



Otieno v Nyanuaya (Chairman Kisumu Centre Juakali Artisans Association) & 2 others; Registrar of Societies (Interested Party) (Civil Case E017 of 2023) [2023] KEHC 26804 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26804 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL CASE E017 OF 2023
RE ABURILI, J
DECEMBER 20, 2023**

BETWEEN

FRANCIS OUMA OTIENO PLAINTIFF

AND

JACOB NYANUAYA (CHAIRMAN KISUMU CENTRE JUAKALI ARTISANS ASSOCIATION) 1ST RESPONDENT

DAVID ODANGA (SECRETARY KISUMU CENTRE JUAKALI ARTISANS ASSOCIATION) 2ND RESPONDENT

EVELYNE EGESA (TREASURER KISUMU CENTRE JUAKALI ARTISANS ASSOCIATION) 3RD RESPONDENT

AND

THE REGISTRAR OF SOCIETIES INTERESTED PARTY

RULING

1. This ruling determines the application dated 15th December 2023 in which the applicant seeks the following orders:
 - a. Spent
 - b. Pending the hearing and determination of this application, the court be and is hereby pleased to issue a temporary order of injunction restraining the respondents whether by themselves, their servants, agents, employees or anybody whomsoever from convening an Annual General Meeting for Kisumu Centre Jua Kali Artisans Association on 20th December 2023.



- c. Pending the hearing and determination of the main suit filed herewith, the Court be and is hereby pleased to issue an injunction restraining the respondents whether by themselves, their servants, agents, employees or anybody whomsoever from expending or in any manner interfering with the funds from Associations Account save for payment of Salaries.
 - d. An order of mandatory injunction compelling the defendants furnish the plaintiff and members of the association with the association's audited financial statements and a list of all the bonafides members of the association.
 - e. An order of mandatory injunction compelling the defendants/respondents to convene an annual general meeting in compliance with the Association Constitution and provisions of the Societies Act.
2. The application was supported by the applicant's supporting sworn on the 15th December 2023 as well as the grounds therein. The parties' counsel argued the prayer for the interim interlocutory injunction orally.
 3. It was the applicants case that the 2nd respondent vide a notice dated 30th November 2023 called for the Association's AGM to take place on the 20th December 2023 which intended meeting is marred with breaches of the Association's Constitution, the Societies Act and the Constitution of Kenya.
 4. It is the applicant's case that the notice issued by the 2nd respondent has excluded consideration of the association's accounts and appointment of an auditor from the list of agenda items as provided in Clause 11 and that the respondents have refused /failed to furnish members with audited statement of accounts as provided for in clause 11 (b) of the Associations Constitution.
 5. The applicant further avers that the respondents have usurped the mandate of the general meeting by purporting to establish an elections sub-committee without any instruction, participation or approval by the general meeting and further that the respondents have neither furnished nor availed for members' inspection the updated register of the Association's members.
 6. It is the applicant's case that the failure and breaches aforementioned violate the members' rights under the Association's Constitution and further violate provisions of sections 27,28 and 29 of the Societies Act and that unless restrained by this court, the respondents shall proceed to hold the sham AGM to the detriment of the Association.
 7. In response, the 2nd respondent swore an affidavit in reply sworn on the 18th December 2023 in which he deposes that the suit was defective ab initio as the Kisumu Center Jua Kali Artisans Association had not been sued.
 8. He further deposed that the Association's Executive Committee convened a Special General meeting on the 24th November 2023 to discuss the Financial Report and appointment of Auditor of the Association and that subsequently on the 30th November 2023 the Special General Meeting settled on Khoya & Company as the Auditors.
 9. It was further deposed that at the Special General Meeting, the Executive was directed not to mix the elections with tabling financial reports as this takes a lot of time and that the auditor be given sufficient time to work on the report. The 2nd defendant further deposed that the unaudited financial report was tabled at the SGM which directed that the same be forwarded to the auditor.
 10. It was deposed that the applicant was not a member of the Association having ceased to be a member on the 1st July 2023 having failed to pay the subscription fee for more than 6 months and that though



not being a member of the Association, attended the SGM and agreed with the direction the SGM had given, which direction bound all members.

11. The 2nd respondent contended that the Elections Committee had already vetted the candidates who had applied for the elections set for the 20th December 2023 and spent Kshs. 1,000,000 in preparation for the same and thus if the orders sought would be granted, the same would affect and hurt over 8000 members of the Association.

