Masaku Teachers Investment Ltd v Kioko & 4 others; Kasimba & 202 others (Interested Parties) (Environment & Land Case 35 of 2014) [2023] KEELC 18599 (KLR) (5 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18599 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE 35 OF 2014

A NYUKURI, J

JULY 5, 2023

BETWEEN

MASAKU TEACHERS INVESTMENT LTD ..... PLAINTIFF

AND

FRANCIS KIOKO ..... 1ST DEFENDANT

DAVID KIKUMU ..... 2ND DEFENDANT

GIDEON KAVUU ..... 3RD DEFENDANT

KWETU SACCO SOCIETY LIMITED (FORMERLY KNOWN AS MASAKU TEACHERS SACCO) ..... 4TH DEFENDANT

COUNTY LANDS REGISTRAR MACHAKOS ..... 5TH DEFENDANT

AND

PETER KASIMBA & 202 OTHERS ..... INTERESTED PARTY

RULING

Introduction

1. Before court is a notice of motion dated December 8, 2021 brought under section 56 of the *Advocates Act* and filed by the 1st to 4th defendants seeking the following orders;

    a. That this honourable court be pleased to find/hold that in purporting to act for Masaku Teachers Investments Limited notwithstanding the orders of the High Court made on the February 26, 2018 in Machakos High Court Misc Application No 35 of 2015; Kwetu Savings and Credit Cooperative Society Limited v James Muiya and Others the law firm of Andrew Makundi & Company Advocates is guilty of misconduct.

b. That the law firm of Andrew Makundi & Company Advocates be ordered and directed to cease acting for the plaintiff Masaku Teachers Investments Limited.

c. That costs be in the cause.

2. The application is premised on the grounds on its face as well as the supporting affidavit sworn on December 8, 2021 by Stanley Kyelenzi the Chief Executive Officer of Kwetu Savings and Credit Society Limited (formerly known as Masaku Teachers Savings and Credit Cooperative Society Limited) hereinafter referred to as Kwetu Sacco, the 4th defendant in this suit.

3. The applicant's case is that when former officials of the 4th defendant were removed from office, it was noted that Masaku Teachers Investment Limited, the plaintiff herein was incorporated on instructions of and using funds from the 4th defendant by its former officials namely James Mvinya, Israel Nzallu, Richard Masila, Patrick Sove, David Mwanthi, David Kioko, Cosmas Mwololo, Wilson Mutunga, Lawrence Mutunga and Josephat Kalonzo who caused themselves to be registered as shareholders and directors of the plaintiff. That this led the 4th defendant to file Machakos High Court Misc. Application No. 35 of 2015 Kwetu Sacco v. James Muiya and Others, seeking to have the register of the plaintiff rectified. That upon hearing the aforesaid suit, the High Court found in favour of the 4th defendant herein and allowed the rectification of the register by removing the names stated above and replacing them with the 4th defendant and its nominee.

4. They stated that this suit was filed between the time the aforesaid shareholders of the plaintiff held office and before the decision by the High Court was made. That this suit was filed by the firm of Andrew Makundi and Company Advocates. That as the aforesaid shareholders were replaced by the 4th defendant and its nominee in the plaintiff's shareholding, the 4th defendant is desirous to have Ms Andrew Makundi Advocates replaced but that the said firm is adamant that it must act although the persons that instructed the said firm are no longer shareholders of the plaintiff. They maintained that the action by Andrew Makundi Advocates to continue acting for the plaintiff without the consent and blessings of the 4th defendant amounted to misconduct, which this court should address.

5. They stated that although the decision to replace the above plaintiff's former shareholders with the 4th defendant and their nominee was made on February 26, 2018, the rectification has not been done at the company's registry as the 4th defendant's counsel has had challenges in getting the file as the company registry and further that even after the file was traced, the officials in the registry have demanded for copies of identity cards and passports photographs of the plaintiff's former shareholders stated herein, but they continue to remain hostile and it is not possible for the 4th defendant to get the same. He attached plaintiff's memorandum and articles of association, and order in Machakos High Court Misc civil application No 35 of 2015.

6. The application is opposed. James Mweu Muiya swore a replying affidavit dated May 10, 2022. He stated that he was a shareholder of the plaintiff/respondent. He maintained that the application was unfounded, incompetent, bad in law and an abuse of the court process. He stated that the notice of motion herein has no basis because in the meetings held on June 10, 2014 and March 7, 2022 by the plaintiff's directors, it was unanimously agreed that the firm of Andrew Makundi Advocates should handle all of the plaintiff's matters.

7. He deposed that this suit was filed in 2015 and that there has been no test suit and that this case is within the ELC jurisdiction which has parallel jurisdiction which is not lower than the High Court and that the decision by the High Court cannot override the decision of this court. He stated that the ruling of the High Court in High Court Misc civil application 35 of 2015 did not refer to this case or the issue of representation by the firm of Andrew Makundi Advocates.

8. He averred that the issue in this suit is whether or not the suit land was transferred illegally but not the choice of advocates. He stated that the decision in Machakos High Court Misc civil application No 35 of 2015 has been appealed against in the Court of Appeal. According to him, the decision of that court only dealt with issues of subscribers and referred to 20,000 shares whereas the subject matter herein is land and does not touch on the issue of representation.

9. It was the respondents position that under the *Constitution* of Kenya 2010, a litigant has a right to be represented by the firm of Andrew Makundi & Co Advocates. Further that an advocate has the right to act for any client and that an advocate can only be barred in a matter where it is demonstrated that he is in a position of conflict of interest. That the applicant has not demonstrated conflict of interest against the firm of Andrew Makundi Advocates. He stated that the respondents and interested parties herein will suffer irreparably if orders sought are granted but that the applicants will not suffer prejudice if the firm of Andrew Makundi continues to act for the plaintiffs. he attached minutes of the plaintiff dated June 10, 2014 and a notice of motion dated December 17, 2019 without a case number.

