



**Kasimba v Kwetu Savings & Credit Co-operative Society Ltd (Formerly
Masaku Teachers Savings Co-operative Society) & 10 others (Civil
Suit 29 of 2018) [2023] KEHC 21616 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21616 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT 29 OF 2018
MW MUIGAI, J
JULY 27, 2023**

BETWEEN

PETER KASIMBA PLAINTIFF

AND

**KWETU SAVINGS & CREDIT CO-OPERATIVE SOCIETY LTD (FORMERLY
MASAKU TEACHERS SAVINGS CO-OPERATIVE SOCIETY) . 1ST DEFENDANT
MASAKU TEACHERS INVESTMENT LTD 2ND DEFENDANT
REGISTRAR OF COMPANIES 3RD DEFENDANT
REGISTRAR OF LAND MACHAKOS COUNTY 4TH DEFENDANT
NATIONAL LAND COMMISSION 5TH DEFENDANT
HON ATTORNEY GENERAL 6TH DEFENDANT
JULIUS NZIOKA 7TH DEFENDANT
JAMES NDUTA 8TH DEFENDANT
FRANCIS KIOKO 9TH DEFENDANT
DAVID KIKUMU 10TH DEFENDANT
MACHAKOS COUNTY 11TH DEFENDANT**

RULING

Notice Of Motion - 26/1/2023 Contempt Of Court Application

1. The Notice of Motion dated 23rd October, 2022 and filed in court on 27th October, 2022, the Applicant sought orders that:



- a. Kwetu Savings & Credit Co-operative Society, Masaku Teachers Investment Limited & Registrar of Companies the 1st, 2nd and 3rd Defendants/ Respondents together with their current directors and principal officers Moses Toroitich Chebet, Stanely Musa Kyelenzi, Lawyer Celestine Anyango Opiyo, Boniface Odhiambo, Senior Records Officer Registrar of Company Office be jointly and severally to be found to be in contempt of the court orders made on 22nd January, 2019, 23rd July, 2019 and 29th April, 2020.
 - b. If found to be in contempt of court orders made on 22nd January, 2019, 23rd July, 2019 and 29th April, 2020 the said 1. Kwetu Savings & Credit Co-operative Society, Masaku Teachers Investment Limited & Registrar of Companies the 1st, 2nd and 3rd Defendants/ Respondents together with their current directors and principal officers Moses Toroitich Chebet, Stanely Musa Kyelenzi, Lawyer Celestine Anyango Opiyo, Boniface Odhiambo, Senior Records Officer Registrar of Company Office to show cause why they should not be punished accordingly
 - c. The 3rd Respondent to convert back Masaku Teachers Investment Limited the 2nd Defendant Company to public company under certificate of incorporation No. C 14/95 and restore the validly elected directors of the Public company and direct that the private company file no C66367 to remain closed and to direct that all documents filed in respect thereof and decisions carried by persons purporting to be acting in respect to documents filed there or are void and invalid.
 - d) The Respondent be condemned to pay the costs of this application.
2. The application was supported by an affidavit dated 23rd October, 2022 and filed in court on 27th October, 2022 sworn by Peter Kasimba in which he deposed that: the Respondents have despite repeated service and follow-up blatantly and fragrantly refused and failed to comply with the Court Orders made on 22nd January, 2019, 23rd July, 2019 and 29th April, 2020 whereby: on 22nd January, 2019 the Court had inter alia directed that status quo with respect to the 2nd Defendant's Register be maintained, on 23rd July, 2019 the Court directed that pending the hearing and determination of the this suit the 1st, 2nd, 3rd, 7th, 8th, 9th, and 10th Defendants be restrained from effecting any fraudulent or unlawful change in the share register and shareholding of the 2nd Defendant which will affect, extinguish or usurp the Plaintiff's shares or winding up the 2nd Defendant; 29th April, 2020 that the 1st, 7th, 8th, 9th, 10th and 12th Defendant be and are hereby ordered and directed to surrender/ handover and give to the 3rd Defendant and/ or 2nd Defendant's bonafide and duly elected directors the original certificate of incorporation no C66367 dated 11th August, 1995 for purposes of replacement thereof and issuance with correct certificate of incorporation No. C. 14/95.
- a. It was deposed that the 3rd Defendant, Registrar of Companies, had in compliance with the court orders done a letter confirming that they had inadvertently issued certificate of incorporation for private company C66367 instead of C 14/95 for public company and stated that the said Certificate of Incorporation C 66367 is null and void and should not be used in any business transaction and proceeded to close the file as it will create apprehension that the company has two different certificates of incorporation, 2 set of directors, 2 different company file numbers and is running both private and public company under the same name (annexed and marked copy of the letter from the Registrar of Companies).
 - b. It was further deposed that the Respondents delinked the company from the online system with a view to effecting fraudulent and contemptuous changes to the company; stating that in breach of the court orders the Respondents have deceptively purported to reopen the closed



file for private company C66367 whilst purporting that the file was lost/ misplaced, remove lists of members/ shareholders of the company, remove list of elected directors of Company.

- c. It was deposed that Respondents have placed reliance on Court Order made on 26TH February,2018 in Machakos High Court Misc Application no 35 of 2015 which only touched on subscribers and 20,000 shares and not shareholders or the Rest of 24,000,000 shares to seek to convert the company from public to private company. Opining that the said order did not direct change/ removal of validly elected directors or removal of bonafide AGM resolutions or invalidation shareholders' decisions as regards status of the company, elected directors in office and public company status of registration.
- d. It was the case that the Registrar of Companies has no powers to cancel, quash and revoke conversion of public company to private company without statutory and strict adherence to the law and Anyango Opiyo & company Advocate the law firm instructed by the Respondents company to carry out the complained actions and effect the forgoing scheme are fully aware of the issues and court orders made herein.
- e. Depositing further that the Respondents carried out the aforementioned in breach of court actions despite the fact that since the inception to date the company has been operated and managed as public company with duly elected directors under mandate of shareholders and that in the circumstances he prayed that this Honorable court do grant the orders sought in the Application.

Replying Affidavit By Celestine Anyango

3. By Replying affidavit dated 27th January, 2023 and filed in court on 1st February,2023, sworn by Ms. Celestine Anyango Opiyo Advocate of the High Court, the affiant herein deposed that she vehemently opposed the Notice of Motion dated 23rd October,2022 terming the application as frivolous and vexatious and that the 1st Defendant issued instructions to her firm vide a letter to follow up on changes in directorship and shareholding of Masaku Teachers Investment to Kwetu Sacco Society Ltd pursuant to Hon. Justice D.K. Kemei 's Order.
 - a. Counsel deposed that she wrote a letter to the Registrar of Companies dated 28th October,2021 seeking their indulgence to give the 1st defendant the status update of the 2nd Defendant company register and progress of the changes pursuant to Hon. Justice D.K Kemei and that via an email the Senior Registrar of Companies one Ms. Ann Kanake informed her that the records of Masaku Teachers Investment Limited of Certificate of Incorporation No 66367 and noted that the company was/is not yet linked on the e- Citizen platform and that they further advised that the company must undertake a link application on the e-Citizen platform through the Company Secretary.
 - b. It was deposed that procedures were followed in respect of rectifying Masaku Teachers Investment Limited Company Certificate No. C66367 by entering Kwetu Savings and Credit Co-operative Society Limited to hold 19999 shares and that Dr. Stanely Kyelenzi was nominated to hold 1 share pursuant to Court Order in MHC Misc Application No. 35 of 2015 and that the said order had been appealed against and there is no stay of execution or stay pending appeal that had been issued by a Court of competent jurisdiction.
 - c. Counsel deposed that the Plaintiff failed to demonstrate that the Respondents and herself willfully, refused or neglected to obey the Court orders and that she was not served with any orders made on 22nd January, 2019, 23rd July,2019 and 29th April,2020 and further that she is not in breach of any Court order.



