



**Mwambi v Mwalimu National Credit and Savings Society Ltd (Tribunal Case 83/
E173 of 2022) [2022] KECPT 897 (KLR) (Civ) (15 December 2022) (Ruling)**

Neutral citation: [2022] KECPT 897 (KLR)

**REPUBLIC OF KENYA
IN THE COOPERATIVE TRIBUNAL
CIVIL
TRIBUNAL CASE 83/ E173 OF 2022
BM KIMEMIA, CHAIR, M. MBENEKA & GITONGA KAMITI, MEMBERS
DECEMBER 15, 2022**

BETWEEN

JAMES ORIERE MWAMBI APPLICANT

AND

**MWALIMU NATIONAL CREDIT AND SAVINGS SOCIETY
LTD RESPONDENT**

RULING

1. The Notice of Motion dated 1/3/22 and the Supporting affidavit of James Oriere Mwambi dated 1/3/22. The applicant moved this Tribunal seeking the orders inter alia:
 - a. Spent.
 - b. Spent.
 - c. That an order do issue directing the status quo be maintained in that the claimant/applicant remains a delegate of the Nairobi branch and a member of the board of directors of the respondent as he was prior to the elections held at the respondent branch in Nairobi on February 5, 2021 pending hearing and determination of the main suit.
 - d. That an order do issue declaring that the Annual General Meeting and elections held on February 5, 2022 at the Nairobi branch null and void.
 - e. That the costs of this application be provided for.
 - f. That any other relief that this court may deem fit to grant.
2. The Respondent filed their replying affidavit on 8/7/22.



The notice of motion dated 20/6/22 and the supporting affidavit of Dennis Juma dated 20/6/22. The applicant moved this court seeking for the orders inter alia.

- a. Spent.
- b. Pending the inter parties hearing and determination of this application, the Honorable Tribunal be pleased to arrest the delivery of the ruling scheduled on June 23, 2022.
- c. The Honorable Tribunal be pleased to set aside the directions of the Tribunal of April 12, 2022 and instead order that the Application dated March 1, 2022 be heard on its merits and thereby allow the respondent/ applicant to file a response to the Application.
- d. That costs of this Application be in the cause.
- e. Any other orders that the court may deem fit.

The respondent has several branches including the one in Nairobi that held its Annual General Meeting on 5/2/22. The claimant has been a member of the respondent for 24 years, a delegate and a member of the board of directors. During the branch Annual General Meeting elections were held to fill the 4 out of 10 delegate vacancies that had fell vacant by rotation. The claimant was one of the 5 contestants of the delegate elections. The elections were held under the supervision of the County Director of Cooperatives and the 4 vacancies were filled up. The claimant wasn't satisfied with the elections and sent a letter to the county director of cooperatives contesting the result on 10/2/22. He contested on ground that one more delegate position had fell vacant by the delegate being transferred to another region and the vacancy wasn't announced. He moved the court on 1/3/22 and on 3/3/22 the Tribunal ordered status quo of the claimant in his position in the respondent. An appeal was taken to the High Court by the respondent dated 3/3/22. The High Court stayed the orders of the tribunal on 7/3/22. The respondent moved this court seeking orders against the Ruling scheduled for 23/6/22, and filed their replying affidavit dated 8/7/22 to the Application dated 1/3/22.

