

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL CASE NO. E017 OF 2023

FRANCIS OUMA OTIENO PLAINTIFF

- VERSUS -

JACOB NYANUAYA 1ST DEFENDANT

DAVID ODANGA 2ND DEFENDANT

EVELYNE EGESA 3RD DEFENDANT

J U D G M E N T

1. The plaintiff commenced this suit against the defendants vide a plaint dated 15/12/2023 in which it sought the following orders: -

- a) *A declaration that the Notice convening the intended meeting for 20/12/2023 is irregular and in fundamental breach of the Associations constitution as well as sections 26, 27, 28 and 29 of the Societies Act.*
- b) *A declaration that failure by the defendants to furnish the Plaintiff and members of the Association with audited accounts of the Association before the AGM is a fundamental breach of the Association's Constitution and sections 27 and 29 of the Societies Act.*
- c) *A declaration that failure by the Defendants to avail updated list of members of the Association is a fundamental breach of the Association's Constitution and section 28 (1) of the Societies Act.*

- d) *A declaration that the establishment of an election subcommittee by the defendants without the approval or participation of the members of the association is a fundamental breach of the Association's Constitution as well as the Societies Act.*
 - e) *An order of mandatory injunction compelling the defendants to convene an annual general meeting in compliance with the Association Constitution and the provisions of the Societies Act.*
 - f) *An order of mandatory injunction compelling the defendants to furnish the plaintiff and members of the Association with the Association's audited financial statements and a list of all bonafide members of the association.*
 - g) *Costs of the suit.*
 - h) *Any other or further relief as the court may be pleased to grant.*
2. The plaintiff's case was that the defendants' being officials of the Kisumu Centre Jua-Kali Artisans Association breached the Association's Constitution as well as the provisions of the **Societies Act** by purporting to call an AGM without furnishing members with the audited reports and statements of account and by usurping the mandate of the general meeting by establishing an election sub-committee.
 3. The defendants filed a joint defence and counterclaim dated **6/2/2024** in which they denied the plaintiff's allegations and asserted that at the time of filing of his suit, the plaintiff had ceased being a member of the association and if at all he was reinstated, he ought to be provided with the proof of the same.

4. That during the 2022 AGM, the members of the Association agreed to have the Association's books audited by a public auditor following the refusal of the Regional Internal Auditor. That subsequently, the Association had an SGM wherein it was resolved that a private auditing firm would be sourced to undertake the audit of the books of account and that the only agenda of the subsequent meeting would be elections.
5. In the counterclaim, the defendants averred that the plaintiff had fallen into arrears of membership fees for a period of 8 months and as per the Association's Constitution, he had automatically ceased to be its member and thus had no locus to bring the suit against it.
6. That as a result of the plaintiff's suit, the Association had suffered loss following the cancellation of its scheduled elections. The defendants thus sought the following orders: -

a) The plaintiff's suit be dismissed.

b) Special damages in the sum of Kshs. 73,510/-.

c) A declaration that the plaintiff is not a member of Kisumu Centre Jua-Kali Artisans Association.

d) A permanent injunction restraining the Plaintiff from henceforth interfering with the activities of Kisumu Centre Jua-Kali Artisans Association.

e) A declaration that the AGM was properly convened.

f) A declaration that the elections subcommittee was procedurally established.

g) Costs of the suit and counterclaim.

h) Interest on (f) above at court rates till payment in full.

i) Any other orders that the court may deem fit to make in the interest of justice.

7. On the **7/2/2024**, the parties agreed to proceed and have the dispute resolved via Court Annexed Mediation and on the **25/4/2024**, a Partial Mediation Settlement Agreement Report dated **20/3/2024** was adopted as an order of the Court resolving all of the issues save for two.
8. At the trial, the plaintiff testified as **Pw1** and called one witness. The plaintiff, **Francis Ouma Otieno** adopted his witness statement dated **15/12/2023** as his evidence in chief. He produced his bundle of documents of even date as **PExh1- 4** and the supplementary bundle of documents as **PExh5 – 6**.
9. In cross-examination, he stated that he was member **no. 496** of the Association and that he had never fallen into arrears in paying membership fees but rather that he was late in payment of the same though he could not recall when he paid up his subscription dues.
10. That the election committee was not properly constituted as there was a conflict of interest, *to wit*, that the office appointing the election Board were interested parties and also that the committee members are elected at the AGM. That the election was not an agenda for the SGM but rather that the agenda was

appointment of auditor and reading of Financial statements. That the SGM was quashed for lack of quorum.

11. In re-examination, **Pw1** reiterated that he never had any arrears in 2022 and that he participated in all affairs of the association.

12. **PW2, Joseph Otieno Oduor** adopted his witness statement dated **30/5/2024** as his evidence in chief and testified that he was a Secretary General of one of the 14 groups forming the Association. That the plaintiff was a member of his group and had been participating in the activities of the Association

13. In cross-examination, he stated that he was the Secretary General of Gor Mahia sub group which the plaintiff belonged to though he failed to produce proof of the same when challenged. That the plaintiff did not have any arrears for 6 months as that had not been communicated to him by the executive from the head office. That if one failed to pay subscription for 6 months they cease to be a member of the Association automatically.