Counsel finally stated that in the circumstances the Plaintiffs Notice of Motion dated 23rd October,2022 ought to be dismissed with costs to the Respondents.

Replying Affidavit By Dr. Stanley Kyelenzi

4.

- a) By Replying Affidavit dated 27th January,2023 and filed in Court on 1st February,2023 sworn by Dr. Stanley Kyelenzi, he deposed inter alia that he vehemently opposed the Notice of Motion Application dated 23rd October,2022 and that the Plaintiff's Application is frivolous and vexatious. He stated that proper procedures were followed in respect of rectifying Masaku Teachers Investment Limited Company Register of Certificate No. 66367 by entering Kwetu Saving & credit Co-operative Society Limited to hold 19999 shares and that he was nominated to hold the 1 share pursuant to Court Order in MHC Misc Application No. 35 of 2015.
- b) He deposed further that he is advised by the advocate on record which advice he believes to be true that complying with Hon.D.K Kemei J order made on 26th February,2018 does not in any way amount to willful contempt of Court orders and that Masaku Teachers Investment Certificate No. C. 66367 is not a public company, it is a private company and further that he was not served orders made on 22nd January,2019, 23rd July,2019 and 29th April,2020, neither was he aware of the said orders. Opining that he is not in breach of any Court Order and that the Plaintiffs have failed to demonstrate that the 1st Defendant the 3rd Defendant, Moses Toroitich Chebet, Stanley Musa Kyelenzi and Celestine Anyango Opiyo have acted in breach of the terms of the Court Orders. Further he deposed that Plaintiffs have failed to satisfy this Honorable Court that willful disregard of the court orders has been established and thus the plaintiffs are not entitled to the orders sought.

Replying Affidavit By James Mweu Muiya

5. In his Replying Affidavit dated 28th February,2023 and filed in court on 1st March,2023, James Mweu Muiya deposed inter alia that he strongly opposed the Application dated 23/2/2023 as it is incompetent, lacks merit, an abuse of court process and that the Applicant had no capacity to pursue any action in the name of the 2nd Defendant herein as they have not been duly appointed by the convened AGM or are they bonafide elected directors hence they have no authority to act on behalf of the 2nd Defendant.
6. It was his case that the Application seeks to fetter and restrict the rights of the shareholders of the 2nd Defendant herein which this Honorable court on interlocutory orders affirmed and similar orders were granted preserving and protecting the shares of shareholders of the company (annexed and marked copy of the ruling delivered by Justice Odunga on 29th /04/2020).

He deposed further that the Applicant herein admits that the funeral home is owned by the 2nd Defendant company for which the Respondents herein are shareholders through their duly elected directors who are entitled to manage and that 1st Defendant SACCO being a shareholder cannot override the duly elected directors in taking over the running and management of the 2nd Defendant company contrary to the stay of execution orders by the Court of Appeal Machakos Misc Case No. 35 of 2015 (annexed and marked copy of the ruling by the court of appeal). And that the supreme effect of the Court of Appeal ruling meant that at very least the directors of the 2nd Defendant resumed and/or reverted to the original position and the illegal changes effected by the 1st Defendant/Applicant to



remove the duly elected directors of the 2nd Defendant/ Respondent at the time of filing this case was illegal null and void ab initio.

7. Depositing that the said Court of Appeal ruling stayed all consequential orders and actions of the 1st Defendant herein in relation to the Ruling of Hon. Justice Kemei and which the 1st Defendant/ Applicant and 7th -10th Defendants/ Respondents seeks refuge cannot purport to be shareholders of the directors of the 2nd Defendant/ Respondent Company.
8. It was his position that the 1st Defendant/ Applicant herein orders by court made on 22nd January,2019 and 29th April,2020, directing that there should be no fraudulent or unlawful conveyance of land Machakos Township Block 11/12 and Makueni Nundu Mbutu Plot No. 908 Kiboko Settlement Scheme Makindu Town Kibwezi, the property and assets the 2nd Defendant contrary to the Plaintiff's Shareholding interest and the action of the 1st Defendant/ Applicant to illegally, unlawfully and fraudulently take over the running and management of the funeral home facility and to purport to have constituted itself to be the 2nd Defendant/ Respondent Company and its Illegal Board of directors despite orders made by the Court of Appeal
9. Depositing further that this court requires decisive/ action by the duly elected board of the directors of the 2nd Defendant / Respondent under the authority of the Plaintiffs/ Respondents and who are shareholders of the 2nd Defendant/ Respondent to demand that the 1st Defendant/ Applicant to keep off and stay from the funeral home and which they have acknowledged is owned by the 2nd Defendant/ Respondent.
10. It was his case that Dr. Kyelenzi is not a shareholder of the 2nd Defendant/ Respondent Company as at the time of the initial share offer he was still in College and by the time of the second share offer he had been engaged as a very junior clerical staff by the 1st Defendant as all the shareholders who bought shares were all teachers working in Machakos and Makueni hence according to him, Dr. Kyelenzi holds no shares nor have does he hold a share certificate. Finally, that Dr. Kyelenzi purports to rely on/to claim he was appointed as unopposed or elected as Director the Order was stayed by the Court of Appeal.

Notice Of Motion Dated 26th January,2023 Eviction/handover Of Management

11. By Notice of Motion dated 26th January, 2023 and filed in Court on 27th January,2023 the Applicant herein sought orders that:
 - a) The 1st Defendant/ Respondent Kwetu Savings & Credit Co-operative Society Ltd to handover to the Plaintiffs, shareholders of the 2nd Defendant and their duly elected directors; the management, running and operations of Makueni Nundu Mbutu Plot No. 908 Kiboko Settlement Scheme Makindu Town (Kibwezi) Kibwezi Funeral Home Services pursuant to the Court granted on 22nd January,2019, 23rd July,2019 and 29th April,2020.
 - b) The 1st Defendant/ Respondent be condemned to pay the costs of this application.
12. The application was supported by an affidavit dated 26th January,2023 and filed in court on 27th January,2023, sworn by Peter Kasimba in which he deposed inter alia that: pursuant to Court orders granted on 22nd January,2019, 23rd July,2019 and 29th April,2020, restrained the 1st ,2nd ,3rd , 7th , 8th , and 10th Defendants from effecting any fraudulent or unlawful change in the share register and shareholding of the 2nd Defendant which would in affect, extinguish or usurp the Plaintiffs shares and or wind up the 2nd Defendant Masaku Teachers Investment Limited.
13. He deposed that contrary to the said orders the Respondent has purported to take over management, running and operations of Makueni Nundu Mbutu Plot No. 908 Kiboko Settlement Scheme