Analysis and Determination

12. After considering all the pleadings filed by the parties herein, I note that at the centre of the applicant's application is the election scheduled for the 20th December 2023 which he alleges is the only item on the agenda for the AGM scheduled then vide a notice dated 30th November 2023 issued by the 2nd respondent. The applicant avers that the respondents have failed to comply with the society's constitution in calling for the aforementioned AGM.
13. This court notes the response by the respondents in which they assert that the applicant is not a member of the Society and further that they complied with their Constitution in the lead up to calling for the AGM scheduled for the 20th December 2023, are facts which were well within the respondents' knowledge as the applicant formed part of the SGM that took place and the applicant took part in making the said decisions. It is the respondents' contention that the applicant has developed sour grapes after he realized that he did not meet the requirements set out under the Society's Constitution to vie for election.
14. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows:

"Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."
15. The test for granting of an interlocutory injunction was considered in the *American Cyanamid Co. v Ethicom Limited* (1975) A AER 504 where three elements were noted to be of great importance namely: -
 - i. There must be a serious/fair issue to be tried,
 - ii. Damages are not an adequate remedy,
 - iii. The balance of convenience lies in favour of granting or refusing the application.
16. The important consideration before granting a temporary injunction under order 40 Rule 1 of the [Civil Procedure Rules](#) is the proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property. The court is in such a situation, enjoined to grant a temporary injunction to restrain such acts.
17. In the instant case, there is no doubt that the subject of the suit is the AGM set for 20th December 2023 and more specifically, the Elections, which is the only thing on the agenda, that is set to be held tomorrow 20th December, 2023. The applicant avers that the said AGM and Elections are being held



in breach of the Association's rules and regulation and that the same shall be to the Association's and its members' detriment. Conversely, the respondents contend that granting the orders sought by the applicant would disenfranchise the Association's 8,000 members who are intended to take part in the elections and further expose the Association to loss considering that it has spent more than Kshs. 1,000,000 in preparation for the elections.

18. The question which therefore arises is whether the application meets the threshold set for the granting of orders of temporary injunction. In *Mrao Ltd v First American Bank of Kenya and 2 others*, (2003) KLR 125 which was cited with approval in *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others*, (2014) eKLR, the Court of Appeal defined a prima facie case as:

“ A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

19. Therefore, has the applicant presented a prima facie case with a probability of success? I have considered the pleadings herein specifically the Association's Constitution and my findings are as follows: Clause 11 of the said constitution is clear that an auditor's report has to be furnished prior to every AGM. The applicant asserted that the respondents are in breach of this clause. However, the respondents contend that they complied with this as the same was considered during the SGM held on the 30th November 2023 and modalities on how this would be undertaken agreed upon by the members present including the applicant albeit he was not a fully paid up member.
20. The applicant on his part alleges that the aforementioned SGM was irregularly conducted as it did not meet the quorum set out in Clause 8 B (c) that requires a 100 registered members to attend an SGM.
21. I have considered the list of members provided by the respondents as those who attended the SGM and note that they do not reach 100 members but are only 62. Further, it is not possible to ascertain whether the said members listed therein are registered or fully paid up members as required by Clause 8 B(c).
22. Accordingly, without going into the merits of the case, I find that the applicant has established a prima facie case.
23. As to whether damages would be an adequate remedy for the applicant, I note that this is a case where damages would not be adequate as it involves protecting the interest of all the members of the Association and not the applicant in isolation.
24. Finally, I find that the balance of convenience tilts in favour of granting the applicant the orders sought so as to protect the interest of all the 8,000 members of the Association, following the serious allegations that prima facie, the respondents are in breach of the Association's Constitution.
25. The upshot of the above is that I find that the applicant merits the award of temporary injunction halting the AGM set for the 20th December 2023 pending the hearing and determination of the substantive prayer.
26. I therefore order that:
- a. Pending the hearing and determination of this application, this court hereby issues an interim temporary order of injunction restraining the respondents whether by themselves, their servants, agents, employees or anybody whomsoever from convening an Annual General Meeting for Kisumu Centre Jua Kali Artisans Association on 20th December 2023 at 9.00am..



b. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 2023 AT 8.00AM.

R.E. ABURILI

JUDGE

