



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC NO. 1112 OF 2013**

MARY NDUTA KIHU.....1<sup>ST</sup> PLAINTIFF  
KATHIRA NOOR H. BILE.....2<sup>ND</sup> PLAINTIFF  
JOSEPH MWANGI.....3<sup>RD</sup> PLAINTIFF  
ROBERT OKWOYO MIRONGA.....4<sup>TH</sup> PLAINTIFF

**(ADVOCATES – MAGEE WA MAGEE & CO.)**

**VERSUS**

**MUUNGANO WA WANAVIJIJI AKIBA MASHINANI TRUST.....DEFENDANT**

**RULING**

There are two applications herein for determination. The 1<sup>st</sup> application is dated 28<sup>th</sup> January, 2014 brought by the Plaintiffs herein. The 2<sup>nd</sup> application is dated 16<sup>th</sup> April, 2014 brought by proposed Defendants. The court made an order that the two applications be canvassed together and thus this ruling.

In the application dated 28<sup>th</sup> January, 2014 the applicants are seeking orders that first, the Memorandum of Appearance dated 8/10/2013 and the Defence dated 22/10/2013 filed on behalf of the Defendant be struck out. Secondly, and consequent to the first order, an Interlocutory Judgment be entered in their favour. The Plaintiffs also want the costs of the application. The application is premised on grounds outlined in the application and supported by an affidavit sworn by Mary Nduta Kihiu. It is deposed for the Plaintiff that the Defendant's counsel Waikwa Wanyoike is not qualified to perform duties as an Advocate appearing independently for any party in court. Further that the said counsel has not complied with the Advocates Act and its regulations. The deponent referred the court to a letter from the Law Society of Kenya dated 4/12/2013 marked "MNK3" confirming that the Defendant's counsel does not have a registered law firm and cannot perform duties undertaken by a law firm. The deponent stated further that Katiba Institute cannot purport to act as a firm of Advocates as it is not registered under the Registration of Business Names Act required of a law firm.

Jane Weru, one of the trustees of the Defendant swore a Replying Affidavit on 4/2/2014 wherein she deposed that Waikwa Wanyoike, Advocate had an admission certificate at the time he received instructions from the Defendant and that the documents filed by the said Advocate, was done in good

faith. She deposed that an advocate who holds his first practicing certificate under Section 7(a) of the Advocate Accountants Certificate Rules need not file an accountant certificate. Therefore that Wonyoike's admission number P.105/9848/13 signifies that he is newly admitted thus did not require obtaining the said certificate. The deponent maintained that nonetheless, the Defendant had since appointed the firm of Balala & Abed to represent it.

By mutual consent of both parties, the application was canvassed by way of written submissions. Counsel for the Plaintiffs submitted that the response to the application do not address the issue at hand, to wit, whether the memorandum of appearance and defence on record are incompetent, and therefore the deponents therein are irrelevant. Counsel submitted that Waikwa Wanyoike, though a holder of a practicing certificate cannot practice on his own without compliance with the Law Society of Kenya Regulations as to professional indemnity. Therefore, the said Advocate could only practice either in partnership or after purchasing a cover. Further that Katiba Institute is not a law firm managed by the said advocate. In sum, it was submitted for the Plaintiffs that Waikwa Wanyoike had breached the provisions of Rule 2 Advocates (Professional Indemnity) Regulations, 2004; Rule 12 Advocates (Practice) Rules; and Rules 3 and 12 Advocates (Accountant's Certificate) Rules.

Counsel for the Defendant submitted on three points. First, that the Plaintiffs had not shown any authority to institute the suit on behalf of 52 trustees of MMBT, and therefore that the Plaintiff is unauthorized and violates several rules of the Civil Procedure Code. Counsel submitted that it thus far undisputed that the Defendant does not have corporate status as it does not have a Certificate of Incorporation. Consequently that MMBT can only lawfully operate as a private trust consisting of 52 trustees. Counsel submitted that since a trust operates to confer personal liability on each trustee, there ought to be written authority from the 48 trustees other the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs.

