



REPUBLIC OF KENYA

High Court of Kisii

Civil Suit 115 of 2011

MASIMBA FARMERS CO-OPERATIVE

SOCIETY LIMITED.....PLAINTIFF

VERSUS

JAMES NGARA OSANO.....1ST DEFENDANT

JARED N.OMOKE.....2ND DEFENDANT

JAMES MATOKE.....3RD DEFENDANT

SIMON NJUGUNA MACHARIA.....4TH DEFENDANT

BOSCO OOGA GICHANA.....5TH DEFENDANT

RULING

1. What is before me is an application dated 15th November, 2012 by the firm of Oguttu-Mboya & Co., Advocates said to have been brought on behalf of the Plaintiff (**hereinafter referred to only as “the applicants”**) under **Orders 45 and 51 of the Civil Procedure Rules, Sections 1A, 1B, and 3A of the Civil Procedure**

Act, Section 159(1)(d) of the Constitution of Kenya,2010 and all other provisions of the law. The application is seeking four(4) principal prayers namely;

i. **an order to expunge and/or strike out the Notice of Change of Advocates and the Notice of Withdrawal of Suit both dated 10th October,2012 drawn and filed in this suit by the firm of Minda & Co. Advocates purportedly on behalf of the Plaintiff;**

ii. **an order to review, rescind, vary, and/ or set aside the orders made on 11th day of October, 2012 and 29th October, 2012 marking this suit as withdrawn and entering of judgment on costs in favour of the 4th and 5th defendants respectively;**

iii. **an order to review, rescind, vary and/or set aside the orders made on the 12th day of November, 2012 purporting to tax the 4th and 5th defendant’s bill of costs dated 25th October,2012 in the sum of Ksh.1,300,000.00 only together with all incidental orders; and,**

iv. **consequent to the granting of the aforesaid orders, an order reinstating and/or restoring this suit for hearing and disposal on merits.**

2. In summary, the application has been brought on the grounds that, this suit was filed on behalf of the Plaintiff by the firm of Oguttu-Mboya & Company, Advocates pursuant to instructions received from the applicants who are the Plaintiff's lawfully constituted Managing Committee through its resolution passed on 27th May, 2011. The applicants contend that, sometimes on 3rd August, 2012, a splinter group of the Plaintiff's members purported to convene an urgent general meeting of the Plaintiff which meeting was not authorized by the District Co-operative Officer Masaba South District at which they purported to pass a number of resolutions some of which were, to elect a new managing committee and to appoint the firm of Minda & Co. Advocates to take over the conduct of this suit from the firm of Oguttu-Mboya & Co. Advocates. The applicants contend that, no valid general meeting of the Plaintiff was held and as such the purported appointment of the firm of Minda & Co. Advocates by the said splinter group to take over the conduct of this suit from the firm of Oguttu-Mboya & Company, Advocates was irregular. In view of its irregular appointment, the firm of Minda & Co. Advocates has no lawful authority to act for the Plaintiff and as such its Notice of Change of advocates and Notice of withdrawal of suit filed herein were both filed without instructions and as such irregular, unlawful, illegal and fraudulent and likewise the orders that were issued at the instance of the firm of Minda & Co. Advocates. It is the applicants' case that there is an apparent error on the face of record of the orders complained of herein which justifies the review of the same. To the affidavit of **Peter Mose Ogero** filed in support of their application herein, the applicants have annexed among others, an extract of a resolution passed by the then management committee of the Plaintiff on 27th May, 2011 appointing the firm of Oguttu-Mboya & Company, Advocates to act for the Plaintiff generally in cases where the Plaintiff has been sued or is suing and the minutes of Annual General Meeting of the Plaintiff that was held on 20th April, 2011 at which the management committee led by **Mr. Peter Mose Ogero** as chairman was elected. The applicants' application is opposed by the defendants and the officials of the Plaintiff who are said to have been elected into office through a meeting that was allegedly held on 2nd October, 2012 aforesaid. This group are represented by the firm of Minda & Co. Advocates and I will refer to them hereafter for lack of a better word and without any prejudice intended as "**the splinter group**" so as to differentiate them from the group being represented by the firm of Oguttu-Mboya & Company, Advocates. The splinter group claims to be the bona fide managing committee members of the Plaintiff. They filed in court a replying affidavit sworn by one, **Johnson Mwambi Oirere** who has described himself in the said affidavit as the chairman of the Plaintiff. **Mr. Oirere** has deposed that, on 2nd October, 2012 the members of the Plaintiff passed a vote of no confidence on their then chairman and the entire management committee and elected a new chairman and management committee who instructed Minda & Company, Advocates to act for the Plaintiff in this suit and to proceed and withdraw the same as it was subjecting the Plaintiff to unnecessary costs. **Mr. Oirere** has annexed to his affidavit, copies of the extract of the minutes of the meeting of the members of the Plaintiff held on 2nd October, 2012 at which a vote of no confidence was passed against the then chairman of the Plaintiff and his entire management committee and a new chairman and management committee appointed. He has also annexed an abstract of the resolution that was passed on 6th October, 2012 appointing the firm of Minda & Company, Advocates and instructing them to withdraw this suit. **Mr. Oirere** has deposed that the firm of Minda & Company, Advocates was lawfully appointed and this suit was withdrawn by the said law firm in accordance with lawful instructions from the members of the Plaintiff. It is the splinter group's contention that, the dispute that has arisen between the members of the Plaintiff and which has brought about the present application is not within the jurisdiction of this Court to determine. They have contended further that there is no error apparent on the face of the record of the orders complained of that can warrant the review sought by the applicants. According to them, the orders sought are intended to return to office the former chairman and management committee of the Plaintiff who were removed from office by members through a resolution that was passed on 2nd October, 2012, an act which this court has no jurisdiction to do. It was contended further by the splinter group that the firm of Oguttu-Mboya & Company, Advocates is irregularly on record in this matter as they are not acting on behalf of any party. The 1st, 2nd and 3rd defendants filed grounds of opposition to the application in which they challenged mainly the jurisdiction of this court to determine the dispute between the members of the Plaintiff as to who are the lawful officials of the Plaintiff. The 4th and 5th defendants also filed grounds of opposition in which in addition to the issue of jurisdiction of the court,

