



**REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS**

Civil Appeal 243 of 2005

STEPHEN OGAMBA1ST APPELLANT

FRANCIS ABURI2ND APPELLANT

SIMION MOKUA3RD APPELLANT

AND

ATTORNEY GENERAL... 1ST RESPONDENT

REGISTRAR OF CO-OPERATIVES..... 2ND RESPONDENT

GUSII FARMERS RURAL SACCO SOCIETY LTD3RD RESPONDENT

(An appeal from the Ruling and Order of the High Court at Kisumu (Tanui, J.) dated 11th July 2005

in

H.C.C. NO. COM. 68 OF 2005)

JUDGMENT OF THE COURT

This is an appeal from the Ruling of the High Court (Tanui, J) dated 11th July 2005 whereby the appellants' suit was struck out on the ground that it was barred by limitation.

On 17th March, 2005, the appellants filed a suit in the High Court at Kisii against the two defendants

(now the two respondents herein). The appellants averred in the plaint *inter alia*, that they were chief delegates of Gusii Farmers Rural Sacco Society Ltd (Society) until they were ousted by a rival group; that by a special delegates meeting held on 17th March 2004 chaired by the Provincial Co-operative Officer at the instance of 2nd respondent all the plaintiffs were exonerated from the allegations contained in the Inquiry Report dated 4th December 2003 made by the 2nd respondent's representative; that by a notice in writing

dated 8th December 2004 the plaintiffs asked the 2nd respondent to comply with the findings of 17th March 2004 by giving a written statement but the 2nd respondent had refused or neglected to give the written statement; that the plaintiffs were apprehensive that the respondents intended to wrongfully use the Inquiry Report and deny the appellants a right to hold the position of a committee member of society for a period of 10 years unless restrained from doing so. The reliefs sought in the plaint were a declaration that the plaintiffs had been exonerated from allegations contained in the Inquiry Report and a perpetual injunction restraining the respondents from preventing the plaintiffs from holding any position in the society.

By a subsequent application dated 30th March 2005, the appellants sought an *Quia timet* injunction to restrain the respondents from prohibiting the appellants from holding the position of a committee member of the society or any other co-operative society pending the hearing and determination of the suit. The application was brought on the ground that the appellants were apprehensive that the respondents intended to disqualify them from contesting the position of committee members in the elections which were going on.

The respondents filed a notice of preliminary objection to the application, one of the grounds of objection being that the suit was time-barred.

The Resident Judge in Kisii disqualified himself from hearing the matter on the ground that he had in the past handled a matter involving the same parties and transferred the suit to the High Court at Kisumu.

When the application came up for hearing on 5th May 2005, before Tanui J the society on its own application was joined as a third defendant. Thereafter Mr. Runo, learned counsel for the respondent raised a preliminary objection to the suit and application on several grounds including the ground of limitation. Regarding the ground of limitation, Mr. Runo submitted in essence that under S.3 (1) of the **Public Authorities Limitation Act** the suit should have been brought within one year from 4th December 2003 the date for the Inquiry Report.

On the other hand, Mr. Bosire learned counsel for the appellants contended that the cause of action arose on 17th March, 2004 and that the suit was filed on 17th March, 2005 within the 12 months limitation period.

The trial Judge upheld the preliminary objection based on the ground of limitation and said:-

“It is common ground that the report which the same damaging allegations, (sic) against the plaintiffs was made on 4th December 2003 and that on 19th March 2004, they were ousted from acting as Chief delegates of Gusii Farmer, Rural Sacco Society Ltd, by another group. The special delegates meeting of 17th March 2004, appears to have held that the delegates be given time to study the report for discussion in another meeting and that a smaller sub-committee was formed to study the report, to question those adversely mentioned and prepare a report. It is therefore clear that the cause of action arose on 4th December 2003 when the said (report) was made. As this case was brought on 17th March, 2005, against the Attorney General and the Registrar of the Co-operative Societies it was time barred.”

The trial Judge thereupon dismissed the suit with costs.