3. The claimant contested that after the respondents Branch Annual General Meeting and elections it came to his attention that one of the 10 delegates of the Nairobi branch had ceased to be a member and a delegate of the branch and it wasn't disclosed. Had it been disclosed of 5 positions vacant they would have been filled by the 5 members who offered themselves as candidates. He will cease being a delegate of the Nairobi branch and a member of the board of directors and by this will be highly prejudiced.
4. The respondents in their replying affidavit stated that the delegates elected at the various branches preside over the matters of the branch including the declaration of vacancies for each year. Branch delegates during one of their quarterly meetings before the Annual General Meeting declare vacancies premised on the 1/3 retirement. The claimant was a delegate and a board member and was offering himself for re-election. Four positions were declared vacant for 5 members who had been cleared to vie including the claimant. Elections proceeded and 4 members were elected as delegates excluding the claimant. Elections were conducted in presence of the County Director of Cooperatives as the Returning officer. The claimant was present in the Annual General Meeting and during the declaration he was present and confirmed that the positions were 4 and even signed the result form. That the claimant indicated that the 5th vacancy came to his attention after the elections. That at the time of filing of the claim the Director was seized of the matter and the claim was filed prematurely and in bad faith. That they found out about the transfer through the claimants letter and it is the branch chairperson's duty to inform the board. The board didn't receive any notification of the transfer hence no action could have been taken. That precedent practice dictates that such vacancy is filled during the next Annual General Meeting.



The application was ordered to be dispensed by way of written submissions.

Claimant's submissions

The claimant/applicant filed their written submissions dated 1/9/22.

5. The claimant in his submissions contended that the respondent out of maliciousness delayed in replying to his letter dated on 10/2/22 having knowledge of by law 30 (1) that requires Applicants to submit their Application 10 days to the date of the elections. In the case of *Fatuma Abdi Jillo v Kuro Lengesen & another* [2021] eKLR the court observed that in *TSS Spinning & Weaving Company Ltd v Nic Bank Limited & another* [2020] eKLR they unmasked the purpose of status quo order as follows;

“In essence therefore a status quo order is meant to preserve the subject matter as it is/existed as at the day of making the order. Status quo is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention.”

The participation of Mr. Banda Godfrey Mayende in the Nairobi branch Annual General Meeting and election of Representatives/ delegates was illegal pursuant to the respondent's by laws; by law 32 1 (b). The mischief by the Respondent in failing to disclose that Mr. Banda had ceased to be a member and a delegate prejudiced the claimants candidature and election as a delegate.

Respondent's Submissions

The respondent/applicant filed their written submissions dated 8/7/22

6. The respondents in their submissions contended that the declaration of vacancies was made in a branch meeting held on 18/1/22 and 4 positions were declared vacant where the claimant was present and didn't raise any objection. The only Reason that Mr. Oriere seeks that the Tribunal directs that he continues serving as a delegate and as a member of the board is that there was an additional vacancy. The vacancy can only be filled through a properly conducted election as per the bylaws. The process would at least entail the declaration of vacancy, the vetting of those interested, the election in a properly called and conducted Annual General Meeting and the declaration of results. Without the process Mr. Oriere has no reason to occupy the said vacancy as that would be taking away the members' democratic rights of electing their desired representative. Mr. Oriere's only agenda is to continue sitting as a delegate and as a director without being subjected to the proper way to occupy the offices. This will encourage bad corporate governance.

The respondent submitted that a delegate serves for 3 years on a rotational basis with an opportunity for re-election. That the nomination committee declares a vacancy in a branch meeting and a name of any eligible person is forwarded at least 10 days before elections.

7. That on January 18, 2022, four (4) delegates positions were declared vacant. Vide retirement of delegates and elections were held on February 5, 2022 for four (4) delegates.

The claimant was the lowest with 483 and the other 4 were picked. 5 days after elections, the claimant expressed dissatisfaction with the election results.

Issues for determination

Principles in *Giella v Cassman Brown* [1973]EA.

1. Establish *prima facie* case



The respondent has submitted that the orders sought in the claim are similar to the orders sought in this application and therefore there will be nothing left to determine.

That there is a vacancy in the Board which vacancy was discussed after elections and which can only be filled by way of elections.

The claimant avers that had there been a declaration of the vacancy, then the elections would have filled the vacancy of which he was a candidate.

That there was failure to disclose the vacancy at the Annual General Meeting hence an illegality of the elections as it prejudiced the claimant's candidacy.

That he should remain in office until the determination of the matter.