It was further submitted that the MMBT constitution does not confer the Plaintiffs authority to swear or institute legal proceedings and the use of a corporate seal is fraudulent as the Plaintiffs pass off as operating as a corporate status whereas MMBT has not acquired such status. In the event that MMBT had a corporate status, Clause 9 (iii) (b) would require a Board of Trustees Resolution authorizing the affixing of the common seal. Counsel also submitted that the Plaintiffs as trustees cannot institute the suit in the names of the Chairman, Secretary and Treasurer or as members of MMBT since there are 2000 members democratically represented by 52 trustees. Therefore, that the exclusion of the other trustees is deliberate and with the aim of enriching a few to the detriment of the majority. It was counsel's submission that the Plaintiffs had thus breached the following provisions of the Civil Procedure Rules - Order 8 Order 9 Rule 2(a) (b) (c), Order 13 and Order 31 Rule 2.

Secondly, counsel submitted that the Waikwa Wanyoike, counsel subject matter of the application, holds a valid practicing certificate issued by the Law Society of Kenya which indicates that he was admitted to practice on 23/1/2013. Having been freshly admitted, counsel submitted that he would not be liable to comply with the Advocates Accounts Certificate Rules. In respect to the lack of Professional Indemnity cover, the counsel submitted that the Defendant took prompt action to change representation. The third point of submission was a plea to the court to allow the memorandum of appearance and defence to be filed out of time in a bid to afford the Defendant an opportunity to defend the case. Further that the Defendant is willing to pay costs as directed by the court. Counsel submitted that the remedy sought by the Plaintiff is too draconian and aimed at causing hardship to all the trustees who are not joined to the suit.

Considering the pleadings herein and the submissions the court finds that the Plaintiffs have asked the court to strike out the Memorandum and Defence filed by Waikwa Wanyoike Advocate on the basis that the said Advocate despite being a holder of a valid practicing certificate, does not qualify to appear independently to represent the Defendant, neither can Katiba Institute be deemed a law firm acting on the Defendant's behalf. As soon as the application was filed, the firm of Abed & Balala filed a Notice of Change of Advocates in place of Waikwa Wanyoike for the Defendant. I read into the change of advocates as a way of rendering the application as overtaken by events. The Defence, however, has been filed in the name of Waikwa Wanyoike c/o Katiba Insitute. I have perused the letter dated 4/12/2013 addressed to the Plaintiffs from the Law Society of Kenya advising that any advocate intending to operate

a law firm or represent clients in court is required to comply with the Accountants Rules, Accounts Certificate Rules and Professional Indemnity Regulations, 2004. In view of the requirements from the Society, I find that indeed there was a mistake as to the Defendant's representation and I accordingly strike out the Memorandum of Appearance and Defence as filed on 8/10/2013 and 22/10/2013, respectively by Waikwa Wanyoike Advocate.

The Plaintiffs pray that consequent to the orders of striking out the defence, that interlocutory judgment be entered in favour of the Plaintiffs. To this prayer, the Defendants aver that the issue revolves around rights to ownership of land of MMBT which comprises of 2000 members. Counsel for the Defendant urged the court to allow the Memorandum of Appearance and Defence to be filed out of time to afford the Defendant an opportunity to defend the suit. The court has found that there was an error on the part of the Defendant's previous counsel and has proceeded to strike out the Defence. The Court is however alive to the fact that the said measure is draconian with the effect of depriving a party of the opportunity to present his case. It therefore invokes its inherent power under Section 3A of the Civil Procedure Act alongside the overriding objectives as provided under Sections 1A & 1B thereto, to afford the Defendant an opportunity to present its case. I am guided by the Court of Appeal decision of **Abdirahman Abdi also known as Abdirahman Muhumed Abdi V. Safi Petroleum Products Ltd. & 6 others, Civil Application No. Nai. 173 of 2010**

**The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice.**

The Defendant is thus allowed to file a fresh Memorandum of Appearance and Defence within 7 days from the date hereof. In effect, the Plaintiffs prayer for interlocutory judgment is denied.

