



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

MISCELLANEOUS APPLICATION NO 35 OF 2015

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

KWETU SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LIMITED

(formerly) MASAKU TEACHERS SAVINGS & CREDIT

CO-OPERATIVE SOCIETY LTD.....APPLICANT

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. MASAKU TEACHERS INVESTMENT LIMITED.....RESPONDENTS

AND

ANNAH MUSILI MWEI & 29 OTHERS....INTENDED 3RD PARTIES/APPLICANTS

RULING

1. This Ruling is in relation to a Notice of Motion Application dated, **20th July 2018** and filed in Court on the 25th July, 2018. It is brought under Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 1 Rule 15, Order 45 Rule 1, and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all the enabling provisions of the Law.

2. The Application is seeking for Orders:

- a. **That this Application be certified urgent and be given the earliest available date.**
- b. **That the intended 3rd parties/Applicants be joined in this case and service of the pleadings be effected on the 3rd parties.**
- c. **That Upon grant of prayer (2) above the ruling and orders made on 26th February, 2018 be reviewed and set aside and the matter reopened for comprehensive viva voce hearing of all the parties on merit of all the issues and claims.**
- d. **That the costs of this application be in the cause.**

3. The first prayer seeking for the Application to be certified as urgent and heard ex parte in the first instance, was dealt with on the 26th day of July 2018, when the Application was heard under a certificate of urgency, and ordered to be served for inter parties hearing on 31st July, 2018. On the said 31st July, I directed that the application be canvassed by way of submissions.

4. Before I go to the submissions, the instant suit vide notice of motion dated 2nd February 2015 was filed on the same date in Nairobi. It was made under Section 118 of the Companies Act. It was seeking the following orders

- a. **That this Application be certified urgent and assigned an early date for taking of directions.**
- b. **That the Register of Companies in respect of the 12th respondent MASAKU TEACHERS INVESTMENT LIMITED be rectified by removing/expunging therefrom the names of the 1st to 11th respondents namely JAMES MUIYA, DANIEL MUTHUNGWA, ISRAEL NZALLU, RICHARD MASILA KAVEKE, PATRICK SOVE, DAVID KIOKO, COSMAS MWOLOLO, WILSON MUTUNGA, LAWRENCE MUTUNGA and JOSEPHAT KALANZO.**
- c. **That Register of Companies in respect of the 12th respondent MASAKU TEACHERS INVESTMENT LIMITED be rectified by entering the applicant KWETU SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LIMITED to hold 19,999 shares.**
- d. **That Register of Companies in respect of the 12th respondent MASAKU TEACHERS INVESTMENT LIMITED be rectified by allocating 1 share to a person to be nominated by the applicant KWETU SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LIMITED.**
- e. **That the applicant be at liberty to complete and file necessary statutory documents including *inter alia* returns and Form 203A to give effect to the rectification as ordered by the Honorable Court**
- f. **That the 1st to 11th respondents be ordered to pay damages to the applicant.**
- g. **That the costs of this application be borne by the 1st to 11th respondents.**

5. After the hearing of the Application on 26th February, 2018, it was allowed and dispensed with thereof.

6. The Applicants herein, have not applied solely to be added as parties to the suit; they have also applied for review and setting aside of the judgment of the court to give them an opportunity to be heard. In other words, the applicant was effectively applying for review and setting aside of the judgment of the Court and an order for *de novo* hearing of the suit, which would afford them an opportunity to be heard Their Counsel submitted that, the reason for the same is that, the ruling of the court affected their shareholdings, shares or membership of the company which they and the respondents have acknowledged their existence and distinct shareholding. That they have distinct rights from the Sacco Applicant and the company and yet are not parties in the plaint or main suit herein. They relied on order 10 rule 2 and Order 45 of the Civil Procedure Rules. All in all they submitted that there was ripple effect of the ruling on the shares and membership of the intended 3rd parties/applicants.

7. The respondents responded to the application by filing grounds in opposition to the Application by saying that the court is *functus officio*, therefore the orders sought are incapable of consideration

8. The applicants in the parent suit are not opposed to the application for review and submitted that it be allowed as prayed.

9. I have considered the Application, the submissions by counsels and authorities cited. In my considered opinion the issues that arise for determination are:

(i) Whether the Applicants can come on record as party to a concluded suit.

(ii) Whether a party can be so enjoined in the lower court after an appeal has already been lodged in a higher court.