14. On the part of the defendants, the 2nd defendant, **David Otieno Odanga** testified as **Dw1** on behalf of the Association. He adopted his witness statement dated **5/2/2024** as his evidence in chief and produced the bundle of documents dated **6/2/2024** as **DExh1**. He told the Court that the plaintiff was not a member of the Association having ceased being so in 2022 because of late payment of subscription as per **section 3 (d) of the Association's Constitution**. That the plaintiff last paid his subscription on **30/9/2023** by way of M Pesa.

15. It was his testimony that the Association counterclaimed against the plaintiff for **Kshs. 73,000/-** which they had spent for the elections prior to the plaintiff obtaining the injunction against them.

16. In cross-examination, he testified that there was official communication to the plaintiff showing that his membership had ceased. That the license of trade the plaintiff filed was fake and that the M-pesa paid by the plaintiff was never refunded.
17. In re-examination, he stated that although the plaintiff subsequently attended the Association's meeting and offered prayers thereat was not proof of membership. That a real license is usually issued by the Association's Treasurer who affixes his stamp upon payment and the Chairman countersigns.
18. The parties filed their respective submissions which are on record. The plaintiff submitted that the assertions that he was not a member of the Association were not logical as the M-pesa statements records produced by the 2nd defendant showed that in 2022, he paid a subscription fees of **Kshs. 600/-** on **8/11/2022** covering 12 months while in 2023, he paid subscription fees on **30/9/2022** covering another 12 months.
19. That he had produced his operations license obtained at the start of 2023 which was a prima facie evidence of compliance with the Association's membership subscription and the argument by the 2nd defendant that the license was forged was without any proof.
20. That evidence on record, the minutes of the general meeting held in 2022, showed consistent and active participation by the Plaintiff in the activities of the Association without any objection from the defendants.
21. That **Article 47 of the Constitution and Section 6 of the Fair Administration Act** entitled every citizen to a notification before any adverse action is taken

against them and in this case, the defendants were under duty to notify him that his membership had been terminated.

22. That the Executive Committee not only attempted to usurp the role of the Annual General Meeting of determining how elections are to be held but also in violation of the principle of impartiality and avoidance of conflict of interest. It decided to constitute a committee that would decide an election in which all of them were participants without consulting the General Meeting.

23. For the defendants, it was submitted that the plaintiff lacked locus standi as he had failed to establish his membership in the Association. That the plaintiff's claim of membership based on minutes was speculative and lacked the factual foundation required under **Articles 22 and 258 of the Constitution** as jurisdiction cannot be conferred by acquiescence but must exist ab initio.

24. That the plaintiff participated in the Special General Meeting (SGM) without protest and thus cannot now challenge its validity due to the doctrine of approbate and reprobate. That the plaintiff failed to utilize the Association's internal dispute resolution mechanisms and thus his suit is premature and violates statutory procedure.

25. That the Association suffered financial loss due to the plaintiff's actions and his conduct destabilized operations and prejudiced bona fide members. That there was no breach on merits as the plaintiff failed to particularize any breach of the Association's Constitution or relevant statutes as audited accounts, member registers and minutes were made available.

26. That the plaintiff sought mandatory injunctions that would paralyze the Association whereas he has not met the threshold for grant of the orders sought.

That given the frivolous nature of the plaintiff's suit, the defendants were entitled to indemnity and to have their counterclaim granted.

27. The court has carefully considered the pleadings, the evidence presented by the parties, their submissions and the authorities relied on. Following the Partial Mediation Settlement Agreement Report dated 20/3/2024 as a court order on the 25/4/2024, the only issue left for the court's determinations are as follows: -

i) Whether the Plaintiff was a member of the Association and thus had locus standi to file the suit, and if so,

ii) Whether the election committee was properly constituted, and

iii) Whether the defendant's counterclaim is merited.

28. On locus, in Alfred Njau v City Council of Nairobi (1983) KLR 625 the Court of Appeal held that: -

"... Locus standi literally means a place of standing and refers to the right to appear or heard in Court or proceedings and to say that a person has no locus standi means that he/she has no right to appear or be heard in such and such proceedings."

29. In Migori Civil Appeal No. 119 of 2015 Julian Adoyo Ongonga v Francis Kiberenge Abano, it was that: -

"Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus in a civil suit lacks the right to institute and or maintain suit even where a valid cause of action subsists. Locus standi relates mainly to the legal

capacity of a party. The impact of a party in suit without locus can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings.”

30. In the present case, the defendants contended that the plaintiff lacked locus standi to file the suit as he had failed to pay his monthly subscription for more than 6 months. That this was contrary to **section 3(d) of the Association’s constitution** having last paid his subscription on **30/9/2023** by way of M Pesa and that he had not applied to be re-admitted as a member of the Association.