In the second application, dated 16<sup>th</sup> April, 2014, **John Mbatia Waweru, Gula Fadhii Yusuf, Cecilia Wanjiru Kibe, Jecinta Wakini Njue, and Thomas Githinji** ("the Applicants"), are seeking for an order that they be added to the suit as Defendants. They also pray that all the trustees of Mukuru Makao Bora Trust (MMBT) be joined in the suit and the Plaintiffs be ordered to effect service on all trustees of MMBT with the suit papers. The application is premised on grounds outlined in the application and supported by an affidavit sworn by John Mbatia Waweru. It is deposed that the intended Defendants are zone trustees among 52 trustees of MMBT and that each trustee has one vote at the MMBT Board of Trustees meeting in accordance with Clause 7 of the MMBT Constitution, whereas the Plaintiff, collectively have one vote since they do not represent any zone. Further that they have an interest in the suit property on their own behalf and that of the beneficiaries of MMBT. The deponent states that none of the proposed Defendants was aware of the suit as no notice of institution of suit was given them as well as any of the 52 trustees. The deponent contends that the suit has been instituted by persons having one vote at the Board of Trustees whereas the MMBT constitution at clause 7 is clear as to the procedures of the Board.

The deponent stated that the Plaintiffs were misleading the court as they presented letters bearing forged signatures. Further that whereas the Plaintiffs had exhibited the a trust deed for MMBT, no Certificate of Incorporation issued by the Minister pursuant to Section 3 of the Trustee (Perpetual Succession) Act, (Cap. 164) has been exhibited. Further that until a lawful certificate of incorporation is issued, all 52 trustees are validly concerned with the suit property since they are each personally liable. In urging the court to allow the application, the deponent contended that Order 31 Rule 2 of the Civil Procedure Rules makes it mandatory that all trustees must be joined and made parties to the suit.

**Mary Nduta Kihii** swore a Replying Affidavit on 12/6/2014 wherein she deposed that the application is incompetent, bad in law and an abuse of the court process for reasons that there is no cause of action against the Applicants, neither have they demonstrated any dispute between them and the Plaintiffs and therefore there is no issue for determination between them. The deponent stated that the Applicants are not members of the Defendant trust neither are they the registered proprietors of the suit properties (LR No. 7109/88 and 89) whereas the Plaintiff's claim against the Defendant is for the transfer of the suit properties to MMBT. Consequently, that there is no lawful manner in which they can be enjoined as defendants in the suit.

It was further deposed that the Applicants have no authority under the trust deed to act for and on its behalf since they are not executive officers and authorized signatories of the Board of Trustees. As regards Order 31 Rule 2, the deponent stated that the same was inapplicable for reasons that the suit properties is yet to be vested in the trustees of MMBT; and that the suit has been filed on behalf of and not against MMBT. The deponent also refuted the allegation that members of MMBT may not be aware of the suit making reference to the annexed meetings of 17/11/2012 and 27/1/2012 in which meetings the Applicants were in attendance. She deposed further that the Board of Trustees of MMBT on 16/8/2013, wherein John Mbatia was present, resolved to institute the instant suit.

The deponent contended that official documents are signed by four trustees – the Chairperson, Secretary, Treasurer and one board member and that the day to day management of the administrative affairs is entrusted to the executive officers of the board as provided under clauses 14 and 9, respectively. She contended further that all the meetings held by the board of trustees in relation to this matter was lawfully held, had the requisite quorum, and followed the correct procedure as provided in the trust deed. It was deposed for the Plaintiffs that the Applicants that there would be no logical explanation as to why the trustees who purport to act for the interest of the beneficiaries of MMBT would join hands with the Defendant which has unlawfully declined to transfer the suit land to MMBT.

The application was canvassed by way of written submissions. Bryant & Associates Advocates for the Applicants filed submission dated 19/7/2014. Counsel submitted that it is established from the Plaintiffs pleadings and documents that the all the parties – Plaintiffs, Defendants and the Applicants are trustees of MMBT and in view of Order 31 Rule 2 of the Civil Procedure Rules the Applicants ought to be made parties to the suit. Further that the Applicants wished to join as Defendants as they are not in agreement with the position taken by the Plaintiffs. It was submitted that the Plaintiffs asserting that they can bring the suit on behalf of trustees through the purported chairman, secretary and treasurer were applying the provisions applicable to suits by Societies yet it is a trust that they are purporting to represent.

Counsel further relied on Order 1 Rule 3 of the Civil Procedure Rules submitting that the Applicants being trustees and beneficiaries of MMBT have a right to relief in respect of any activity undertaken with regards to the acts and transactions over the trust and its property. Counsel also submitted that under Order 1 Rule 8(3) the Applicants being members of MMBT on whose benefit the suit is instituted have the right to apply to the court to be made party. It was also submitted that the court will not be seized of all the relevant information and therefore not effectually and completely adjudicate the dispute without the input of the Applicants.

