



**Kasimba & 220 others v Kwetu Savings & Credit Cooperative Society Limited
(Formerly Masaku Teachers Savings Cooperative Society) & 11 others (Civil
Suit 29 of 2018) [2024] KEHC 14617 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14617 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT 29 OF 2018
MW MUIGAI, J
NOVEMBER 21, 2024**

BETWEEN

PETER KASIMBA & 220 OTHERS & 220 OTHERS & 220 OTHERS PLAINTIFF

AND

**KWETU SAVINGS & CREDIT COOPERATIVE SOCIETY LIMITED
(FORMERLY MASAKU TEACHERS SAVINGS COOPERATIVE SOCIETY) & 11
OTHERS & 11 OTHERS & 11 OTHERS DEFENDANT**

RULING

Background

1. The genesis of this case is Plaintiff filed by Plaintiffs and 1st defendant against Defendants claiming shareholding ownership of properties, management and operations of 2nd defendant Company. There are contested and competing legal interests and rights over the Companies the subject of ongoing hearing of the main suit.
2. Prior to commencement of the hearing various Interlocutory orders were sought and granted mainly maintaining status quo pending hearing and determination of the matter.
3. Case Management /Pre-Trial Process was granted vide Ruling of 27/7/2023 and Parties /Counsel filed and exchanged Lists of Witness Statements List of Documents that form part of the Court record.

Proceedings

4. On 19/11/2024, the Court proceedings commenced with the evidence/testimony of PW2 Patrick Muita Mutisya former Chairman of Masaku Teachers Investment Company Limited who was led by Counsel Mr Odawo in examination in Chief. PW2 went on to refer to various documents in Plaintiff's



bundle of Documents Volume 1 filed in Court on 19/10/2023 when he was Chairman amongst other documents.

These were;

1. Witness Statement of 15/6/2021
 2. Chairman's Report of 31/5/2003- Pg 39-41
 3. Chairman's Report of 27/5/2006-Pg 45-48
 4. Minutes of AGM of 29/5/2004- Pg 42 -44
 5. Chairman's Report of 27/5/2006-Pg 45-48
 6. Minutes of AGM of 23/6/2007-Pg 49-68
 7. Minutes of AGM of 26/7/2008-Pg 69-84
5. During Cross examination of PW2 by Defense Counsel Mr. Amollo representing 1st 2nd 7th 8th 9th 10th Defendants reference was made to the following documents in Vol 1 of Plaintiff's bundle;
1. Documents at Pg 33-35 – AGM on 25/4/1998
 2. Documents at Pg 36-38 -AGM on 25/4/1998
 3. Documents at Pg 39-41- Chairman's Report 16/5/2003
 4. Documents at Pg 42-44-Minutes of AGM of 29/5/2004
 5. Documents at Pg 49-Minutes of AGM of 23/6/3007
 6. Documents at Pg 69-Minutes of AGM of 26/7/2008
 7. Documents at Pg 78-Minutes of AGM of 26/7/2008 -end of meeting.
6. In the above -mentioned documents referred to the Witness in cross examination Counsel asked if PW2 as Chairman of Masaku Teachers Investment Company Limited he signed these Minutes and PW2 stated he did not sign, there was no signature except his full names as Chairman.
7. In Re-examination of PW2 by Counsel for Plaintiffs Mr.Odawo, he referred PW2 to Pg 48 of the Plaintiff's bundle at Pg 48 and it was Chairman's Report to Shareholder's AGM starting from Pg 45 -48 and the same was/is signed by PW2 as Chairman Masaku Teachers Investment Co Ltd.

Objection

8. At this point, in the proceedings Counsel for Defendants Mr. Amollo objected to the line of re-examination by Mr Odawo to PW2 with reference to Document at Pg 48 as the said document was not referred to in cross examination.
9. The Court took the view that the document having been produced as bundle Vol 1 of Plaintiff's bundle and served to Defendants and vice versa by Defendant filing their bundle of Documents and Witness Statements, the Objection had no merit and ought to be allowed. The Defense Counsel Amollo sought Ruling on the issue as herein under.
10. Mr. Odawo for the Plaintiffs stated that Defense Counsel Mr. Amollo cross- examined PW2 thus;

“ Show me where your signature is on these documents” the documents referred to were those produced by the Witness during the hearing and it was with reference to the Witness's own



documents already in Court and not any other document. He asked the Court to disallow the objection/preliminary objection.

11. Mr. Kiluva representing 2nd Defendant/Respondent concurred with the submissions by Mr. Odawo for the Plaintiffs.

Determination

12. The issue at hand is whether the objection by Defense Counsel of PW2 referring to Document at Pg 48 and not any of the Documents referred to during cross examination is upheld or dismissed.
13. The Court is duty bound to uphold Fair Hearing as outlined in Article 50 CoK 2010.

“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

14. The High Court, in Pinnacle Projects Limited vs. Presbyterian Church of East Africa, Ngong Parish & another [2018] eKLR, had the following to say on Article 50 with respect to fair trial principles in civil cases:

“... it is important that in any judicial process adjudication parties involved be given opportunity to present their case and have a fair hearing before the decision against them is made by the respective judge or magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system.

