



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NUMBER 175 OF 2015**

**MIGORI TEACHERS SACCO SOCIETY LTD. .... PLAINTIFF**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA LTD. .... DEFENDANT**

**AND**

**MSL SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LTD. .. APPLICANT**

**R U L I N G**

1. The proposed interested party MSL Savings and Credit Co-operative Society Limited has moved this honourable court by way of a Notice of Motion dated 1<sup>st</sup> day of October, 2015 under Section 3A of the Civil Procedure Act, Order 1 Rule 10(2) of the Civil Procedure Rules 2010, seeking the following orders:

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- a. The applicant be granted leave to be enjoined in these proceedings as an interested party,
- b. Upon granting of prayer (1) above, the court do issue other or further directions as it is deems appropriate.
- c. The costs be provided for.

The Plaintiff has opposed the joinder of the Interested Party by way of a replying affidavit sworn by John Sewe on the 13<sup>th</sup> day of November, 2015. In addition it filed a preliminary objection on the 16<sup>th</sup> November, 2015.

2. Parties agreed to have the application and the preliminary objection disposed off at the same time by way of written submission which they highlighted on the 28<sup>th</sup> July, 2016.

3. The Interested Party's application is supported by the affidavit sworn by Paul Mwangi on the 1<sup>st</sup> October, 2015 wherein he avers that the interested party entered into a share purchase agreement sometime in the year 2008 wherein they bought shares amounting to Kenya Shillings Sixty One Thousand Two Hundred and Forty Five (61,245 per value 100) of the Defendant upon payment of full consideration of Kshs. Six Million Nine Hundred Twenty Thousand Six Hundred Eighty Five (Ksh.6,920,685/-). That while the transaction was awaiting formal transfer, the Plaintiff claimed to have misplaced the share certificates which upon being re-issued, the Plaintiff failed to hand them over to the Applicant for completion of transfer in spite of the Applicant having paid the full purchase consideration. That in blatant disregard of the Applicant's rights and interests in the said shares, the Plaintiff is now in the

process of fraudulently selling the shares to another party while being fully aware that they do not have the legal capacity to do so.

4. The Applicant further avers that the fraudulent sale of the said shares to another party if allowed, will lead to a great injustice and irreparable loss of property by the Applicant who is the legal and rightful owner of the shares. That the Applicants presence before this court is necessary in order to enable it to effectually and completely adjudicate upon and settle matters in dispute between the parties.

5. In its replying affidavit, the Plaintiff/Respondent has denied having sold the said shares to the Applicant and that the allegations on sale of the said shares is imaginary, unlawful, fraudulent and unfounded, in that there was no resolution of members of the Plaintiff to authorize the sale. It is averred that in the meeting held on 8<sup>th</sup> July, 2000 when the sale of the shares was said to have been discussed, the issue was not in the agenda items in the notice calling the General Meeting for that day. According to the deponent, if the Applicant executed the power of Attorney with the Plaintiff with regard to the sale of the share as alleged, nothing would have been easier than to enforce the Power of Attorney if the shares were genuinely acquired. It is further averred that the Applicant has not attached copies of the said share certificates Numbers 23211, 20651, 17613, 15516, 13751, 11036 and 10210 to demonstrate that the said shares actually existed and that they were registered in the names of the Plaintiff/Respondent.

6. In addition to the replying affidavit the Respondent filed a notice of preliminary objection based on the following points of law: -

a. This Honourable court does not have jurisdiction to hear the application by virtue of Section 76 (1) (c), 74(2) and 81(5) of the Co-operative Societies Act (No. 12 of 1997) as amended by Act No. 2 of 2004.

b. There is a related suit at the Co-operative Tribunal between the Plaintiff/Respondent and the Applicant herein and the Co-operative Tribunal has issued orders restraining the Plaintiff/Respondent from dealing or transferring 61,245 shares that are the subject of the sale agreement of 2008.

c. The application related to the sale agreement entered in 2008 which is over six years.

Parties agreed to dispose off the application and the preliminary objection together. They further agreed to canvass the same by way of written submissions which were highlighted on the 29<sup>th</sup> August, 2016.

7. I have carefully considered the application, the preliminary objection and the submissions filed herein by the parties together with the list of authorities. I propose to deal with the issues raised in the preliminary objection first. On the issue of jurisdiction, Section 76(1) of the Co-operative Societies Act is very clear; that if any dispute concerning the business of a Co-operative Society arises between two societies and any other Co-operative Society, it shall be referred to the Tribunal. In the matter herein, the dispute is between two Co-operative Societies which are the Plaintiff and Interested party. The dispute also involves another party which is not a Co-operative Society that is, the Co-operative Bank of Kenya Limited, the Defendant herein. In fact the suit as filed is between the Plaintiff and the Defendant while the applicant seeks to be enjoined as an Interested Party. Under the Act, the jurisdiction of the tribunal is limited to disputes between two co-operative societies. The question that begs for an answer is, what happens in a case where the dispute involves two Co-operatives Societies and a third party like we have in this case? In my view, the presence of a third party who in this case is Co-operative Bank Limited ousts the jurisdiction of the tribunal and the only other court which would be vested with the jurisdiction is the High Court. I am, therefore, not persuaded by the submissions by the counsel for the Plaintiff that the court has no jurisdiction.

