REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO. 35 OF 2015

(FORMER NAIROBI ELC MISC 78 OF 2015)

KWETU SAVINGS AND CREDIT CO-OPERATIVE

SOCIETY LIMITED (formerly MASAKU TEACHERS INVESTMENT LTD**......APPLICANT**

VERSUS

JAMES MUIYA AND 11 OTHERS...RESPONDENTS

RULING

1. By a Notice of Motion dated 4th July, 2019, the applicants herein vide their advocate Moses Odawa and Co Advocates pray for the production, introduction and formation of part of the record of proceedings of a letter by the Registrar of Companies dated 18th June, 2019 directing the 12th Respondent to return the earlier certificate of incorporation No C 66367 dated 11th August, 1995 for purposes of replacement thereof and issuance of the correct certificate of incorporation Number C 14/95 confirming the status of the company as a limited liability company**.**

2. The said application is supported by the affidavit of James Muiya, Israel Nzau, Cosmas Mwololo and David Mwanthi sworn on the 4th July, 2019. It was deponed that the 1st, 3rd, 7th and 8th Respondents were sued in their subscriber capacity and were issued with the subject letter whose contents they believe ought to be brought to the attention of the court as the SACCO Applicant's rights will be defined by the contents of the letter.

3. In opposition to the application, the Chief Executive Officer of the Applicant/Respondent filed the replying affidavit of Stanley Kyelenzi, described as the CEO of the applicant/respondent, sworn on 12th July, 2019. It was contended that the court directed that the Register of Companies be rectified and that the applicant/respondent be entered in the register to hold 19,999 shares and one share to be held by a nominee of the applicant/respondent. The deponent averred that the court is functus officio vide the decision of 26th February, 2018 and in this regard the court could not make any pronouncements on Masaku Teachers Investments Limited which was what the instant application sought. He further averred that the certificate of incorporation of Masaku Teachers Investments Limited has never been an issue during the dispute that resulted in the subject decision and therefore the instant application was an abuse of the court process. Further that the subject letter was a response to a letter that was dated 21st May, 2019 by persons claiming to be directors of the 12th respondent and who are clearly in contempt of the court order dated 26.2.2018 and that the instant application seeks to reopen a substantive dispute that has been determined.

4. In rejoinder, the 1st, 3rd, 7th and 8th Respondents averred that the subject letter proves that the 12th Respondent is a public company.

5. The application was dispensed by way of oral submissions and Mr Odawa for the Respondent/Applicant submitted that there are new changes on the status of the 12th Respondent hence the court ought to be made aware of the same as the subject letter will be important in the ruling on stay of execution pending appeal.

6. Mr Amollo learned counsel for the Applicant/Respondent submitted that the court has already made a pronouncement on the issue and this is an attempt to review the order through the backdoor seeking to bring in a document that was not part of the ruling on 26.2.2018. Further that no evidence has been brought to show that the new certificate was prepared and further that the said applicants have filed a case HCCC 29 of 2018 at Machakos in an attempt to undermine the ruling dated 26.2.2018. Learned counsel submitted that the 12th Respondent was a limited liability company and enjoyed all the privileges and the fact of change of certificate is of no consequence to this matter. In addition, the directors could not be sued unless they had committed a civil wrong and he urged the court to dismiss the application.

7. Mr Makundi also teaming up with Mr Odawo submitted that the court is not functus officio as the ruling on stay is yet to be delivered and the status of the 12th Respondent is what the admission of the latter seeks to clarify to court. Further that the letter will render the appeal nugatory and that since the applicants are subscribers of the 12th Respondent then the new issue ought to be incorporated.

8. I have considered the pleadings, depositions and rival submissions. I take the following view of the matter. It is important to note that this matter is pending ruling and pending hearing of the appeal. There is consequently a general caution on making findings that would embarrass the appeal court. The veracity of the claims of the 1st, 3rd, 7th and 8th Respondents and the rebuttals by the applicant ought to be tested by evidence which in my mind is the true province of the appeal court. As a result, the relevance and admissibility of the documents, will depend on the rules of evidence and the pleadings by the parties in the appeal. The application appears to be mischievously hinged on the law that provides that a party could be compelled to deliver the impugned materials as prayed, however the 1st, 3rd, 7th and 8th Respondents seem to seek to have admitted as evidence a letter that they say confirm the status of the 12th Respondent and hence the issue for determination in the instant application is whether the application should be allowed.

9. In determining this application, it is my view that the court has to consider the facts of the present case as presented to the court and direct its mind to the relevance and necessity of the documents which the 1st, 3rd, 7th and 8th Respondents seek in this matter as well as the law that is applicable.