- Makindu Town (Kibwezi) Kibwezi Funeral Home Services (the funeral home) without sanction of the court or shareholders' approval whilst the case is pending hearing.
14. Stating that the land where the funeral home is run was purchased by the 2nd Defendant Company via the shareholders' initiative and resolutions, built and developed by the 2nd Defendant company via shareholding finance and the 1st Defendant being a shareholder of the 2nd Defendant cannot purport to take over the operations of the funeral home or extinguish the rights of the 2nd Defendant's shareholders.
 15. It was his position that the said funeral home was developed and construction supervised by the 2nd Defendant's Board of director's chairman Mr. Patrick Mutisya on behalf of the 2nd Defendant and shareholders. The Court directed that there should be no fraudulent or unlawful conveyance of land No. Machakos Township Bloc 11/112 and Makueni Nundu Mbutu Plot No. 908 Kiboko Settlement Scheme Makindu Town (Kibwezi), property and assets of the 2nd Defendant contrary to the Plaintiff Shareholding interest.
 16. He deposed that the Respondent has purported to seek to take over fraudulently and unlawfully the running and management of the funeral home and the collection and banking of the generated revenue which is one of the assets of the 2nd Defendant contrary to Court Orders and shareholders interest.
 17. He deposed that the Court directed the Respondents to handover and surrender to the 3rd Defendant and/ or the 2nd Defendants bonafide and duly elected directors the original Certificate of Incorporation No. C. 66367 dated 11/8/1995 for the purpose of replacement thereof and issuance with the correct certificate of incorporation No. C. 14/195; failure to which the 3rd Defendant was to issue certificate of incorporation as replacement of the earlier certificate of incorporation.
 18. He stated that contrary to the court orders the Respondent has been using the revoked certificate of incorporation No. C. 66367 and placing reliance on it to purport to take over the 2nd Defendant Company, its directorship, change its name and take over its properties and assets.

Replying Affidavit By Dr. Stanley Kyelenzi

19. In reply to the Notice of Motion application dated 26th January,2023 Dr. Kyelenzi in his Replying affidavit dated and filed on 6th February,2023 deposed that that this honorable court did not grant orders of 22nd January,2019, 23rd July,2019 and 29th April,2020, and more particularly, the Honorable Court did not grant any substantive orders at the interlocutory stage that the 1st Defendant herein handover to the plaintiffs the management, running and operations of Makueni Nundu Mbutu Plot No. 908 Kiboko Settlement Scheme Makindu Town (Kibwezi) Kibwezi Funeral Home Services.
20. He opined that he can confirm that the 1st and 2nd Defendants have not undertaken any fraudulent or unlawful conveyance of land No. Machakos Township Block 11/112 and Makueni Nundu Mbutu Plot No. 908 Kiboko Settlement Scheme Makindu Town (Kibwezi), and that he is advised by his advocate on record that this court on 13/12/2022 did not issue any order for the Plaintiffs to take over all operations at Makueni Nundu Mbutu Plot No. 908 Kiboko Settlement Scheme Makindu Town. The orders granted on 22nd January,2019, 23rd July,2019 and 29th April,2020 did not order that the 1st Defendant herein hand over to the Plaintiffs the management, running and operations of Makueni Nundu Mbutu Plot No. 908 Kiboko Settlement Scheme Makindu Town (Kibwezi) Kibwezi Funeral Home Services.
21. The 1st Defendant and himself are shareholders of the 2nd Defendant and there is no extra ordinary General Meeting that was held to elect Board of Directors as new management to handle the



operations of Makueni Nundu Mbutu Plot No. 908 Kiboko Settlement Scheme Makindu Town (Kibwezi) Kibwezi Funeral Home Services; deposing that the Plaintiffs have not adduced any evidence before this Honorable Court that shows that they were given the mandate and authority to receive all payment in respect to the operations of Makueni Nundu Mbutu Plot No. 908 Kiboko Settlement Scheme Makindu Town (Kibwezi) Kibwezi Funeral Home Services.

22. It is not true that this Honorable Court or any other Honourable Court within the jurisdiction of Kenya has revoked the 2nd Defendant's Certificate of incorporation No. C. 66367 and that the 2nd Defendant herein is a Private Limited Company duly registered under Certificate of Incorporation No. C. 66367; further that the Plaintiff herein has failed to disclose to this Court through their advocate that there is High Court Case Misc Application No. 35 of 2015 Kwetu Savings & Credit Co-operative Society Limited v James Muiya & 11 Others where an order delivered by Hon. D.K. Kemei J on 26th February, 2018 the Court ordered that:
- a) The Register of Companies in respect of the 12th Respondent Masaku Teachers Investment Limited be rectified by removing/ expunging their names from the names of the 1st -11th Respondents namely; James Muiya, Daniel Mathunga, Israel Nzalu, Richard Masila Kaveke, Patrick Sove, David Mwanthi, David Kioko, Cosmas Mwololo, Wilson Mutunga, Lawrence, Mutunga & Josphat Kalonzo
 - b) That the Register of Companies in respect of the 12th Respondent Masaku Teachers Investment Limited be rectified by entering the Applicant Kwetu Savings & Credit Co-operative Society Limited to hold 19999 shares.
 - c) That the Register of companies in respect of the 12th Respondent Masaku Teachers Investment Limited be rectified by allocating one share by the applicant Kwetu Savings & Credit Co-operative Society Limited.
 - d) That the Applicant be at liberty to complete and file necessary statutory documents inter alia returns and form 203A to give effect to the rectification as ordered by the Honorable Court.
23. Finally, he deposed that he is aware that this Honorable Court has ordered severally in the Rulings delivered in Civil Suit No. 29 of 2018 Peter Kasimba & Others v Kwetu Savings & Credit Co-operative Society Limited & 11 Others his Honorable Justice Odunga (as he then was) has explicitly stated that the issues and controversy raised in Misc Application No. 35 of 2015 Kwetu Savings & Credit Co-operative Society Limited v James Muiya & 11 Others are not similar issues. Urging that in the circumstances application dated 26th January, 2023 ought to be dismissed with costs to the Respondents in the interest of justice.

Notice Of Motion Dated 16th February, 2023

24. The Notice of Motion dated 16th February, 2023 and filed in court on 17th February, 2023 the Applicant herein sought orders that:
- a) The matter be certified urgent and be heard ex-parte in the first instance.
 - b) Pending the hearing and determination of this application, and/or main suit, an interlocutory order do issue restraining the Plaintiffs, their employees, servants, agents, advocates and any other person through whom they may act from illegally encroaching, trespassing, interfering, leasing and/ or in any way other manner dealing with or effecting any fraudulent and/ or unlawful conveyance or any fraudulent and/ or unlawful change in the share company shares of Masaku Teachers Investment Limited of Registration No. C. 66367 Kibwezi in any way



detrimental to the interests of the 1st ,2nd ,7th ,8th ,9th & 10th Defendants; and from illegally and fraudulently taking over the management, running, operations and/ or in any way other manner dealing with the 2nd Defendant properties known as Machakos Township Block 11/112 and Makueni Nundu Mbutu Plot No. 908 Kiboko Settlement Scheme Makindu Town Kibwezi in any way detrimental to the interests of the 1st ,2nd ,7th ,8th ,9th & 10th Defendants.