The appeal is against that finding. There are two grounds of appeal, the first being that the Judge erred in holding that the cause of action arose on 4th December, 2003 instead of 17th March, 2004 and the second, that, the Judge misdirected himself fundamentally in dismissing the suit when the date of the cause of action was in issue.

Mr. Bosire argued the two grounds together and submitted *inter alia*, that the cause of action arose as a result of a resolution made on 17th March, 2004 to the effect that the Management Committee resume office immediately; that the 1st and 2nd respondents failed to exonerate the appellants; that there was no evidence to show when the cause of action arose and that the finding that the appellants had been ousted by a rival group on 19th March, 2004 was not supported by evidence.

Mr. Eredi, learned counsel for the 1st and 2nd respondents opposed the appeal and submitted *inter alia*, that the committee of inquiry was appointed by the Commissioner of Co-operatives under Section 58 of the Co-operative Societies Act; and that the report of the committee was adopted on 24th February, 2004 by special meeting of the society in which the appellants were present.

On his part, Mr. Orimba for the 2nd respondent opposed the appeal and submitted among other things, that, the appellants ceased to hold office upon the adoption of the inquiry report on 24th February, 2004 and a new committee took over; that the inquiry report recommended the disbandment of the management committee, election of a new committee,

and barred the appellants from holding office and, lastly, that by 17th March, 2004 the appellants were not in office.

We have considered the material placed before the High Court, the ruling of that Court, the grounds of appeal and the respective submissions of the counsel. Section 3(1) of the **Public Authorities Limitation Act** provides that no proceedings founded on tort shall be brought against the government or a local authority after the end of 12 months from the date on which the cause of action accrued.

In paragraph 4 of the supporting affidavit to the application for injunction sworn on 30th March, 2005 Francis Aburi, the 2nd appellant deposed:

“4. That by an inquiry report made on 4th December, 2003 at the instance of the 2nd defendant/ respondent it was recommended that:-

“The current management committee has rundown the society as shown in the main body of this report. We therefore recommend that it be disbanded and fresh election conducted immediately during the resultant elections

Section 30 (g) and (i) of the Co-operative Societies Rules should be observed.”

The 3rd respondent annexed the minutes of special delegates meeting of the society held on 24th February, 2004 to its affidavit to support the application seeking the joinder of the 3rd respondent in the suit as a third defendant. Those minutes show that the three appellants were among the management committee members who attended the meeting. Indeed, the minutes show that the first appellant chaired the meeting. By minute 2/24/02/04, the Inquiry Report was read, proposed, seconded and ultimately adopted and thus became the property of the

society. It remained for the society to implement the report. It was submitted by Mr. Omariba that the 1st appellant by purporting to chair the meeting of 17th March, 2004, was purporting to expunge the resolution of the society which adopted the Inquiry Report.

Mr. Francis Aburi further deposed in paragraph 3 of the aforesaid affidavit that the appellants were on

19th March, 2004 wrongfully ousted from acting as chief delegates of the society by a rival group. Thus Mr. Bosire's submission that there was no evidence that the appellants were ousted on 19th March, 2004 is, with respect, incorrect.

It seems to us from the foregoing that the underlying grievance of the appellant in the suit was essentially the report of committee of inquiry dated 4th December, 2003. By the demand letter dated 8th December, 2004, the appellants were essentially demanding the withdrawal of the inquiry report which made adverse findings against the appellants amongst other members. Further, by the suit, the appellants were seeking a declaration nullifying the inquiry report as it relates to them. It follows that the subject matter of the suit was the committee of inquiry report dated 4th December, 2003 which mentioned the appellants adversely. The cause of action accrued from the date of the report. The suit was filed on 17th March, 2005 more than 12 months from the date the cause of action accrued. On analysis we are satisfied that the decision of the High Court was correct.

In the result we dismiss the appeal with costs to the respondents.

Dated and delivered at Kisumu this 22nd day of March, 2012.

R. S. C. OMOLO

.....

JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

P. N. WAKI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR