applied to resolve disputes akin to them. I do not see anything void or repugnant if the dispute herein was first forwarded to the 1st respondent for resolution as required by Section 52 of the Community Development Fund Act”

In the above case Makhandia J[21] (as he then was) also stated that:-

“I do not think it is right for a litigant to ignore a dispute resolution mechanism provided for in a statute and which would easily address his concerns and resort to this court under the guise of constitutional petition for alleged breach of constitutional rights under the bill of rights”

I find that judicial pronouncements made before the promulgation of the 2010 Constitution concerning Section 76 of the Co-operative Societies Act are still good law and that the constitution is not a substitute for dispute resolution mechanisms that are clearly spelt out in the statutes. Of course I am fully aware that section 76 of the Act defines the category of disputes that ought to be referred to the Tribunal and that some disputes do fall outside the said category warranting them to be litigated in court of law. But as already found in this judgement, the allegations in this Petition are rather shallow and do not meet the standard of prove required even if I were to admit them as being outside the definition in Section 76 in addition to my earlier finding that the right party to sue ought to have been the management committee.

In view of my finding above, my answer to the third issue is in the negative. The up-shot is that I find that this Petition has no merits and the same is dismissed with costs to the Respondents. Accordingly I make the following orders:-

- i. The Petitioners Petition be and is hereby dismissed.
- ii. The Petitioners shall pay the costs of this Petition to the Respondents.

Orders accordingly

Dated at Nyeri this 9th day of November 2015

John M. Mativo

Judge

[1] Cap 490, Laws of Kenya

[2] Petition No. 71 of 2013, Nairobi, Judgement delivered on 20.2.2015 by Lenaola J, Ngugi J & Majanja J.

[3] See Tinyefunza vs A G of Uganda, Constitutional Petition No. 1 of 1997 { 1997}, UGCC 3

[4] {1991} 20 SA 805, Cited in Petition no 71 of 2013, see note 7, supra

[5] See Wechsler, {1959}. Towards Neutral Principles of Constitutional Law, Vol 73, Havard Law Review P. 1.

- [6] {1979} 3 ALL ER 21
- [7] Nairobi Criminal Application no. 701 Of 2001
- [8] {2004 } 1 KLR 232, {2008} 2 KLR (EP) 624 (HCK)
- [9] {1979}1LKR 1272
- [10] High Court Petition No. 229 of 2012
- [11] NBI Pet. No. 1030 OF 2007
- [12] {2012} eKLR
- [13]High Court of Uganda, Constitutional Petition No. 15B of 1997, see Judgement of Twinomujuni JA
- [14] {1955} 1 WLR 948 at 955
- [15] {2007} 4 SLR (R) 855 at 59
- [16] Koinange and 13 others vs Koinange {1968} KLR 23
- [17] {1947} 2ALL ER 372
- [18] Court of Appeal No. 114 of 1998
- [19] Court of Appeal No 25 of 2002, Kisumu
- [20]Kisii High Court Const Pet No. 3 of 2010
- [21] Ibid