10. The application was canvassed by written submissions. On record are the plaintiff/respondent's submissions dated November 3, 2022. Counsel for the plaintiff regurgitated the contents of the plaintiff/respondent's replying affidavit and submitted that the firm of Andrew Makundi was instructed by the plaintiff to act for them in this matter and that the applicant's rely on the decision made by Machakos High Court Misc. Application No. 35 of 2015, when the same has been appealed against. Counsel maintained that the 2010 Constitution grants litigants a right to be represented by counsel of their choice and that the plaintiff chose to be represented by the firm of Andrew Makundi. It was submitted further for the respondent that he who alleges must prove and that the applicants had not proved any misconduct on the part of the firm of Andrew Makundi. Counsel maintained that an advocate can only be barred from acting in a matter where it is shown that there is a conflict of interest and that in this matter no such proof was given by the applicants.

Analysis and Determination

11. I have carefully considered the application, the replying affidavit and submissions. The issue before court is whether the firm of Andrew Makundi is guilty of misconduct and whether the said firm ought to be directed by this court to cease acting for the Plaintiff.

12. Section 56 of the *Advocates Act* provides for the disciplinary powers of the court as follows;

> "Nothing in this Act shall supersede, lessen or interfere with the powers vested in the Chief Justice or any of the judges of the court to deal with misconduct or offences by an advocate, or any person entitled to act as such, committed during, or in the cause of, or relating to, proceedings before the Chief Justice or any judge.

13. Section 60 of the *Advocates Act* defines professional misconduct by an advocate to include conduct incompatible with the status of an advocate. In this matter the applicants stated that as the 4th defendant and its nominee are the plaintiff's shareholders who replaced James Muiya and other former shareholders by dint of the order of the High Court in Machakos Misc Application No 35 of 2015, that the 4th defendant is desirous of replacing the law firm of Andrew Makundi with an advocate of their choice but the said law firm remains adamant. The applicant maintains that this act by the said law firm amounts to misconduct. On the other hand, Mr James Muiya swore a replying affidavit stating that he was one of the plaintiff's shareholders and that the plaintiff instructed the firm of Andrew Makundi to act for them. He attached minutes dated June 10, 2014 to that effect and maintained that the plaintiff has a constitutional right to choose an advocate of its choice.

14. Article 50 (2) (g) of the *Constitution* provides for every person's right to a fair trial which includes a right to choose and be represented by an advocate of their choice. Having considered the application, the applicant's position being that James Muiya and other former directors of the plaintiff have no authority to appoint an advocate for the plaintiff. As it is not disputed that this suit was filed in 2014, when Mr James Muiya and his colleagues were directors of the plaintiff and before the orders in Machakos High Court Misc Application No 35 of 2015 were made, and therefore it is my view that their appointment of Andrew Makundi Advocates to act for the plaintiff, was properly within their right and the advocate cannot be faulted for filing this suit.

15. On whether there is misconduct, the applicants maintained that they desire to replace the firm of Andrew Makundi Advocates but that the said firm is adamant and that the latter's instance on continuing to act for the plaintiff without the blessing of the 4th defendant amounts to misconduct. I note that the applicants only state that they desire to replace the firm of Andrew Makundi. The High Court in Machakos High Court Misc Application No 35 of 2015 replaced Mr James Muiya and his other shareholders with the 4th defendant and its nominee. Although Mr James Muiya stated that there was an appeal against the decision of the High Court, nothing was attached to the replying affidavit to show that there was a pending appeal. The notice of motion attached and dated December 17, 2019 had no case number neither any endorsement by the Court of Appeal to show that the same was filed at the Court of Appeal. In the premises therefor, I find and hold that the respondent did not prove that there is an appeal filed or pending against the decision in Machakos High Court Misc Application 35 of 2015.

16. The above being the position, it is therefore clear that the 4th defendant and its nominee are the plaintiff's shareholders with the authority to choose which advocates should act for the plaintiff. The applicants state that they desire to replace the firm of Andrew Makundi in this matter but that the said firm remains adamant and continues to act for the plaintiff. Having considered the application, I find no evidence to show that the applicants desire to replace the firm of Andrew Makundi Advocates. There was no notice of change of advocates filed and attached to the supporting affidavit to demonstrate their desire to change advocates and nothing stops the current shareholders of the plaintiff to instruct a new advocate to file notice of change of advocates in this matter. Therefore the allegation that the firm of Andrew Makundi has remained adamant and continues to act for the plaintiff is not in my view proof of misconduct on the part of the said law firm. The plaintiff being a limited liability company is a legal entity whose legal mind is exercised through its directors and is at liberty to replace the firm of Andrew Makundi by instructing an advocate of their choice for that purpose. As there is no notice of change of advocates or notice of intention to act in person filed to replace the firm of Andrew Makundi then it is not for this court to order the firm of Andrew Makundi to cease acting as it is not the function of this court to hire or fire a litigant's advocate. The plaintiff is aware that the right to hire and fire its counsel is solely in its hands and it does not need the assistance of this court to exercise such right.

17. In the premises, I find no merit in the notice of motion dated December 8, 2021 and the same is hereby dismissed. In view of the circumstances obtaining herein and the relationship between the plaintiff and the 4th defendant, I make no order as to costs.

18. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 5TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Odawa for Interested Parties

Mr. Kiluva holding brief for Mr. Makundi for Plaintiff/Respondent

No appearance for Defendant/Applicant

Josephine – Court Assistant