- c) That the OCS Machakos & Makueni Police Station to assist in the enforcement of the court orders.
 - d) That the cost of this application be awarded to the Applicant
25. The said Application was Supported by an affidavit sworn and dated on 16th February,2023.
- a) Depositing that he his further advised by their advocate that that this Honorable court on 13th December,2022 did not issue any order for the Plaintiffs herein to receive any payment in respect to Kibwezi Funeral Services Makindu and that this Honorable Court on 13th December,2022 did not issue any order for the Plaintiffs to be purportedly appointed by the 2nd Defendant to enable them take over as new Directors as per Court orders of 22nd January,2019, 23rd July,2019 and 29th April,2020.
 - b) The 1st Defendant and himself are shareholders of the 2nd Defendant and there is no extra ordinary General Meeting that was held to elect Board of Directors as new management to handle the operations of Makueni Nundu Mbutu Plot No. 908 Kiboko Settlement Scheme Makindu Town (Kibwezi) Kibwezi Funeral Home Services and that the Plaintiffs in this Application have not attached the minutes of extra ordinary General Meeting that elected them to run the affairs of Makueni Nundu Mbutu Plot No. 908 Kiboko Settlement Scheme Makindu Town (Kibwezi) Kibwezi Funeral services and that they were given mandate and authority to receive all payments in respect to the operations.
26. He further opined that parties appeared before this honorable Court on 7th February,2023 the Honorable Court confirmed that on 13th December,2022 it did not re -issue any court orders of 22nd January,2019, 23rd July,2019 and 29th April,2020.

The Preliminary Objection

27. A preliminary objection dated 21st February,2023 and filed in court on 1st March,2023, plaintiffs herein raised the objections to the application dated 16th February,2023 on the grounds that:
- i) The said application seeks to unlawfully appeal against 3 Judge bench and to procedurally vary or set aside the orders by the court of appeal made in Nairobi Civil Application No. 12 of 2020 James Muiya & 11 Others v Kwetu Savings & Credit Co-operative Society directing stay of execution of ruling and orders of 26/2/2018 and all consequential orders made pursuant to and in reaction to Machakos High Court Misc Application No. 35 of 2015.
 - ii) The law firm of Amolo Kibanya & company Advocates and the Law firm Anyango Opiyo & company Advocates have never been appointed to act and / or represent the 2nd Defendant public company in any duly convened and or duly held annual or extra ordinary meeting of the public company.
 - iii) The deponent of the supporting affidavit Dr. Stanley Kyelenzi has never been bonafide shareholder of the 2nd Defendant Public Company.



- iv) The deponent of the supporting affidavit Dr. Stanley Kyelenzi does not qualify to be a director of the 2nd Defendant Public Company.
- v) The deponent of the supporting affidavit Dr. Stanley Kyelenzi has never been elected as a director of the 2nd Defendant Public Company in any duly convened and or duly held annual or extra ordinary meeting of the public company.
- vi) The Application seeks to unlawfully appeal against, vary or set aside the orders made by this Court on 22nd January,2019, and 29th April,2020 restraining the 1st ,2nd ,3rd ,8th & 10th Defendant from effecting any fraudulent or unlawful change in the share register and share - holding of the 2nd Defendant which would affect, extinguish or usurp the Plaintiffs shares and or wind up the 2nd Defendant.
- vii) The Application seeks to unlawfully appeal against, vary or set aside the orders made by this court on 22nd January,2019, 23rd and 29th April,2020 directing that there should be no fraudulent or unlawful conveyancing of land No.Machakos Township Block 11/112 and Makueni Nundu Mbutu Plot No. 908 Kiboko Settlement Scheme Makindu Town (Kibwezi) property and assets of the 2nd Defendant contrary to the plaintiffs shareholding interest.
- viii) The Application seeks to unlawfully appeal against, vary or set aside the orders made by this court on 23rd July,2019 directing the Respondents to hand over and surrender to the 3rd Defendant Registrar Companies and/ or 2nd Defendant public company bonafide and duly elected directors the original certificate of incorporation No. C. 66367 dated 11/8/1995 for purpose of replacement thereof and issuance with correct certificate of incorporation No. C. 14/195; failure to which the 3rd Defendant issued certificate of incorporation as replacement of the earlier certificate of incorporation.

28. The matter was canvassed vide written submissions.

Submissions

The Plaintiffs/ Applicant's Submissions

29.

- a) The Plaintiffs/ Applicants vide their Submissions dated 14th March, and filed in court on 20th April,2023 submitted that the court finds and holds that the 1st Defendant Sacco to purport to have its executive officer Kyelenzi to make affidavits on behalf of the 2nd Defendant is unlawful as the court had granted orders directing the Respondents to hand over and surrender to the 3rd Defendant and/ or 2nd Defendant bonafide and duly elected directors. The original certificate of incorporation No. C. 66367 dated 11/8/1995 for purpose of replacement thereof and issuance with correct certificate of incorporation No. C. 14/195; failure to which the 3rd Defendant was to issue certificate of incorporation as replacement of the earlier certificate of incorporation.
- b) Submitting that unless the above orders are set aside and 3rd Defendant recalls the Public Company certificate of incorporation No. C. 14/195 the 1st Defendant cannot purport to rely on the called and replaced certificate of incorporation No. C. 66367 for Private Company to seek to purport to appoint law firm to take over instructions from Makundi & Company Advocates contrary to resolutions made in extra Ordinary General meeting by shareholders.



- c) Reliance was made on the case of *Kuri Tea Factory Ltd v Tea Development* (2013) eKLR to buttress this point.
- d) Submitting that court find that the law firm of Anyango Opiyo cannot swear affidavit on behalf of the 2nd Defendant company as the shareholders who are plaintiffs herein are not aware of the said law firm nor did they appoint them urging that for the court to appreciate that representation, they pointed out the Machakos High Court Misc Application No. 35 of 2015 in which the Sacco had sued the company and the Company had retaliated by suing the Sacco in Machakos ELC Case no. 35 of 2014 Masaku Teachers Investment Ltd v Kwetu Sacco & Others.
- e) It was their case that court orders to preserve uphold the Plaintiffs' shareholding interest and rights and that court find and hold that under their shareholding rights the Plaintiffs acquired proprietary rights to the shares which entitles them to control and say how the funeral home a property of the company is being managed and its revenues banked and those rights cannot be taken away by the 1st Defendant Sacco without due process.
- f) They urged that to allow the 1st Defendant Sacco together with appointees who have not been elected to run the funeral home and collect revenue would be contrary to the basic legal foundation of the legal creation called a company which is distinct and separate from its shareholders. Contending that court find that this case is different from the Miscellaneous Application Case.
- g) Averring that Court of Appeal stayed the orders which were made in the Miscellaneous case and it follows that Kyelenzi cannot purport to act as a shareholder or director of the Company or claim the property of the company to be part of the Sacco or to have powers to oversee and control running of the funeral home as he claimed.
- h) It was their contention that how will the 1st Defendant Sacco be accountable to the 2nd Defendant Company Shareholders to show that the funeral home is being run in a prudent and businesslike manner to ensure profitability and returns on investment if the Sacco which is a mere shareholder is running it unlawfully and receiving revenues thereof and that Plaintiffs challenge Sacco's Kyelenzi to display his share certificate or provide resolutions and minutes of meeting which he was elected to be a director of the company and he has availed none since not being a shareholder he is incompetent to be a director or to swear any affidavit on behalf of the Company.
- i) Finally, they submitted that they challenged the Sacco to avail Resolutions passed by the 1st Defendant shareholders authorizing the Sacco to take over or run the funeral home and none has been availed hence they urge the court to allow the Application to prevent further loss of revenue and illegal management of the 2nd Defendant Company's Assets.

