



**VG Patel & Sons Limited v Ombasa, The Liquidation Agent, Middle Africa Finance Company Limited (In Liquidation) & another (Environment & Land Case E017 of 2021) [2023] KEELC 19211 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19211 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE E017 OF 2021**

**JO OLOLA, J  
JULY 28, 2023**

**BETWEEN**

**VG PATEL & SONS LIMITED ..... PLAINTIFF**

**AND**

**JOHN MASEGA OMBASA, THE LIQUIDATION AGENT, MIDDLE AFRICA FINANCE COMPANY LIMITED (IN LIQUIDATION) ..... 1<sup>ST</sup> DEFENDANT**

**PETER NJOROGI GICHUKI T/A SPOTLIGHT INTERSEPTS AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Plaint dated August 10, 2021, V. G. Patel & Sons Limited (the Plaintiff) sought inter alia a permanent order of injunction restraining the Defendants from advertising for sale, offering for sale, selling or transferring the suit properties being Title No. 2787/1/12 in the name of Lenana Steelcom and Title No. 2787/140 in the name of Laikipia Saw Mill Limited. In addition, the Plaintiff also sought an order restraining the Registrar of Titles in Nairobi from registering or transferring the said properties to any third Party at the instance of the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
2. Upon being served with the suit as well as a Notice of Motion application filed by the plaintiff and dated August 10, 2021 the 1<sup>st</sup> defendant filed a notice of preliminary objection dated October 13, 2021 objecting to both the suit and the application on the grounds:
  1. That this honourable court lacks jurisdiction to hear and determine this matter pursuant to the Court of Appeal Judgment delivered in *Co-operative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 others* (2017) eKLR; and



2. That the dispute before this honourable court is not one of land, but of the commercial nature whose determination is not within the jurisdiction of the Environment and Land Court.
3. Having heard the objection and by a Ruling rendered herein on May 26, 2022, this court overruled the 1<sup>st</sup> defendant's preliminary objection while allowing the plaintiff's Motion dated August 11, 2021.
4. By this second notice of preliminary objection dated November 1, 2022, the 1<sup>st</sup> defendant objects to the suit and the earlier motion filed by the plaintiff on the grounds:
  1. That the plaintiff failed to seek leave of the court before instituting the suit against the 1<sup>st</sup> defendant as is anticipated in section 56(2) of the *Kenya Deposit Insurance Act* No. 10 of 2012; and
  2. That failure to obtain leave from Court as required under section 56(2) of the *Kenya Deposit Insurance Act* No. 10 of 2012 goes to the root of the matter and is fatal.
5. Following directions given herein, it was agreed that the said objection be disposed of by way of written submissions. I have accordingly carefully perused and considered the said preliminary objection as well as the written submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
6. By their new preliminary objection, the 1<sup>st</sup> defendant asserts that the suit herein is fatally defective on account that the plaintiff never sought the leave of the court prior to the institution of the suit as provided for under Section 56(2) of the *Kenya Deposit Insurance Act* No. 10 of 2012.
7. In response to the said preliminary objection, the plaintiff asserts that the 1<sup>st</sup> defendant having filed another preliminary objection earlier, the present one is an afterthought and an attempt to abuse the process of the court by delaying this matter and thereby circumventing justice. It is the plaintiff's case that the 1<sup>st</sup> defendant is not an institution capable of taking refuge under section 56(2) of the cited Act and that in any event the 1<sup>st</sup> defendant has been sued in his individual capacity and as a liquidating agent of the Kenya Deposit Insurance Corporation.
8. Section 56 of the said *Kenya Deposit Insurance Act*, 2012 provides as follows:
 

“56. Stay of proceedings –

  - (1) No cause of action which subsisted against the directors, management or the institution prior to liquidation shall be maintained against the liquidator.
  - (2) No injunction may be brought or any other action or civil proceedings may be commenced or continued against the institution or in respect of its assets without the sanction of the Court.”
9. Explaining the rationale of the said provision in *Andrew G. Muchai v Chase Bank Limited* (2016) eKLR, Nzioka J., observed as follows:
 

“... In my opinion, to answer this question, one needs to appreciate what receivership is all about. In my opinion, receivership in legal terms entails an order/directive where all the property and affairs of an institution are placed in the dominion and control of an independent person known as a receiver. This receivership is a preservation process put in place to protect the asserts, liabilities and business affairs of a bank with the aim of protecting



the interest of its depositors, creditors and members of the public. In this case to preserve the bank's liquidity, assets to find the best way to return it into normal business.

The essence of seeking leave to commence a suit is to verify that the applicant has a valid claim, which they need to pursue against the institution and by extension the corporation. The main aim is thus to create orderliness, decency and avoid a floodgate of actions, which may involve some of the matters placed under supervision. This is informed by the fact that when Chase Bank Kenya (in receivership) was placed under receivership, the Kenya Deposit Insurance Corporation declared a moratorium to the Bank's business to be undertaken by all stakeholders of the bank; including limiting the Bank's services. A moratorium is a temporary delay or suspension of an activity. The same prohibits a Bank from inter alia receiving deposits and making payments, unless it is partially or fully listed by the Kenya Deposit Insurance Corporation. Thus suits cannot be commenced suo moto without the Court's leave and/or sanction. That will create anarchy. I hold that; for a company under receivership, a Party suing it must seek the court's leave before commencing a suit against it. Therefore institution of any proceedings will require the sanction of the court ..."

10. In the matter before me, the plaintiff describes the 1<sup>st</sup> defendant John Masega Ombasa at Paragraph 2 of the Complaint filed herein on August 11, 2021 as the Liquidation agent, Middle Africa Finance Company Limited (in liquidation). From the pleadings filed herein, it was apparent that the said Middle Africa Finance Company Limited is a company in liquidation and that as a micro-finance company, it qualifies as an institution which is defined under section 2 of the Kenya Deposit Insurance Act No 10 of 2012 as "a bank, financial institution or mortgage financial company as defined in the Banking Act (cap 488) or a Micro-Finance Bank as defined in the Micro-Finance Act 2008 or any other deposit taking entity licensed by the Central Bank."
11. As a Liquidating Agent, it was apparent the 1<sup>st</sup> defendant was reporting to a principal which is disclosed in these proceedings as the Kenya Deposit Insurance Corporation. The plaintiff does not dispute that no leave was sought prior to the commencement of this suit. Nothing would have been easier to demonstrate if leave was sought herein. It is apparent from the prayers made in the Complaint that this suit touches on the assets of the institution under liquidation.
12. In the result I am persuaded that the sanction of the court was required prior to the commencement of the suit. That being the case and this suit have been so filed without leave, the same is defective and misconceived. I strike it out with costs to the 1<sup>st</sup> defendant.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI  
THIS 28<sup>TH</sup> DAY OF JULY, 2023.**

**IN THE PRESENCE OF:**

**MR. JOHN ABWOUR FOR THE PLAINTIFF**

**MR. PRAVIN ODIYO FOR THE DEFENDANT**

**COURT ASSISTANT - KENDI**

.....

**J. O. OLOLA**

**JUDGE**