31. On his part, the plaintiff submitted that the Mpesa statements records produced by the 2nd defendant showed that in 2022, he paid a subscription fees of **Kshs. 600** on **8/11/2022** covering 12 months while in 2023 he paid subscription fees on **30/9/2022** covering another 12 months.

32. **Section 107(1) of the Evidence Act** provides as follows: -

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

33. And **section 108 of that Act** provides that: -

“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.”

34. It is trite that in civil case, the burden of proof is on a balance of probabilities. In **Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR**, the court stated that: -

“The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller –vs Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say: - “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. 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. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

35. In challenging the plaintiff’s locus, the defendant’s alleged that by virtue of the provisions of the Association’s Constitution, once a member was in arrears of the monthly subscription for 6 months, he automatically ceased to be a member. That the plaintiff had fallen into arrears and had not paid the 2022 subscription fees and that he had therefore ceased to be a member of the Association.
36. The defendants did not prove this allegation. They never produced the Register of Members of the Association to prove this fact. They also did not point out the exact provision of the Constitution of the Association that provided as such. Neither did they prove that the plaintiff’s name had either been struck out of the Register of Members of the Association or was missing therefrom.

37. What was on record was a feint copy of the Association's Constitution produced by the plaintiff. In article 3(d) thereof which the defendant's sought to rely on, it was provided that: -

“d) Any member who falls into arrears with his monthly subscription for more than six months shall automatically seize (sic) to be a member of the society and his name shall be struck off, ... may however, in its discretion re-instate such a member on payment of the total amount of subscription outstanding.”

38. There was no evidence that the name of the plaintiff had been struck off the register. The register was in the possession of the defendants as officials of the Association and by dint of ***section 112 of the Evidence Act***, it was upon them to prove the contents therein. By having failed to produce the same, the irresistible inference is that if it was produced, it would have been adverse to them.

39. Further, the evidence of **Pw2** was firm that the Association had not communicated to him as the Secretary General of the Gor Mahia sub-group that the plaintiff's membership no. 496 had been terminated.

40. In any event, when the plaintiff paid the subscription membership for both 2022 and subsequently 2023, the same was received and happily kept by the Association. If the plaintiff was not a member in 2023, the Association would not have received and kept his subscription fee of **Kshs.600/-** when it was paid in September, 2023. **Dw1** himself admitted that after that subscription of 2023 was received, it was not returned.

41. Corollary to the foregoing is that, since **Article 3(d) of the Association's Constitution** gave the Committee discretion to re-instate a member who had paid the arrears of the subscription fees, by accepting the plaintiff's subscription fees of 2023 and keeping it in September, 2023, the Association is deemed to have re-instated him if at all he had ceased to be a member, which in any event the Court has found not to be the case. The Court holds that the plaintiff had locus to institute and prosecute the suit.
42. The next issue is whether the election committee was properly constituted. It was the defendants' contention that the same was properly constituted which the plaintiff denied. The defendants did not refer to this Court where they got the mandate or powers to create and/or form the election committee.
43. The Committee is created by **Article 6 of the Constitution of the Association**. Its duties are set out in **Article 7** thereof. In none of the said articles allow, permit or bestow upon the Committee the duty of creating an election sub-committee. To the contrary, **Article 6(h)**, the Committee can only perform such other duties and functions as shall be directed by the membership, this must be at an AGM or SGM.
44. In view thereof, this Court finds that the election Committee was not lawfully or regularly created. The Committee acted ultra vires the Constitution of the Association.
45. The final issue is the defendant's counterclaim. The defendants sought general damages. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Accordingly, this is not an appropriate case on which to award general damages.

46. The defendants also sought special damages of **Kshs. 73,510/-** being funds used in the election that did not happen as a result of the injunctory orders sought and obtained by the plaintiff. The legal position on this is that special damages must be specifically pleaded and strictly proved. In **David Bageine v Martin Bundi [1997] eKLR**, the court stated: -

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684:

“... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Part Hotel Limited [1948] 64 TLR 177 thus;

“Plaintiff must understand that if they bring actions for damages, it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, ‘this is what I have lost, I ask you to give me these damages, ‘They have to prove it.’”

47. In the present case, the defendants did not produce any evidence of the alleged expense. In any event, the injunction obtained by the plaintiff was merited as the defendants had commenced to act irregularly and not in the best interest of the Association. The suit having been merited, no claim against the plaintiff can stand.

48. The upshot of the above is that I find that the plaintiff proved his case to the required standard. I allow the suit and grant the declarations prayed in the plaint. The defendant's counterclaim is dismissed. The costs of both the suit and the counterclaim is awarded to the plaintiff in any event.

It is so decreed.

DATED and **DELIVERED** at Kisumu this 19th day of **December, 2025**.

A. MABEYA, FCI Arb
JUDGE