The 1st, 2nd, 7th, 8th, 9th, 10th, 11th And 12th Defendants Written Submissions.

30.

- a) The defendants vide their written Submissions dated 27th March, 2023 to the Notice of Motion dated 26th January, 2023 raised the following issues which they submitted on sequentially.
- b) On whether or not the Notice of Motion Application dated 26th January, 2023 should be allowed as prayed, it was their case that the said application is for dismissal with costs for reasons that prayers sought in the application are disjointed with the prayers sought in the Plaint and



that the parties are bound by their pleadings hence cannot seek in an interlocutory application an averment or prayer which was not specifically pleaded or prayed in the main suit and that Applicant has pleaded more facts and issues which are not pleaded in the plaint.

- c) On the issue that the Application is seeking orders in an interlocutory stage, it is contended that the 1st Defendant are the shareholders of the 2nd Defendant with 19999 ordinary shares, the 2nd Defendant is a company that was registered as a private company on 11th August, 1995 and the company registration No. is C. 66367. It is the 1st Defendant who has been running and managing the suit property known as and Makueni Nundu Mbutu Plot No. 908 Kiboko Settlement Scheme Makindu Town Kibwezi.
- d) Averring that the Plaintiffs purport that the 2nd Defendant is a public company with a purported Certificate of registration C. 14/ 95 and that the plaintiffs are its members, opining that 1st,2nd,7th,8th, 9th and the 10th Defendants have always maintained that the 2nd Defendant has never been registered as a public company and that the 1st and 2nd Defendants do not know and have never obtained the purported registration C. 14/ 95. And that it is only after the merits of the case is heard and determined in the main suit that this Honorable Court can issue substantive orders.
- e) As regards that the Plaintiffs, they have not come to Court with clean hands, it is submitted by Defendants that the plaintiffs are guilty of non-disclosure of material facts. Averring that the purported court orders made on 22nd January,2019, 23rd July,2019, 29th April,2020 and purported orders reissued on 13th December,2022 did not order the 1st Defendant to hand over to the plaintiffs, Shareholders of the 2nd Defendants and their duly elected directors the management, running and operations of Makueni Nundu Mbutu Plot No. 908 Kiboko Settlement Scheme Makindu Town (Kibwezi) Kibwezi Funeral Services.
- f) Reliance was made on the case of *Hussein Ali & 4 others v Commissioner of Lands, Land Registrar & 7 Others* (2013) eKLR, whilst setting aside ex- parte orders granted upon material non-disclosure opined:

“Where a party is guilty of material non-disclosure, such a party will be dis-entitled to the equitable remedy of injunction. It is also an established principle of law that a party cannot be heard to say that he was not aware of the importance of the facts so misstated or concealed or that he had forgotten them (See Malindi Misc. Civil Application No. 27 of 2012; *Vischi Fernando v Land Registrar, Kilifi & 2 others*).

- g) Further the Defendants contended that in *Hussein Ali's case Supra*:

“It was the duty of the Plaintiffs/Respondents to disclose to this Court the existence of Malindi HCCC No. 100 of 2007. As was stated in the case of *The Owners Of The Motor Vessel "Lilians -v- Caltex Oil (kenya) Limited* C.a. NO. 50 of 1989, in which the court cited with approval the case of *Republic v Kensington Edmond De Poligna C* (1917) 1 K.B. 486 which held as follows:

“It is well settled that a person who makes an ex-parte Application to court, that is to say in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest possible disclosure, then he cannot



obtain any advantage from the proceedings, and he will be deprived of any advantage by him. That is perfectly plain and requires no authority to justify it.”

- h) Similarly, they quoted the cases of *Nipun Nagnda Patel v AG*: H.C Misc Application No. 463/2005, *Uburu Highway Development Ltd v CBK*; HCCC No. 29 of 1995, *Aviation & Airport Authority & Another* (2014) eKLR and *Abraham Mutai & 5 Others v Paul M. Mutwii & 34 Others* (2015) eKLR to buttress his point on one’s guilt of material non-disclosure.
- i) As to the issue that the Application is an abuse of court process, it is their contention that the Plaintiffs have sought to file several applications to frustrate the Respondents and ensure that the matter is not heard and determined to its logical conclusion. Opining that the application herein is misconceived, incompetent, is a non-starter and perpetuates a gross violation and / or abuse of court process hence be dismissed with costs.

As to who should bear the costs of this Application it is prayed that costs be awarded to the Respondents.

The 1st,2nd,7th,8th, 9th ,10th,11th And 12th Defendants Written Submissions To The Application Dated 23Rd October,2022

31.

- a) The Defendants vide their written Submissions to the notice of motion dated 23rd October,2022, following issues which they submitted on sequentially.
- b) On the issue of where there was a valid order, it was their submission that there is no valid and that the order of the honorable court on 22nd January,2019 which was thrust forward as subject of alleged act of contempt of court was interlocutory and was to remain in force up to until 22nd February, 2019 and therefore lapsed on the later date and was not in force at the date alleged acts of contempt of Court.
- c) Urging that the order of the honorable of 20th April 2020 was not served upon the 1st and 2nd defendant hence they were not aware of its existence and that the order of 23rd July, 2019 dealt with issues which already were res judicata having been decided by the Honorable Justice Kemei, J on 25th September,2019 in determining the Notice of Motion dated 4/7/2019.
- d) On whether the Respondents were personally served and whether the Respondents were personally aware of the Court Orders, it is contended that there is no proof of service upon the defendants and that Plaintiffs on 13th December,2022 orally applied to Court to have the order served upon the Registrar of Companies. The service of the said order was being done after the Plaintiffs had filed this Application hence they have not adduced the evidence that they effected service upon Registrar of Companies, Moses Toroitich Chebet, Stanley Musa Kyelenzi, Lawyer Celestine Anyango Opiyo, Boniface Odhiambo, Senior Records Officer Registrar of Companies. Urging that this Honorable Court cannot find that the Respondents and the alleged contemnors are guilty of contempt.
- e) Reliance was made on the cases of *Kasturi Ltd v Kapurchand Depar Shah* (2016) eKLR, *Tribe Hotel Ltd v Josphat Cosman Onyango* (2018) eKLR, *Republic v City Council of Nairobi & 2 others ex-parte Kaka Travellers C-operative Savings & Credit Ltd* (2012) eKLR among others to buttress their case.