10. The application is brought under Order 11 and 14 Rules 4 and 6 which relate to an application for an order of discovery. Related to order 14 is Section 22 of the Civil Procedure Act that provides the court with the power to make such orders as maybe necessary in relation to matters regarding discovery, inspection, impounding and return of documents. Learned Counsel for the applicant argued that the documents sought to be presented are not only relevant to this case, but that the 12th Respondent was sued as a company. Counsel for the 1st, 3rd, 7th and 8th Respondents argued that the same have a high evidential value with respect to the status of the 12th Respondent as a public and not a private company. The case of **Oracle Productions Limited v Decapture Limited & 3 others HCCC No. 567 of 2011** posited that discovery is limited solely to the matters in contention, whereby relevance can be gauged or tested by ***the Pleadings or particulars provided***.

11. As illustrated by the learned authors in **Halsbury's Laws of England, Volume 13 at para 38**, the Court will not make any orders for documents which have no significance or relevance to the matter. The learned authors state:

> ***"Discovery will not be ordered in respect of an irrelevant allegation in the pleadings, which, even if substantiated, could not affect the result of the action nor in respect of an allegation not made in the pleadings or particulars nor will discovery be allowed to enable a party to "fish" for witnesses or for a new case, that is to enable him frame a new case. Each case must be considered according to the issues raised; but where there are numerous documents of slight relevance and it would be oppressive to produce them all, some limitation may be imposed."***

12. It is clear that the true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at the trial. In ***Oracle Productions Limited v Decapture Limited & 3 others [2014] eKLR*** where **Kimondo J** observed thus;

> ***"............Pre-trial discovery is so central to litigation that the entire order 11 of the Civil Procedure Rules 2010 has been substantially devoted to it, including sanctions for non-compliance. Orders 4 and 7 now require parties to file and serve documentary evidence with their pleadings. Order 14 empowers the court to order for production, impounding and return of documents. I agree with the holding of Havelock J in the Concord Insurance case (supra) that discovery should be limited solely to the matters in contention. Relevance can only be gauged or tested by the pleadings or particulars provided. Halsbury's Laws of England (supra) paragraph 38. See also Kahumbu Vs National Bank of Kenya Limited [2003] 2 E.A 475, Oluoch Vs Charagu [2003] 2 E.A 649."***

13. From the foregoing case, it goes without saying that relevance of the documents sought must be tested by the pleadings and particulars presented to the court. After examining both the pleadings in this application, it is my opinion that from the competing claims disclosed in the pleadings, the 1st, 3rd, 7th and 8th Respondents seek admission of the impugned letter to get a fair trial. Nevertheless, I am not able to find whether or not the subject letters are relevant and necessary. I say so because, the nature of the dispute at hand are contained in the parent file and I am curious why a new file was opened and yet there is already a main file that is in existence. *A priori*, the 1st, 3rd, 7th and 8th Respondents have not shown to the court how the documents sought are relevant to the application. There is a remedy of review that would be available to them to show the court why the application should be allowed however it is seemingly barred by the doctrine of *res judicata*.

14. Be that as it may, I also find that the 1st, 3rd, 7th and 8th Respondents have the onus of proving that the Applicant is in possession of the documents sought. Fortunately or unfortunately, the applicant is not the custodian of the document for the same was authored by the Registrar of Companies who is not a party to the suit. The applicant's CEO has indicated in its affidavit that the subject letter is in response to a letter that was issued on the registrar of companies and the same has been conveniently left out of the 1st, 3rd, 7th and 8th Respondents application and therefore the court cannot make an imaginary order that is not supported by necessary evidence as this would be tantamount to putting the cart before the horse. To this end, I find that at the opportune time the issue of the document in question will be dealt with appropriately when the court has been properly moved. Suffice to add that as the document is contested the same calls for evidence to be received so as to enable the court make an informed decision thereon.

15. It is my opinion that the court cannot compel the Applicant to produce any material or document that is not in its possession. It also cannot sit to rewrite the pleadings of the parties neither can it reopen a matter that it has already determined and made a pronouncement upon. The applicant confirms that the matter had already been heard and determined and that what is now pending is a ruling on stay pending appeal. Bringing up new issues at this stage will muddle up the matter. It is appropriate for the parties herein to await the decision on the application for stay pending appeal and thereafter they will be at liberty to take any steps deemed necessary. From the forgoing, it is my

finding that the court cannot grant the orders sought.

16. In the result, it is my considered view that the application dated 4th July 2019 fails and is dismissed with costs.

It is so ordered.

Dated and delivered at **Machakos** this **25th** .day of **September, 2019.**

D. K. Kemei

Judge