8. We have carefully considered the submissions of both parties. It is clear that the prayers sought as the applications are similar to those of the main claim hence the reason why the main claim should be heard and determined expeditiously.

It is clear there was a vacancy which was not declared for filling. The respondents contend that they were not aware and that the issue was only raised after the elections. The validity of the elections has been challenged and therefore, the claimant has established a *prima facie* case which requires calling of evidence to rebut the allegations of the claimant. This can only be done at the hearing of the main claim.

2. Irreparable Injury

The respondent has submitted that the injury can be assessed in terms of money. However we note that as a delegate, we would not be able to quantify injury if any, suffered by the constituents who he represents in the Board.

3. Balance Of Convenience

We note that this is a society in which members are represented via a delegate system. It is not clear what actions if any were taken by the Respondent to address the issue of the vacancy. For good corporate governance, the management committee are liable to the members for their decisions. It is not clear whether the committee addressed the issue raised by the claimant in his letter challenging the elections for failure to disclose the additional vacancy.

The only response was that the Respondent would confirm the vacancy after the said complaint, which issue has not been resolved to date and if the same has been resolved, the same is yet to be disclosed by the Respondent.

The Management Committee have an obligation under section 28 *Cooperative Society Act* on how to run the society on behalf of the members.

It is not clear how the Management Committee would not know the existence of a vacancy during elections. In the circumstances, to unplug this predicament, we would have to hear the parties' evidence to enable us to determine the matter on its merits.

9. In the circumstances, we find that the claimant's application dated March 1, 2022 has merits and allow in terms of prayer C. For prayer D, we find that the parties will need to call evidence in the main claim to enable us to appreciate the facts on record and costs in the cause.

For application dated June 20, 2022, the same seeks to arrest a Ruling scheduled for June 23, 2022 to enable the respondents defend the application dated March 1, 2022.



The respondent being dissatisfied with the orders of this Tribunal filed an appeal on the status quo order being stayed. The orders were stayed and the appeal was determined and the stay orders discharged.

The Notice of Motion application dated June 20, 2022 seeks arrest of delivery of Ruling dated June 23, 2022 and setting aside of directions of April 12, 2022 to have the application dated March 1, 2022 heard on merits and to allow the respondent to file replying affidavit.

As it is, we deem that there prayers have been overtaken by events; the Ruling was arrested, the applicants were allowed to file their replying affidavit and the Notice of Motion Application dated March 1, 2022 was heard on merits and whose decision has been issued herein above.

We therefore find that the application dated June 20, 2022 was overtaken by events and also overtaken by the letters dated June 27, 2022 and July 28, 2022 seeking for an early ruling date for the application dated March 1, 2022.

The application dated June 20, 2022 is therefore dismissed with costs.

In summary:

Application dated March 1, 2022 is allowed on the following terms.

1. Prayer a spent
2. Prayer b spent
3. That an order directing the status quo is maintained in that the claimant applicant remains a delegate of the Nairobi branch and a member of the board of directors of the respondent as he was prior to the elections held at the Respondent branch in Nairobi on February 5, 2021 pending hearing and determination of the main suit.
4. That an order declaring that the Annual General Meeting and elections held on February 5, 2022 at the Nairobi branch null and void to be determined in the main claim
5. That costs in the cause.
6. Parties to file and serve their witness statement and documents within 21 days herein.
7. The matter to be fixed for hearing expeditiously.
8. Mention for Pre- trial directions on February 15, 2023. Notice to issue.

RULING SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF DECEMBER, 2022.

Hon. Beatrice Kimemia Chairperson Signed 15.12.2022

M. Mbeneka Member Signed 15.12.2022

Mr. Gitonga Kamiti Member Signed 15.12.2022

Tribunal Clerk J. Koki

No appearance

Hon. Beatrice Kimemia Chairperson Signed 15.12.2022

Later

Juma for Respondent.



Hon. Beatrice Kimemia Chairperson Signed 15.12.2022