Although in particular circumstances errors, omissions, missteps and blunders are made by parties or their counsels during pretrial or in the course of trial to find appropriate balance fundamental requisite of due process of law should be accorded a purposeful meaning to protect right to a fair hearing. The *Civil Procedure Act* and Rules provides for time-frame rules and commitments for parties to comply with discovery; dates for closure of pleadings, filing of witness statements, production of expert material where applicable, scheduling of cases and disposition dates. Needless to say that all these commitments are aimed at each litigant to have adequate notice and fair understanding of the litigation road ahead of time disposition ...”

15. Civil proceedings originate and are processed in accordance with *Civil Procedure Act* and Rules. Upon filing and exchanging pleadings these pleadings disclose the nature and scope of the disputes. During Case Management/Pre- Trial Management provided by Order 11 CPR 2010; Parties/Counsel may/ ought to file exchange either Joint/ Separate issues for determination. These Issues inform the facts in issue throughout trial. The Court and parties are bound by pleadings filed.
16. Murphy on Evidence 12th Edition at paragraph 17.17 thus:

“the general rule of practice, in both Criminal and Civil cases, is that every party must call all the evidence on which he proposes to rely during the presentation of his case, and before closing his case. (See Kane {1977} 65 CR APPR 270). This involves the proposition that the parties should foresee, during their preparations for trial, what issues will be, and what evidence is available and necessary in order to deal with those issues. The definition of the issues in a Civil case, by exchange of statements of case and witnesses’ statements, is designed to enable this to be done wherever possible.”



17. In *Galaxy Paints Company Limited V. Falcon Guards Limited Court of Appeal Case Number 219 OF 1998*, the Court of Appeal stated that

“issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court’s determination.”
18. During proceedings the parties adduce evidence oral direct evidence and/or documentary evidence based on statutory and legal burden and standard of proof to prove the issues for determination. The witness adduces evidence in examination in chief as provided by Section 145 of *Evidence Act*. The witness’s credibility is tested and veracity of the evidence is also tested through cross-examination which is considered an integral part of fair trial.
19. Thereafter, the witness may be re-examined if need be by his Counsel in view of examining the critical issues raised in cross examination in order to clarify or emphasize what was stated in examination in chief by the witness.
20. Section 146 (3) of the *Evidence Act* provides that:
 - (3) The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.
21. The provision is self-executing in 2 instances; first re-examination is only in relation to explanation to matters raised in cross examination.
22. In the instant proceedings; PW2 in examination in chief referred and relied on his Witness Statement and various documents housed in Vol1 of Plaintiff’s bundle of documents produced and served during Case Management/Pre-Trial (as other parties to these proceedings dis) and now forms part of the Court record. The document at Pg 48 of the Plaintiff’s bundle was not new but was not referred by the Defense Counsel during cross examination of various other documents on whether they were signed by PW2. It is in Re-examination, that Counsel for Plaintiff referred PW2 to document at Pg 48 and he confirmed it was signed. The document at Pg 48 was not new but part of Vol 1 of Plaintiff’s bundle which was already filed and exchanged with Defendants. There was no prejudice on the Defendants.
23. Secondly, Section 146 (3) Evidence also allows with leave of Court a new matter to be introduced in re-examination as long as the adverse party is also allowed to further cross examine on the new matter.
24. Again, if the Defense Counsel took the view that reference to Pg 48 by Plaintiff’s Counsel to PW2 was the document was signed or not, was a new matter not raised in cross examination, the objection would be compromised by the Court allowing further cross examination on Pg 48 document and ensure no prejudice if any.
25. In the case of Peter Wellington Wambora v Mary Atieno & 4 others [2022] eKLR, A. Ombwayo J observed;

“This section of the *Evidence Act* speaks for itself and does not provide for the filing of new documents. The import of section 146 (3) is that where the Re-examination raises new issues the person who cross examined will be allowed to cross examine on the new issues. Ideally, re-examination should not raise new issues.”



26. In *Chris Munga N. Bichage & 2 others v I.E.B.C & 2 others* [2017] eKLR, it was observed thus:

Under Section 146 (3) of the *Evidence Act* provides:

“Section 146 (3): The re-examination shall be directed to the explanations of matters referred to in cross-examination; and if new matter is, by permission of the court introduced in reexamination, the adverse party may further cross-examine upon that matter.”

The witness was questioned on matters relating to Irondi Polling Station. He was referred to a particular form. He cannot be legally barred from giving explanations on that matter especially when based on a document filed by the 1st Petitioner and which forms part of the record.

27. Therefore, from the above legal tenets that prescribe conduct of Court proceedings ensuring Fair Trial, this Court finds that the parties file pleadings that disclose the dispute for resolution and highlights the issues for determination. So that during the conduct of proceedings, admissibility and relevance of evidence is determined based on Section 5 of the *Evidence Act* and informs the conduct of examination in chief, cross examination and reexamination of witnesses.

28. With this back ground, based on the Law of Evidence the objection raised by the Defense on re-examination of PW2 by reference to Pg 48 of Vol 1 of Plaintiff's bundle on whether it was signed or not, the objection is compromised and if there is prejudice, the Defense Counsel is at liberty to further cross-examine of the document at Pg 48 of the bundle.

RULING DELIVERED SIGNED & DATED IN OPEN COURT ON 21/11/2024 AT MACHAKOS HIGH COURT (PHYSICAL/ VIRTUAL CONFERENCE).

M.W. MUIGAI

JUDGE

