



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC APPLICATION NO. 35 OF 2015

(FORMERLY ELC MISC. NO. 78 OF 2015 NAIROBI)

KWETU SAVINGS & CREDIT CO-OPERATIVE

SOCIETY LIMITED (formerly MASA KU TEACHERS

SAVINGS & CREDIT CO-OPERATIVE SOCIETY LTD....APPLICANTS

VERSUS

1. JAMES MUIYA

2. DANIEL MATHUNGWA

3. ISRAEL NZALU

4. RICHARD MASILA KAVEKE

5. PATRICK SOVE

6. DAVID MWANTHI

7. DAVID KIOKO

8. COSMAS MWOLOLO

9. WILSON MUTUNGA

10. LAWRENCE MUTUNGA

11. JOSPHAT KALANZO

12. MASA KU TEACHERS INVESTMENT LIMITED.....RESPONDENTS

RULING

1. The Applicants filed a notice of motion dated 2nd February, 2015 seeking orders that:

a) The register of companies in respect of the 12th Respondent be rectified by removing expunging there from the names of the 1st to 11th Respondents.

b) The register of companies in respect of the 12th Respondent be rectified by entering the applicant to hold nineteen thousand nine hundred and ninety nine (19,999) shares.

c) The register of companies in respect of the 12th Respondent be rectified by allocating one (1) share to a person to be nominated

by the applicant.

d) The Applicant be at liberty to complete and file necessary statutory documents including inter alia returns and form 203 A to give effect to the rectification as ordered by the court.

e) The 1st to 11th Respondents be ordered to pay damages to the applicant.

f) The costs of this Application be borne by the 1st to 11th respondents.

2. The grounds upon which the motion was based were that; by a letter dated 20th May, 2014 the applicant applied to change its name, amend its by-laws and for replacement of its certificate of registration and the application was accepted. Sometime in mid-1991, the applicant resolved to purchase from Machakos District Co-operative Union Ltd (*'the union'*) land parcel L.R. No. Machakos Town/Block II/112. The applicant engaged the services of M/s Otieno Lumumba & co. advocates to undertake the purchase and provide consultancy services. The Applicant sought and obtained the authority of the Ministry of Co-operative Development to purchase the said land. That although the union had indicated that it would sell the land for a sum of Kshs. 3.7 Million and the Ministry had given authority to the applicant to pay the said sum, the applicant negotiated a price of Kshs. 3.2 Million and paid the same. By a letter dated 11th July, 1991, the Municipal Council of Machakos gave its consent for the transfer of the land from the Union to the Applicant and the land was transferred to the applicant on 1st August, 1991 vide a certificate of lease. By a letter dated 12th October, 1994 the Applicant instructed their M/s Lumumba & Ojwang', the successor of Otieno Lumumba & co. advocates, to undertake certain tasks namely, incorporation of an investment company and the transfer of the land from the applicant to the investment company. That it was the applicant's intention that it would concentrate on its core-business as a savings and credit co-operative while upon incorporation Machakos Teachers Investments Ltd would be its special purpose vehicle to undertake investment and ultimately the land and other investments would be transferred to the said special purpose vehicle. In accordance with the Applicant's instructions, Lumumba and Ojwang' advocates, Masaku Teachers Investment Ltd was incorporated on 11th August, 1995 vide certificate of incorporation no. 66367. That by reason of fraud or deceit or inadvertence and without any lawful justification, the then officials of the applicant caused their names to be endorsed upon the memorandum of association and articles of association as the promoters and subscribing shareholders of Masaku Teachers Investment Limited and took up shareholding to wit:

<u>Names</u>	<u>Shares</u>
James Muiya	300
Daniel	300
Israel Nzallu	600
Richard Masila Kaveke	300
Patrick Sove	300
David Mwanthi	150
Cosmas Mwololo	300
Wilson Mutunga	150
Lawrence Mutunga	150
Josephat Kalanzo	300
<u>Total</u>	<u>3,150</u>

3. That the shares of 3,150 taken was valued at Kshs. 63,000/= out of the total authorized 20,000 shares and no shares was allocated to the applicant. That the 1st to 11th respondents did not pay any money for the shares they purported to take up in Masaku Teachers Investment Ltd and therefore fraudulently, deceitfully or inadvertently caused themselves to be entered into the register of Masaku Teachers Investment Ltd as promoters and subscribing shareholders to the Applicant's prejudice without paying any consideration for the shares that they purport to own and therefore it is equitable that the prayers sought be granted. That while awaiting for the incorporation of the special purpose vehicle, the Applicant engaged a firm of architects and contractors to proceed with the development of the land and related activities. That the tenants who were inherited from the union were clear in their mind that their landlord was the Applicant and not Masaku Teachers Investment Ltd. That due to the foregoing, the 1st to 11th respondents have no justification to deny that they took leave of their obligations as officials of the Applicant to breach their duties as trustees of the 3,150 shares they hold in Masaku Teachers Investment Ltd. That due to the apprehension by the Applicant that Masaku Teachers Investment Ltd would without any justification claim ownership of the land, representations were made to the land Registrar, Machakos and the Commissioner of Co-operatives which resulted in the rectification of the land register and the ownership of the land was then reverted to the applicant. That it is the collective desire of the members of the applicant who initially comprised of members of the teaching profession in the old Machakos District (currently Machakos County and Makueni County) to have the register of Masaku Teachers Investment Ltd rectified so that the applicant as the real and *bona fide* shareholder and proprietor of the said company may take control and convene an appropriate meeting of its members to amend the memorandum and articles of association and do all things relating to the company and move the company to necessary heights.