they contended that they are lawful tenants of the Plaintiff who should not be affected by the management wrangles of the Plaintiff's members.

3. At the hearing of the application on 21st January, 2013, Mr. Ochwangi advocate who appeared for applicants adopted the grounds set out in the body of the application and the contents of the affidavit of **Peter Mose Ogero** filed in support of the application. Mr. Ochwangi submitted that, the meeting held on 2nd October, 2012 at which new officials of the Plaintiff were allegedly elected and who subsequently purported to appoint the firm of Minda & Co. Advocates to take over the conduct of this suit was held in the absence of a representative from the Ministry of Co-operative Development. It was therefore not a lawful meeting at which any election of officials could be carried out. Mr. Ochwangi submitted further that since the management committee who appointed the firm of Oguttu-Mboya & Company, Advocates to act for the Plaintiff were elected there has never been any other election of officials of the Plaintiff. On the issue of the jurisdiction of the court that was raised by the defendants and the splinter group, Mr. Ochwangi submitted that, the issue had been laid to rest in a previous decision by **Justice M.A. Makhandia**. In response to the submission of Mr. Ochwangi, Mr. Okenye, advocate for the 1st, 2nd and 3rd defendants reiterated the contents of his clients' grounds of opposition and submitted that this court has no jurisdiction to determine internal disputes between the members of the Plaintiff society which should be arbitrated upon only by the Co-operative Tribunal. Mr. Okenye submitted further that, the decision of **Justice Makhandia** that Mr. Ochwangi had referred to on the issue of jurisdiction is not binding on this court. According to counsel, the withdrawal of this suit was proper and lawful and there is no reason why the court should hold otherwise. Mr. Nyasimi, advocate for the 4th and 5th defendants submitted that, in order for the court to determine whether this suit was lawfully withdrawn or not, the court will have to determine first, the legitimate officials of the Plaintiff Society an exercise which is reserved solely for the Co-operative Tribunal. Counsel submitted that, this court is only mandated to hear appeals from the said tribunal but cannot entertain disputes reserved for the said tribunal in the first instance. Counsel submitted further that, the reinstatement of this suit will not resolve the management wrangles bedeviling the Plaintiff. Counsel submitted that the Plaintiff should be given an opportunity to have legitimate officials to manage the affairs of the Plaintiff. Mr. Nyasimi submitted that the 4th and 5th defendants are mere tenants in the Plaintiff's property and as such are not involved in the raging leadership wrangles at the Plaintiff Society. On **Justice Makhandia's** ruling on the jurisdiction of this court, counsel submitted that the issues that were before **Justice Makhandia** are different from the issues that have been raised herein by the applicants. Counsel submitted that the issues raised for determination in the present application are outside the jurisdiction of this court. On his part, Mr. Minda who appeared for the splinter group associated himself with the submissions made by Mr. Okenye and Mr. Nyasimi. In his submission, he relied on the affidavit of **Johnson Mwambi Oirere** that I had referred and maintained that his firm came on record in this suit procedurally in accordance with the provisions of the Civil Procedure Rules. Mr. Minda contended that, after he had filed a notice of change of advocates on behalf of the Plaintiff, the firm of Oguttu-Mboya & Company, Advocates could not continue to act for the Plaintiff in the matter without filing in court a document entitling them to so act. Counsel submitted that, in the circumstances, the application brought by the firm of Oguttu-Mboya & Company, Advocates in which they have purported to appear for a party who has an advocate on record is bad in law. Counsel submitted that his clients and the clients being represented by the firm of Oguttu-Mboya & Company, Advocates have both produced extracts of minutes of meetings at which resolutions were made appointing both firms to act for the Plaintiff and it only the Co-operative Tribunal who has the jurisdiction to inquire as to the validity of the two resolutions. Counsel submitted that the applicants should have moved the Co-operative Tribunal first to determine the legitimate management team of the Plaintiff before coming before this court for the orders sought. Counsel suggested that applicants' best option would have been to seek a stay of this suit pending the determination by the Tribunal of the legitimate officials of the Plaintiff. Mr. Minda submitted further that no valid grounds have been advanced to warrant the review sought. Counsel submitted further that the review sought is against the orders of the Deputy Registrar and as such the present application should have been made before the Deputy Registrar. In his reply to the submissions in opposition to the application, Mr. Ochwangi submitted that there are no management disputes in the Plaintiff Society and as such the court has the jurisdiction to determine the issues raised in the application. Counsel submitted that the Court was not being called at all to determine the legitimate officials of the Plaintiff.