10. I shall first deal with the issue of enjoining a party into proceedings. This is informed by an understanding that, a Party cannot have the *locus standi* to address the Court unless and until they are properly on record or a Party to the suit. In that regard I wish to first of all examine the Law relating to Parties being enjoined in a Suit.

11. Order 1 Rule 15 of the Civil Procedure Rules provides that the applicant brings his application under circumstances that deal with enjoining of a Third Party by the Defendant. This provision is not relevant to the instant application.

12. **Order 1 Rule (10) (2)** of the Civil Procedure Rules that the applicant has quoted in their application empowers the court, at any stage of the proceedings, upon application by either party or *suo moto*, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party.

13. Commenting on this provision, the learned authors of *Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887)*, state that:

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

14. Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. *Sarkar's Code*, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings.

15. I shall now deal with the issue of an Interested Party. For a party to be so enjoined, his presence must be necessary in determining the matter. Hence, the Applicant has to show that he has a stake in the proceedings and his presence will help determine the issues at hand. The mere mention of the interested party does not entitle him to be enjoined as a party to the proceedings.

16. The Civil Procedure Act is silent on the concept of **“interested party”**. However, under Order 41 Rule 5 of the Civil Procedure Rules 2010, make a reference to the term **“interested party”** and states;

“The court either on its own motion or on application by any interested party, remove a receiver appointed pursuant to this order on such terms as it thinks fit”

17. 22. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, defines an interested party as;

“A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation”

Legal Notice No 117 of 2013 further provides that, a person with leave of the Court may make an oral or written application to be joined as an interested party to the Court, on its own motion, may also join an interested party to the proceedings before it.

18. The Black's Law Dictionary 9th Edition, page 1232 defines an interested party as;

“A party who has a recognizable stake (and therefore standing) in the matter”

19. The Black's Law Dictionary, 9th Edition defines a “Necessary Party” as being

“A party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings”

20. I find that a person seeking to be enjoined in a suit as an interested party may be allowed under Article 48 of the constitution.

21. Article 48 thereof, states that;

“The state shall ensure access to justice for all persons, and if any fee is required, it shall be reasonable and shall not impede access to justice”.

22. The common thread that runs through the above legal provisions is that there must be a pending suit so as to allow enjoinder of a party and not if the court is *functus officio*

23. The *functus officio* principle was conclusively dealt with by the Court of Appeal in **Telkom Kenya Limited vs. John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR** where Githinji, Karanja & Kiage JJ.A observed thus:

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of the 19th Century. In the Canadian case of Chandler vs. Alberta Association of Architects [1989] 2 S.C.R 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);

“The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in re St. Nazaire Co. (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. Where there had been a slip in drawing it up, and,

2. Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp. [1934] S.C.R. 186”

24. The Supreme Court in **Raila Odinga vs. IEBC** cited with approval an excerpt from an article by **Daniel Malan Pretorius** entitled, **“The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law”** (2005) 122 SALJ 832 in which the learned author stated;

...“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

25. In the current instance, this court has previously deliberated on this matter and as such this court cannot purport to alter its decision as this would be tantamount to an appeal. An appeal against an order granted by the High Court can only be heard and determined by the Court of Appeal by as per **Article 164(3)(a)** of the **Constitution of Kenya**. As such, the court is *functus officio* in this regard.

26. While this court is vested with adjudicative powers, once a court becomes *functus officio*, the only orders it can grant are review orders which are an exception to the *functus officio* doctrine. This was aptly summarized in the case of **Jersey Evening Post Ltd vs. Al Thani [2002] JLR 542 at 550** which was cited and applied by the Supreme Court in **Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 others [2013] eKLR** that:

“A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”

27. A look at the applicant’s application and prayers thereof shows that they seek to improperly admit evidence and add parties to a suit after the suit had been heard and concluded. The evidence they seek to rely on had not been introduced at the trial of the suit and could not be brought in after the matter had been heard and concluded, *a priori*, I am being asked to re-open the trial and convert myself to sit as an appeal court, which power I do not have. In light of the foregoing, there already being a pending appeal, the only recourse available to the Applicant in this case would be to go to the Court of Appeal.

28. In the premises, I find that the application dated 20th July, 2018 is devoid of merit and consequently dismiss it with no order as to costs.

It is so ordered.

Dated and delivered at Machakos this 9th day of November, 2018.

D.K. KEMEI

JUDGE