4. In contention thereto, the 1st Respondent swore a replying affidavit on 26th February, 2015. He stated that while it is true that Masaku Teachers Savings and credit co-operative society limited purchased the land but that it is his team that negotiated the price at lower than the limit allowed by the Ministry. That the instruction to Lumumba and Ojwang' was that the society was not to construct a building but transfer the plot from Masaku teachers to the newly formed company and that the transfer of the plot will form the purchase of shares by the society in the company. That the value of the land was to be the shares contribution of the society in the company's shares capital of the company, being Kshs. 24 million divided into 1.2 Million shares of Kshs 20/= each but erroneously indicated as 20,000/= shares in the memorandum of association but later increased to Kshs. 5 Million to enable the company raise sufficient capital to complete the building,

5. That the transfer of the land to the company was done at Kshs. 4 Million this then being the society contribution into the company being partly the 25% society's contribution toward the building. That each shareholder, including the society has a share certificate confirming the number of shares held. That the applicant has all along been a tenant of the landlord company and has duly been paying rent like other tenants in the building. That the balance sheets of the 12th respondent have been reflecting the ownership of shares as 410,064 of a total of 2.5 Million between the year 2007 and 2012 while the rest being held by individual persons.

6. That the sacco has been receiving dividends due to its shareholding and at one time the deponent to the supporting affidavit Mr. Kyelenzi printed a copy of top 22 shareholders in the year 2004. That on 23rd March, 2001, the leasehold in favour of the company was renewed for a further 99 years. The Ministry of Co-operatives from 1990 to date did not allow the society to go into real estate as suggested by the applicant. That the financial statement of the 12th respondent since incorporation to date as well as the Management Committee meetings minutes of the Society of 1993-1996 are in custody of the applicant which minutes vindicate him on matters raised in this matter.

7. That the transfer of ownership of the land from the 12th respondent to the society was fraudulent and illegal and it forced the respondents to raise the issue with the land registrar leading into a restriction of dealings with the said leasehold. That upon further inquiry from the land registrar, it was revealed that the land had been sold and transferred to the applicant. That as by law required, the matters raised were brought to the attention of the registrar of companies who by a letter dated 3rd February, 2014 restrained the applicants from changing the status of the company after summoning and hearing both sides which included the said Mr. Kyelenzi. That although a caution was lodged against any dealings in the land, the same did not see the light of day. That rather than comply with the directions and advice of the registrar of companies, the applicant transferred the land to itself in May, 2014. That the mentioned assets form part of the company and the changes done without regard or any notice and or resolution of the members of the company and the present application are aimed at hiding the truth and is an abuse of court process.

8. The supplementary affidavits subsequently filed were a reiteration of the parties facts in their initial affidavits. It was the applicant's submission that by reason of fraud, deceit or inadvertence, the respondents being officials of the applicant caused their names to be endorsed upon the memorandum and articles of association of Masaku Teachers Investment Ltd as the promoters and subscribing shareholders and took up 3,150 shares out of the authorized share capital of 20,000. That the said shares were never allotted to the respondents and they were never paid for.

9. On the other hand, the respondents submitted that despite alleging fraud on the part of the 1st to 11th respondents, no particulars of fraud were specifically pleaded in the pleadings filed by the applicant as in law required. It was further argued that no fraud has been demonstrated. The respondents in this regard cited Gudka v. Dodia Civil Appeal No. 21 of 1980 and James Muthui Mungania v. Margaret Karema where the courts held that an allegation of fraud must be strictly proved more than on a mere balance of probabilities.

10. I have given due consideration of the parties case together with their submissions. I shall not delve into the issue of transfer of the land as this is not within the confines of this court in terms of jurisdiction. The issue that is therefore left for this court's determination is whether or not the 1st to 11th respondents caused their names to be endorsed upon the memorandum and articles of association of Masaku Teachers Investment Limited as the promoters and subscribing shareholders and took up 3,150 shares out of the authorized share capital of 20,000.

11. Clause 5 of the memorandum and articles of association states that "The capital of the Company is Kenya Shillings Twenty-Four million (Kshs.24,000,000/=)divided into Twenty thousand (20,000) shares of Kenya Shillings twenty (20/=) each with such rights, privileges and conditions respectively attached thereto as may be from time to time conferred by the regulation of the company. The 1st to 11th respondents are seen to have shares allocated as alleged by the applicant. While the said respondents contend that allegation, the memorandum of association confirms the applicant's allegation. I further note that at clause 6 of the said memorandum and articles of association, adjustments can be made on the shares but only subject to consent or confirmation as required by the law. The said respondents other than alleging a typographical error on the memorandum and articles of association have not furnished court with any such consent or otherwise. In the absence of the requisite consent or any legitimate waiver thereof advanced to the Respondents, I find their claim and opposition to the Applicant's Application fails to meet the requisite threshold.

12. In the result the Applicant's Application dated 2nd February, 2015 has merit. The same is allowed as prayed with costs to the Applicants.

It is so ordered.

Dated and Delivered at Machakos this 26th day of February, 2018

D.K. KEMEI

JUDGE

In the presence of:-

Munyao for Makundi - for the Applicants

No appearance for Omollo - for the Respondents

Kituva - Court Assistant