He submitted further that this is the appropriate forum to challenge the orders complained of.

4. I have considered the applicants' application and the affidavit filed in support thereof. I have also considered submission made in support of the said application. I have equally considered the affidavit and grounds of opposition filed in opposition to the application and the submissions made by defendants advocates and Mr. Minda on behalf of the splinter group. This is the view that I take on the matter;

5. The issues arising for determination from the application before me are, whether the firm of Minda & Co. Advocates is properly on record in this suit as advocates for the Plaintiff and if it is not, whether the withdrawal of this suit by the said firm of Minda & Co. Advocates and the consequent proceedings and orders that followed that withdrawal are valid. As I have stated above, it is the applicants' case that, the only firm of advocates that was instructed by the Plaintiff to act for it in this matter is Oguttu-Mboya & Company, Advocates. They have exhibited a certified extract of the resolution that was passed by the Plaintiff's Management Committee on 27th May, 2011 appointing the said firm of advocates to act generally for the Plaintiff in cases in which the Plaintiff is suing or is being sued. On the other hand, the splinter group's position is that, it is the firm of Minda & Co. Advocates who have instructions to act for the Plaintiff in this matter the said firm having been appointed by the Plaintiff's Management committee on 6th October, 2012 to take over the conduct of this case from the firm of Oguttu-Mboya & Company, Advocates. It is instructive to note that the Management Committee that appointed the firm of Oguttu-Mboya & Company advocates to act for the Plaintiff is not the same one which appointed the firm of Minda & Co. Advocates to act for the Plaintiff. The two law firms insist therefore that both were validly appointed to act for the Plaintiff in this matter. The basis of applicants' challenge to the firm of Minda & Co. Advocates alleged appointment to act for the Plaintiff in this case is that, the Management Committee that appointed the said firm of advocates was not validly elected as there was no valid general meeting held at which such appointment could have been made. In response to this allegation, the splinter group has maintained that a valid general meeting was requisitioned and held on 2nd October, 2012 at which a vote of no confidence was passed against the then Chairman of the Plaintiff and his entire management team who are represented by the firm of Oguttu-Mboya & Company Advocates and a new Management Committee which is now being represented by the firm of Minda & Co. Advocates appointed. The splinter group has produced an extract of the minutes of the said general meeting that was held on 2nd October, 2012. From the foregoing, it follows that in order for this court to determine whether or not the firm of Minda & Co. Advocates was lawfully appointed to act for the Plaintiff in this matter, the court will have to determine first, the issue as to whether or not the Management Committee that appointed the said firm of advocates was validly elected into office. I am of the view that this is an issue which is beyond the scope of these proceedings as it cannot be determined without a full hearing in a substantive suit brought for that purpose. This suit was concerned with the issue of the validity of the lease that the 1st, 2nd and 3rd defendants in their capacity as the then officials of the Plaintiff executed in favour of the 4th and 5th defendants over the parcel of land known as **Plot No. KISII MUNICIPALITY/BLOCK III/108** owned by the Plaintiff. No issue arises in the pleadings filed in this suit concerning the general meeting of the Plaintiff that was purportedly held on 2nd October, 2012. The issue that this court has been called upon to determine concerning the validity or otherwise of the general meeting of the members of the Plaintiff that was allegedly held on 2nd October, 2012 and the resolutions that were passed thereat is therefore out of character with the pleadings