8. The other issue raised in the preliminary objection is on the suit pending before the Co-operative Tribunal between the Plaintiff and the Interested Party. In the said suit, the court has been told that the tribunal has issued orders restraining the Plaintiff/Respondent from dealing or transferring 61,245 shares that are the subject of the sale agreement of 2008. Though it is not clear to this court what the cause of

action before the tribunal is, the fact that the tribunal has issued orders in favour of the interested party, is prima facie evidence that on a balance of probability, it has a cause of action worth protecting pending the hearing and determination of the suit.

9. The last issue in the preliminary objection is on limitation period. The basis of the same is that the sale agreement was entered into in 2008 which is over a period of six years. I have taken the liberty to peruse the said agreement and Clause 5.8 therein provides as follows: -

***“the vendor shall immediately surrender the share certificates for the above shares if they are found or immediately surrender the share certificates issued after the split to the purchaser if they are sent to the vendor.”***

It is clear from the agreement what the intention of the parties was and by executing the same, they were bound by the terms and conditions of the agreement. In furtherance of that intention the purchaser paid the whole purchase price to the vendor who acknowledged receipt of the money. It is also clear that the share certificates were to be surrendered to the purchaser immediately they were found or replaced. The questions then are, were the share certificates ever handled to the purchaser in compliance with Clause 5.8 of the agreement? When did the time start to run? In my view, upon payment of the full purchase price and upon the vendor undertaking to surrender the share certificates, a constructive trust was created and from then hence, the Plaintiff held the shares in trust for the purchaser and it cannot raise the issue of limitation. For the aforesaid reasons, I find that the preliminary objection has no merits.

10. Having made a finding on the preliminary objection, I now turn to the merits of the application. The issue to be determined is whether the interested party should be enjoined in the suit.

11. Who is an Interested Party? Black’s Law Dictionary, 9<sup>th</sup> Edition page 1232 defines **“Interested Party”** thus,

***“A party who has a recognizable stake (and therefore standing) in a matter. Rule 2 of the Mutunga Rules, that is, the protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013 defines an Interested Party as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court, but is not a party to the proceedings or may not be directory involved in the litigation.***

***The enjoinder of an interested party can be inferred from Order 1 Rule 10(2) of the Civil Procedure Rules which details as to when a joinder can be made.”***

According to this rule, a joinder would normally be allowed where a party’s presence may be necessary for purposes of allowing the court to adjudicate on all questions involved in a suit.

12. In the Supreme Court case of **Francis Kariuki Muruatetu & another Vs Republic & 5 others (2016) eKLR** the judges held: -

***“From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party; one must move the court by way of a formal application. Enjoinder is not as a right, but is at the discretion of the court; hence sufficient grounds must be laid before the court, on the basis of the following elements.***

***i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.***

***ii. The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.***

*iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court.*

13. Further, in another Supreme Court case of **Trusted Society of Human Rights Alliance Vs Mumo Matemo & 5 Others (2014) eKLR**, the Supreme Court judges defined an interested party. They stated thus: -

*“Consequently, an interested party is one who has a stake in the proceedings though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”*

14. In the light of the above, the question, therefore is whether the proposed Interested party meets the threshold required of an interested party so as to be enjoined in the suit herein. The interested party claims legal interest in some, Sixty One Thousand Two Hundred and Forty Five Thousand shares which it purchased from the Plaintiff but which are being held by the Defendant. The Plaintiff is in the process of fraudulently selling the said shares to another party which will highly prejudice the interests of the interested party. The interested party seeks to be enjoined in the suit so that it can protect its interest in the said shares.

15. In view of the **Francis Kariuki Muruatetu case (supra)** the personal interest or stake that a party has in a matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything, that is merely peripheral. I find the reasons advanced by the interested party for joinder good enough or key to warrant the joinder. Furthermore, I am not satisfied that any prejudice will be suffered by the Plaintiff in case of joinder.

16. In the premises foregoing, I find that the application dated 1<sup>st</sup> October, 2015 has merits and it is hereby allowed in terms of prayer 1. Costs of the application shall be in the cause.

Dated, signed and delivered at Nairobi on 31<sup>st</sup> day of October, 2016.

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**L NJUGUNA**

**JUDGE**

**In the presence of**

..... **For the Plaintiff**

..... **for the Defendant**

..... **for the Applicant**