- f) They contended that in the Replying Affidavit of Moses Toroitich He Deponed That The 1ST Defendant through their Board of Director's meeting held on 10th September, 2021 under BD MIN 8: 10/9/2021 appointed him as the company secretary for the 2nd Defendant hence proper procedures were followed in respect of rectifying Masaku Teachers Investment Limited Company Register of Certificate No. C. 66367 by entering Kwetu Savings and Credit Co-operative Society Limited to hold 19999 shares and Dr. Kyelenzi was nominated to hold 1 share pursuant to the Court order in Misc Application No.35 of 2015.
- g) It was the Defendant's case that the Replying affidavit of Dr. Kyelenzi who is the CEO of the 1st Defendant confirms that the 1st Respondent issued instructions for the firm of Messrs. Anyango Opiyo and Company advocates vide a letter dated 22/10/2021 to follow up on the changes of the directorship and shareholding of Masaku Teachers Investment to Kwetu Savings and Credit Co-operative Society Limited pursuant to Justice Kemei's order.
- h) It is finally submitted that it is not fraudulent nor unlawful as alleged by the plaintiffs but simply the implementation by the 1st and 2nd Defendant of the orders of the Honorable Court in Misc. Application No.35 of 2015 and complying with the said orders. Urging that the alleged contemnors are not in violation of any court order and no basis has been laid by the Plaintiffs to warrant committal for contempt of court orders asking this honorable court to dismiss the application dated 23rd October,2022 with costs to the alleged contemnors.

The 1st, 2nd,7th,8th,9th,10th ,11th And 12th Defendants Written Submissions On The Notice Of Motion Dated 16th February,2023

32.

- a) The Defendants vide their written Submissions to the Notice of Motion dated 16th February, 2023, raised the following issues which they submitted on sequentially.
- b) On the issue whether the defendants have satisfied the conditions upon which a temporary injunction can be granted, reliance was made on Order 40 (1) (a) and (b) of the [Civil Procedure Rules 2010](#).
- c) Opining that the Plaintiffs are not shareholders of the 2nd Defendant, they do not run day to day affairs of the 2nd Defendant and that the purported public Company is unknown to the Defendants the company as registered is a private company with registration no C. 66367 and the extra ordinary general meeting purportedly held cannot hold water as the said meetings were never held by the shareholders and Directors of the 2nd Defendants.
- d) Urging that in the instant case, there is no doubt the suit property is in danger of being alienated as the Plaintiffs do not deny that they have trespassed and demanding to take over management of the suit property and to the detriment of the Defendants/Applicants reliance was made on the cases of *Giella v Cassman Brown & Company Limited* (1973) EA 358, R.J.R *Macdonald v Canada (Attorney general)* and [Paul Gitonga Wanjau v Githuthi Tea Factory Company Ltd & 2 Others](#) (2016) eKLR to buttress their point on conditions that court considers when issuing temporary injunction.
- e) Finally, it was submitted that act of trespass by the Plaintiffs does not confer any proprietary rights on the plaintiffs or any other entity or persons whatsoever hence the Defendants have met conditions necessary for the grant of interlocutory injunction relief as enshrined in the well- established case of *Giella v Cassman Brown supra*.



Analysis/ Determination

33. The Court considered the pleadings and submissions of respective parties through Counsel on record and the issues for determination are centered on the 3 outlined Applications and Preliminary objection.

Preliminary Objection

34. In the case of *Mukisa Biscuits Manufacturing Ltd –v- West End Distributors* (1969) EA 696 is landmark case on the issue of what constitutes a preliminary objection where their Lordships observed thus:

“----a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

In the case of *Peter Mungai v Joseph Ngaba Kuria & another; Leah Njeri Ndichu (Interested Party)* [2022] eKLR, it was observed at paragraph 20 that:

“20. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.”

35. The Preliminary Objection dated 21st February,2023 and filed in court on 1st March,2023, The Plaintiffs herein raised the objections to the application dated 16th February,2023 on the basis that the said application seeks to unlawfully appeal against 3 Judge bench and to procedurally vary or set aside the orders by the Court of Appeal granted in C.A. Nairobi Civil Application No. 12 of 2020 *James Muiya & 11 Others v Kwetu Savings & Credit Co-operative Society* granting stay of execution of Ruling and Orders of 26/2/2018 and all consequential orders made pursuant to and in reaction to Machakos High Court Misc Application No. 35 of 2015.
36. The Court orders granted in Machakos High Court Misc Application No. 35 of 2015 were that the Company Registrar rectify the Register in respect of the 12th Applicant removing and/or expunging therefrom the names of the Applicants; the Register of the 12th Applicant be rectified by entering the Respondents as holding 19,999 shares while that of the 12th Applicant retains 1 share. The Court of Appeal granted stay of execution of these orders pending hearing and determination of the appeal.



37. The instant application of 16/2/2023 the applicants seek in a nutshell maintenance of the current status quo pending hearing and determination of applications and main suit and will not interfere with proceedings and Ruling of Machakos High Court Misc Application No. 35 of 2015 which is the subject of Appeal. The stay of execution of orders in the said matter Court of Appeal granted in C.A. Nairobi Civil Application No. 12 of 2020 binds all parties herein and this Court and therefore in its proceedings would not interfere with the stay of execution order by C.A.
38. The Court shall consider the application of 16/2/2023 on merit without interfering /jeopardizing the stay of execution granted by the Court of Appeal and hence dismisses the Preliminary Objection as outlined hereinabove. The Preliminary Objection is anticipatory as no interference/breach has been made by this Court or proved to have been made. Secondly, the Preliminary Objection is based on disputed facts and is not a pure point of law.

Contempt Of Court Application

39. The Notice of Motion dated 23rd October,2022 and filed in court on 27th October,2022, the Applicant sought orders Kwetu Savings & Credit Co-operative Society, Masaku Teachers Investment Limited & Registrar of Companies the 1st,2nd and 3rd Defendants/ Respondents together with their current directors and principal officers Moses Toroitich Chebet, Stanley Musa Kyelenzi, Lawyer Celestine Anyango Opiyo, Boniface Odhiambo, Senior Records Officer Registrar of Company Office be jointly and severally to be found to be in contempt of the court orders made on 22nd January,2019, 23rd July,2019 and 29th April,2020.
40. In *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others* [2014] eKLR the Court of Appeal held that:
- “By dint of section 5 of the *Judicature Act*, the procedure of instituting contempt of court proceedings in Kenya is set out in Part 81 of the *Civil Procedure of the UK* which entirely replaced Order 52 of the Rules of the Supreme Court England (RSC) through the Civil Procedure (Amendment No.2) Rules of 2012. The court observed that the repealing of the said Order 52 brought certain changes in the procedure for bringing contempt applications which are relevant to the objection herein.” See the Court of Appeal in *Shimmers Plaza Limited v. National Bank of Kenya Limited* [2015] eKLR.
41. In the case of *Sam Nyamweya & Others -V- Kenya Premier League Ltd And Others* [2015] eKLR) the Court stated that:-
- “Contempt of Court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”
42. In *Re Bramblevale* (1970) 1 Ch. 128 Lord Denning, affirmed this position when he stated as follows:
- “Contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honored phrase, it must be proved beyond all reasonable doubt.”