and issues raised in this suit. As I have observed above, the determination of these new issues calls for a substantive suit in which all the officials elected at the said meeting are made parties and the court is called upon to declare the alleged meeting and purported vote of no confidence on the then management committee and election of the new management committee a nullity. If I was to decide on these issues without having all the necessary parties before me, that would lead to a miscarriage of justice as I would have condemned those who are said to have been elected as officials of the Plaintiff on 2nd October, 2012 unheard. I would wish to add that, the defendants herein would not in fact need to be parties to such a suit. The defendants' advocates raised another issue as to why this court should not determine the issue of the legitimacy of the officials of the Plaintiff. In their objections to the present application, the advocates for the defendants and Mr. Minda submitted that, this court has no jurisdiction to determine the issue as to who are the legitimate officials of the Plaintiff. It was their contention that a dispute between members of a co-operative society as to who are their lawfully elected officials should be determined by the Co-operative Tribunal established under **Section 77(1) of the Co-operative Societies Act, Cap.490 Laws of Kenya**. In response to this submission, Mr. Ochwangi had submitted that the issue of the Jurisdiction of this court had been determined by **Justice M.A.**

Makhandia in his ruling of 23rd September, 2011 which has neither been reviewed nor set aside. I have perused the ruling by **Justice Makhandia** which Mr. Ochwangi referred to. I am in agreement with the submission of the advocates for the defendants that the grounds on which the jurisdiction of this court was challenged before **Justice Makhandia** are not the same grounds being raised before me. The issue before **Justice Makhandia** was whether the court had the jurisdiction to entertain the claim by the Plaintiff herein against the 1st, 2nd and 3rd defendants who are members of the Plaintiff society with respect to a dispute over the manner in which they discharged their duties. My jurisdiction on the other hand has been challenged on the grounds that I have no jurisdiction to determine the issue of the legitimacy of the officials of the Plaintiff. I would wish also to add that when arguing the issue of Jurisdiction before the learned judge, the attention of the judge was not drawn to the fact that the provisions of **Section 76(2)** of the **Co-operative Societies Act, Cap. 490** as to the disputes that can be entertained by the Co-operative Tribunal is not exhaustive. I doubt that if the attention of **Justice Makhandia** had been drawn to this fact, he would have ruled that the Co-operative Tribunal had no jurisdiction to entertain the claim herein which the Plaintiff had lodged against the 1st, 2nd and 3rd defendants. For the above reasons, I am not in agreement with the submission of Mr. Ochwangi that the issue of jurisdiction of this court had been laid to rest. I am of the view that the Co-operative Tribunal would have the jurisdiction to determine the issue as to the validity of an election of the officials of a corporative society. That is a jurisdiction that this court even if it was moved by way of a substantive suit would not be able to exercise. Due to the foregoing, although this court has the jurisdiction to determine the application that is before it, the determination of the application is dependent on the determination of other issues that, first, are beyond the scope of the present suit and, secondly, are beyond the jurisdiction of this court conferred under **Section 13 of Environment and Land Court Act, No.19 of 2011** to determine. The applicants will have to move either the High Court or the Co-operative Tribunal depending on how they are advised for the determination of the issue as to whether it is the applicants or the splinter group who are the legitimate officials of the Plaintiff. If the issue is determined in their favour, they can then move this court for the orders sought.