Magee wa Magee Advocates for the Plaintiff filed submissions dated 25/7/2014 wherein counsel reiterated the contents of the Plaintiff's Replying Affidavit that Order 31 Rule 2 of the Civil Procedure Rules is inapplicable as it provides for the joinder of trustees, executors and administrators whereas the suit property is yet to be vested in the trustees of MMBT.

Having now considered the pleadings and the submissions the Court finds that the dispute between the Plaintiffs and Defendant is on two properties which the Plaintiffs aver that they, under MMBT comprising of over 2000 members, purchased through the Defendant and have since completed mortgage payments. The Plaintiffs therefore pray that the Defendant be directed to transfer the said properties to MMBT. The Applicants seek to be joined as Defendants on the grounds that they are trustees representing zones each of which comprises of members of MMBT. The Plaintiffs in response to admit that the Applicants are trustees of MMBT but lack authority under the Trust Deed to act for an on behalf of MMBT as they are not executive officers and authorized signatories of the Board.

The Applicants want to be joined as Defendants in the suit. Order 1 Rule 3 provides for who can be joined as Defendants. It reads:

**All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.**

The Plaintiffs on their part aver that the Plaintiff is not a member of the Defendant, neither are they registered as proprietors of the property and therefore there is no lawful manner in which they can be enjoined as Defendants in the suit. As stated hereinabove, the Plaintiffs pray for Judgment against the Defendant for the transfer of two properties, subject matter of the suit. In my view, there is no remedy that the Plaintiffs seeks from the Applicants and I therefore decline to allow a joinder of the applicants as defendants to this suit. The case of **Joseph Leboo & 2 Others v Director Kenya Forest Services & another Eldoret E&L No. 273 of 2013 [2013] eKLR** is very of great persuasion to this finding.

However, I have perused the Trust Deed which provides at Clause 6 that there shall be a Board of Registered Trustees that shall be the Supreme Organ of the Trust comprising of between 32 – 52 trustees and its membership shall be drawn from among others, zones. Sub-clause (b) states that a registered trustee representing a zone must have been elected by his group members at the zones. Consequently, therefore, the Applicants are not strangers but representatives of members of MMBT in their respecting zones. It is stated at Clause 9 that there shall be executive officers – Chair, Vice Chair, Secretary, Vice Secretary and Treasurer who shall manage the day to day administrative affairs of the trust. Though the zone representatives are not part of the executive officers of the Board, they are an integral part that forms part of the Supreme Organ of the trust.

It is my finding therefore that the Applicants have a stake in the suit, thus qualify as Interested Parties. **Black's Law Dictionary, 9<sup>th</sup> Edition**, defines "Interested Party" (at p.1232) as, **A party who has a recognizable stake (and therefore standing) in a matter. Order 1 Rule 10 of the Civil Procedure Rules** gives this court discretion at any stage of court proceedings to add parties whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. Order 1 Rule 10(2) provides as follows:

**The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.**

The above cited rule allows the court to join a party whose presence is necessary to adjudicate on all questions in a suit, even though not as Plaintiff or Defendant, hence the joinder of parties as interested parties. See **Stephen Mwaka Mbuvi v Patrick Mutuku Mbovi Nairobi ELC Civil Suit No. 256 of 2014 [2014] eKLR**

The final orders of the Court on the two applications are as follows:

1. ***The Defendant's Memorandum of Appearance and Defence filed by Waikwa Wanyoike, Advocate are hereby struck out.***
2. ***The Defendant is hereby directed to file and serve a Memorandum of Appearance and Defence within 7 days from the date hereof.***
3. ***The Plaintiffs prayer of Interlocutory Judgment is disallowed.***
4. ***All trustees of Mukuru Makao Bora Trust including the five proposed Defendants are hereby joined to the suit as Interested Parties.***
5. ***Costs of both applications be in the cause.***

Dated, Signed and Delivered this 14<sup>th</sup> day of November 2014

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

.....For the Plaintiffs

.....For the Defendant

.....For the Interested Parties

.....Court Clerk