43. In the case of *Trusted Society Of Human Rights Alliance v. Cabinet Secretary For Devolution And Planning & 3 Others* [2017] eKLR provides:

...There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard which in civil contempt cases the burden of proof is higher than a balance of probabilities required in civil cases and provides that:

- i. the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- ii. the defendant had knowledge of or proper notice of the terms of the order;
- iii. the defendant has acted in breach of the terms of the order; and
- iv. the defendant's conduct was deliberate...

44. The legal provision and case-law above outline what constitutes Contempt of Court and the mandatory requirements to conform to Contempt of Court. The Court orders in issue are;

- a. 22nd January, 2019 vide Application of 3/12/2018 provides among other orders;

-That status quo with respect to the 2nd Defendant's Register to be maintained

-That 4th & 5th Defendants be and are hereby restrained from effecting any fraudulent and/or unlawful conveyance of Land No Machakos Township block 11/112 & Makueni Nundu Mbutu Plot No 908, Kiboko settlement Scheme Makindu Town (Kibwezi), property and assets of the 2nd Defendant contrary to the Plaintiff's shareholding interests pending and hearing and determination of this Application.

- b. 23rd July, 2019 the Court issued orders;

-That 1st, 7th, 8th, 9th, 10th & 12th Defendants be and are hereby ordered and directed to surrender/handover to the 3rd Defendant and/or 2nd Defendant's bona fide and duly elected Directors and original certificate of Incorporation No C 66367 dated 11/8/1995 for purpose of replacement thereof and issuance with correct Certificate of Incorporation number C 14/95.

-That in the event of default by the Respondents to comply with Order (1) above within 30 days of service of the Order by Licensed Court Process Server and furnishing of proof of service

The 3rd Defendant may proceed to issue the correct Certificate of Incorporation as replacement for the earlier Certificate of Incorporation

- c. 29th April, 2020, the Court issued orders as follows;

(after Court Ruling of 29/4/2020)

That pending the hearing and determination of this suit the 1st, 2nd, 3rd, 7th, 8th, 9th & 10th Defendants be and hereby restrained by/from effecting any fraudulent and/or unlawful change in the Register and shareholding of 2nd Defendant which will affect, extinguish, usurp the Plaintiffs share or wind up the 2nd Defendant.



That pending hearing and determination of this suit , the 4th & 5th Defendants be and are hereby restrained from effecting any fraudulent and unlawful conveyance of the land Machakos Township Block 11/112 and Makueni Nundu Mbutu Plot 908 Kiboko Settlement Scheme Makindu Town (Kibwezi) property and assets of the 2nd Defendant contrary to the Plaintiffs shareholding interest.

45. The 2nd Defendant submitted that the 3rd Defendant defied Court Orders as per the Court Ruling of 7/2/2022 by Hon G.V. Odunga J (as he then was) for 3rd Defendant to convene a meeting of the 2nd Defendant and the resolution to be filed in Court. It was alleged that such meeting was not convened but unlawful changes in the Company Registry were said to be coordinated by 3rd Defendant
46. The 1st, 3rd-11th Respondents delinked the Company from the online system with a view to effecting fraudulent and contemptuous changes in the Company whilst purporting that the Company the Company that was always online had somehow disappeared from the online file linking system.
47. The loss/misplacement of the file of the Company (ies) was not communicated or notice issued to parties or resolutions undertaken to support reconstruction of the Court file.
48. It was submitted that the Registrar of Companies had no powers to quash and remove conversion of public company to private Company in contempt of existing and prevailing Court orders and therefore the Respondents are in willful and blatant contempt of Court orders.
49. The Respondents on the other hand submitted that the order of the honorable court on 22nd January, 2019 which was thrust forward as subject of alleged act of contempt of court was interlocutory and was to remain in force up to until 22nd February, 2019 and therefore lapsed on the later date and was not in force at the date alleged acts of contempt of Court.
50. With regard to the order of the honorable Court of 20th April 2020 it was not served upon the 1st and 2nd defendant hence they were not aware of its existence and that the order of 23rd July, 2019 dealt with issues which already res judicata having been decided by the Honorable Justice Kemei on 25th September, 2018 in determining the Notice of Motion dated 4/7/2019.
51. On whether the Respondents were personally served and whether the Respondents were personally aware of the Court orders, it is contended that there is no proof of service upon the defendants and that Plaintiffs on 13th December, 2022 orally applied to court to have the order served upon the Registrar of Company. The service of the said order was being done after the plaintiffs had filed this Application hence they have not adduced the evidence that they effected service upon Registrar of Companies.
52. The Applicant confirmed existence of valid legal and regular Court orders as outlined above but with regard to the issue of service of the said Court orders however, it was not proved on record that the Orders were served to ALL impugned parties by service of the said orders with Penal Notice the terms of the order(s) and Affidavits of Service filed or that these parties participated in proceedings that culminated to the said Court orders.
53. The Court Orders as set out are/were clear and unambiguous and were binding on the Respondents but in the absence of proof of service or participation in the proceedings that led to the issuance of the said orders the Court cannot delve into whether the Respondents acted in breach of the terms of the order and/or that the Respondents conduct was deliberate.
54. Of concern the Registrar of Companies powers and duties have been brought into question, the Registrar of Companies (the 3rd Respondent) this was to effect that Orders of 23/07/2019 replacing a Certificate of Incorporation with another Certificate was outside the powers and duties of the Registrar



of Companies. Section 832 & 839 of Companies Act set out the role of Registrar of Companies within this context, contempt of Court Orders are therefore premature.

55. In the instant matter there are various Court orders that require outlining;
- a. Ruling by Hon.D.K. Kemei J of 26/2/2018
 - b. Ruling by Hon G.V.Odunga J – 29/4/2020
 - c. Ruling by Hon.G.V.Odunga J of 7/2/2022
 - d. Ruling by Hon.G.V.Odunga J of 18/10/2022
 - e. Ruling by C.A. of 3/2/2023
56. In each of the Rulings were/are Court orders that required compliance by parties herein which seemingly have not been complied with. What seems to be apparent are competing legal interests and rights over the Companies involved, whether 1st & 2nd Defendants Companies are private or public Companies, holding and/or subsidiary Companies and which is the legal/valid Certificates of Incorporation, Memarts (Memorandum & Articles of Association) whether Annual General Meetings(AGM) were held, Annual Returns filed from 1995-2013 filed that were omitted give different versions of status of the 1st & 2nd Defendants Companies and awaiting hearing and determination of the main suit, these issues remain unresolved at the Interlocutory stage.
57. In this situation it is problematic to pinpoint contempt of court specifically to a party as the situation is fluid and is hotly contested and awaits final determination upon hearing and orders on the prevailing dispute.
58. Therefore, at this stage, this Court considers the parties well informed of the said orders pending compliance and are allowed a grace period to comply and purge the contempt pending hearing and determination of the matter. The application for contempt of Court orders is not upheld due to circumstances raised that prevented compliance.
59. In Directline Assurance Co Ltd v. Jamii Bora Bank Ltd & 5 Others (2015) eKLR where it was stated that;
- “.....When a court orders are being disobeyed, or are about to be disobeyed, and the contemnor comes down and purges the contempt, either out of his own freewill or at the prompt of the court, the court will accept the purge of the contempt unless circumstances exist to suggest that the coming down, or the alleged purging of the contempt, is not genuine, or is done in bad faith, or is in itself a continuation of the original contempt. In accepting the coming down of the contemnor, the court will assess the reasons given for the disobedience, the time taken to come down, and the cost incurred in the process”.