6. This then takes me to the final issue namely, what in the circumstances would be the most fair and just order to make on the application before me. For reasons that I have already given, I am unable to grant nearly all the orders sought in the application dated 15th November, 2012. The applicants however had asked this court in addition to the principal orders that were sought, to consider granting such further and/or other orders that the court may deem fit and expedient to grant. The applicants are claiming that they are the bona fide officials of the Plaintiff. They have contended that the appointment of Minda & Co. Advocates to act for the Plaintiff in this suit and the subsequent withdrawal of the suit against the defendants herein have been done irregularly and fraudulently by the splinter group who have no power or authority in law to conduct the affairs of the Plaintiff. The applicants' claim that, as a result of these illegal acts, the Plaintiff is now at risk of losing up to a sum of Ksh.1, 300, 000.00 which the firm of Minda & Co. Advocates and the firm of Nyamori & Nyasimi Advocates have agreed by consent as costs payable to the 4th and 5th defendants for the withdrawn suit. The 1st, 2nd and 3rd defendants are yet to tax their bill of costs but going by the amount that has been awarded to the 4th and 5th defendants by consent, the 1st, 2nd and 3rd defendant's costs would also be substantial. All these issues raised by the applicants are yet to be investigated by a competent Court or tribunal. Under investigation, it may as well turn out that the firm of Minda & Co. Advocates was not lawfully appointed to act for the Plaintiff in this suit and as such all the process issued at their instance and consequent orders made pursuant thereto are nothing but a nullity. In the circumstances, I am of the view that in the interest of justice and fairness, it is necessary to protect the Plaintiff from possible injustice as the two groups, one represented by the firm of Oguttu-Mboya & Company, Advocates and the other by Minda & Co. Advocates wrangle over the leadership of the Plaintiff society. At the moment, the Plaintiff seems to be a ward of the court as it is not clear as to who is acting for it. I believe that the interest of the Plaintiff is of paramount importance than that of any of the wrangling groups and that no prejudice would be occasioned to any of the groups if this court accords some measure of protection to the Plaintiff. Under **Section 13(7) (a)** of the **Environment and Land Court Act, No. 19 of 2011**, this court has the power to make interim or permanent preservation orders. This court is also enjoined under **Article 259(2)(d)** of the **Constitution** to dispense justice without undue regard to procedural technicalities. This court is therefore not fettered from making the said preservation orders on the ground that the same were not expressly sought in the

application. The intended protection is meant to ensure that, none of the groups steal a march against the other, the parties are put at equal footing and that the assets of the Plaintiff are preserved as the issue as to who are the legitimate officials of the Plaintiff is being determined. For the defendants, the proposed measure of protection would suspend temporarily the right to costs that has accrued to them but will not take them away at this stage.

It is a cost that they will have to pay for justice to be done. The court's decision to make preservative orders in relation to the Plaintiff society is informed by the fact that the orders complained of were made in this suit and since the court has reached a decision that it cannot at this stage decide whether or not the orders complained of should be reviewed until some further investigations are done in another forum, it is this court which is seized of the jurisdiction to maintain the status quo in this suit pending the said investigations if it deems it just to do so. This is not a step which can be taken in the forum where the applicants herein may go to for the determination of the pending issues. The upshot of the foregoing is that, I decline to grant **prayers 4,5,6,7 and 8** in the application dated 15th November, 2012. In place thereof, I hereby grant an order of stay of any further proceedings in this matter for a period of ninety (90) days from the date hereof during which time the

applicants should to move to an appropriate forum as they may be advised for the determination of the legitimate Management Committee of the Plaintiff as between the applicants who are represented by the firm of Oguttu-Mboya & Company,

Advocates and the splinter group represented by the firm of Minda & Co. Advocates. The stay order shall lapse automatically without any further reference to the court after the expiry of the said ninety (90) days. All the parties shall have the liberty to apply to this court on the issue of the order of stay made herein. Since the defendants have substantially succeeded in the application, they shall have the costs of this application to be paid by the Plaintiff.

Dated, signed and delivered at Kisii this 15th day of March, 2013

**S. OKONG'O,
JUDGE.**

In the presence of:-

Mr. Oguttu for the Applicant.

No appearance for the 1st, 2nd and 3rd Respondents.

No appearance for the 4th and 5th Respondents.

No appearance for the interested Parties.

Mobisa Court Clerk.

**S. OKONG'O,
JUDGE.**