Eviction/handover Of Management

60. By Notice of Motion dated 26th January,2023 and filed in court on 27th January,2023 the Applicant herein sought orders that the 1st Defendant/ Respondent Kwetu Savings & Credit Co-operative Society Ltd to handover to the Plaintiffs, shareholders of the 2nd Defendant and their duly elected directors; the management, running and operations of Makueni Nundu Mbutu Plot No. 908 Kiboko Settlement Scheme Makindu Town (Kibwezi) Kibwezi Funeral Home Services pursuant to the court made on 22nd January,2019, 23rd July,2019 and 29th April,2020.
61. This Court perused the Court file and found no Court order(s) on overhaul and/or changeover of management and/or operations of the 1st Defendant but there are various interim /temporary orders



to preserve the subject-matter of the dispute. Secondly, the applicants herein seem to seek final orders before/pending hearing of the dispute, interpartes.

62. On 22/01/2019 – status quo was maintained of 2nd Defendants Register and Defendants restrained from any fraudulent/unlawful conveyance. On 23/07/2019 - the Defendants were to handover to 3rd Defendant or 2nd Respondent bonafide or duly elected Directors as per the Certificate of Incorporation. On 29/4/2020 the Defendants were restrained from unlawful or fraudulent change in the Register.
63. It is appreciated that the hearing of the substantive suit has taken long due to various applications filed by parties for hearing and determination, but the Court has to grant orders based on evidence adduced by parties with a view to proving each party's claim to aid the Court in reaching an informed decision. In the absence of such a process of viva voce evidence subjected to cross examination to test its veracity, the Court cannot at this stage grant Final Orders while the matter is pending for hearing of the matter. Eviction of current office bearers and taking over management and operations of the 1st Defendant is a final order and shall await hearing of the suit.

Application For Restraining Orders

64. The Notice of Motion dated 16th February,2023 and filed in court on 17th February,2023 the Applicant herein sought orders that: Pending the hearing and determination of this application, and/ or main suit, an interlocutory order do issue restraining the Plaintiffs, their employees, servants, agents, advocates and any other person through whom they may act from illegally encroaching, trespassing, interfering, leasing and/ or in any way other manner dealing with or effecting any fraudulent and/ or unlawful conveyance or any fraudulent and/ or unlawful change in the share company shares of Masaku Teachers Investment Limited of Registration No. C. 66367 Kibwezi in any way detrimental to the interests of the 1st ,2nd ,7th ,8th ,9th & 10th Defendants; and from illegally and fraudulently taking over the management, running, operations and/ or in any way other manner dealing with the 2nd Defendant properties known as Machakos Township Block 11/112 and Makueni Nundu Mbutu Plot No. 908 Kiboko Settlement Scheme Makindu Town Kibwezi in any way detrimental to the interests of the 1st ,2nd ,7th ,8th ,9th & 10th Defendants.
65. This Court finds similarly, the parties herein the Defendants are seeking far reaching permanent and final Court orders during the interim period, in a nutshell the Application seeks non-interference of the Plaintiffs & 1st Defendant in 2nd Defendants operations and management of the Company. The other parties are Plaintiffs are pursuing legal claims against the Company and have interim orders to protect their interest and hence involvement is expected. These temporary orders sought are final orders in the absence of hearing and determination of the dispute.
66. Secondly, the Applicant ought to prove a prima facie case to warrant injunction under Order 40 CPR 2010. At this stage the parties have deposed competing and parallel legal claim and interests awaiting determination.
67. In the case of *St Patricks Hill School Ltd versus Bank of Africa Kenya Ltd* [2018] eKLR the court opined that; -

“I am of the view that the conditions for the grant of an interlocutory injunction are now well settled as stated in *Giella v Cassman Brown and co ltd* 1973 EA 360, *Mrao v First American Bank of Kenya Ltd and 2 others* 2003 klr 125, and *American Cynamid co v Ethicon Ltd* 1975 1All E.R. The principles are: (a) an applicant must show a prima facie case with a probability of success (b) In an interlocutory injunction the applicant must show that unless



injunctive orders are granted he will suffer irreparable harm which would not be adequately compensated for by damages. (c) And if in doubt in any of the above conditions the court will decide then on a balance of convenience.”

68. In the case of *Mobile Kitale service Station versus Mobile Oil Kenya Limited & Another* (2004) 1 KLR 1 the Court held that; -

“An interlocutory injunction is given on the court’s understanding that the defendant is trampling on the rights of the Plaintiff.

An interlocutory injunction, being an equitable remedy, would be taken away (discharged) where it is shown that the person’s conduct with respect to matters pertinent to the suit does not meet the approval of the Court which granted the orders which is the subject matter. The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose-to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it.”

69. This Court notes with concern that on record are Court Rulings of Courts of competent, similar, equal jurisdiction where interim /temporary orders to protect the subject matter have been granted but not complied with. Therefore, this Court will not grant further orders but parties to ensure compliance with existing Court orders as they remain valid, legal and regular orders of the Court until set aside, varied, reviewed or successfully appealed against.

In the case of *Prisillah Wanja Kibui v James Kiongo Kibui & Charles Wambugu Gitonga* ELC 170 of 2011 it was held as follows;

Status quo is defined in *Black’s Law Dictionary* as “the situation as it exists”

In my view an order to status quo to be maintained is different from an order of injunction both in terms of the principles for grant and practical effect of each. While the latter is an substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for preservation of the situation as it exists in relation to pending proceedings before hearing and determination thereof.

Disposition

1. The applications are dismissed.
2. The Preliminary Objection is dismissed.
3. Parties to comply with Court orders in the Rulings on record as they remain valid legal and regular orders of the Court.
4. The parties to maintain status quo pending hearing and determination of the suit/matter.
5. In the meantime, the 2nd Defendant Company to avail the Asset Register and Auditor’s Certified Annual Accounts 2019 – 2023 to the DR MHC within 60 days of the Ruling.
6. The Parties to engage/complete Pre- Trial Management with DR MHC within 60 days.
7. The Parties may consider Court Annexed Mediation and proceed to DR MHC for screening.
8. Costs in the Cause.
9. Further Mention for Directions in New Term – 9/10/2023.



**RULING DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 27/7/2023.
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W.MUIGAI

JUDGE

