



Mbaru & 12 others v Wangui; Muhihi & 4 others (Third party) (Environment & Land Case 636 of 2015) [2023] KEELC 19298 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19298 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 636 OF 2015
LC KOMINGOI, J
JULY 26, 2023**

BETWEEN

- JOHN NJOGU MBARU 1ST PLAINTIFF**
- MARY MUTHONI KINYANJUI 2ND PLAINTIFF**
- STEPHEN GITHUA MWATI 3RD PLAINTIFF**
- EUNICE WANJIRU MBURU 4TH PLAINTIFF**
- MARGARET WACHERA NJOROGE 5TH PLAINTIFF**
- KENNETH MBUGUA NGANGA 6TH PLAINTIFF**
- GEORGE GACHANJA WAMBUI 7TH PLAINTIFF**
- TERESA WANGARI KUMUHU 8TH PLAINTIFF**
- MARGARET WANJIRU KIMANI 9TH PLAINTIFF**
- JAMES NJOROGE 10TH PLAINTIFF**
- CATHERINE WAMBUI NJOGU 11TH PLAINTIFF**
- MAGDALINE WANJIRU NJOROGE 12TH PLAINTIFF**
- POWDERSPRING INVESTMENT 13TH PLAINTIFF**

AND

- JANE WANGUI DEFENDANT**

AND

- HERMAN MUHIHI THIRD PARTY**
- NGUNDU FARMERS CO-OPERATIVE SOCIETY LTD THIRD PARTY**
- JOHN GITHII KIGUNDA THIRD PARTY**



MICHAEL NJOROGE GACHUHI THIRD PARTY
COMMISSIONER FOR LANDS THIRD PARTY

RULING

1. This suit was commenced by a plaint dated July 6, 2015. The plaintiff sought a permanent injunction to restrain the defendant from interfering with the parcel of land known as LR No Nairobi Block 126/266 situate at Kamulu area within Nairobi .
2. In response to the claim, the defendant filed a defence and counterclaim dated March 19, 2018. She accuses the 2nd third party of preparing a list of owners different from the one on the original register of its shareholders, omitting the original allottee to plot 266, inserting another name and reallocating the said plot which had already been allotted to the 1st third party she also accuses it of issuing a certificate of title and consequent transfers to the 4th third party, who then transferred the property to the plaintiffs.
3. Pursuant to leave of court granted on December 9, 2019, a 3rd party notice was issued on January 30, 2020 by the defendant against five third parties. Subsequently, the 2nd third party filed a notice of preliminary objection dated April 21, 2022 which is for determination before this court. It objects to the hearing of the suit against it on grounds;
 - a. No leave has been sought by the defendant to proceed with the suit as against the 2nd third party which is under liquidation contrary to section 432(2) of the [Insolvency Act](#).
 - b. The 2nd third party ceased to exist upon liquidation and thereby lacks capacity to be sued and/or defend this suit as such other than through its appointed liquidator pursuant to section 66 (1) (b) of the [Co-operative Society Act](#) No 12 of 1997.
4. The matter was canvassed by way of written submissions. The 2nd and 4th third parties filed written submissions dated September 14, 2022. They raise the following issues;
 - a. Whether leave was actually sought and granted to proceed with a suit as against the 2nd third party (in liquidation)
 - b. Whether the 2nd third party ceased to exist upon liquidation and thereby lacks legal capacity to be sued and/or defend this suit as such other than through its appointed liquidator?
5. It is the 2nd and 4th defendants submission that the 2nd 3rd party was dissolved pursuant to section 61(1) of the [Co-operative Society Act](#) No 12 of 1997 and a liquidator appointed to take into his custody all the property of the said society to complete the liquidation process and as per section 432 of the [Insolvency Act](#) No 18 of 2015, legal proceedings against a liquidated company can only be commenced with the approval of the court and subject to such conditions as the court may consider appropriate.
6. They also submit that section 228 of the [Companies Act](#) apply in relation to winding up of a co-operative society pursuant to provisions of section 94 of the [Co-operative Societies Act](#) and in this case, leave was not sought. They rely on the case of [George Wanyoike Njuguna & another v Daniel Mbugua Mari & 23 others](#) [2021]e KLR and the case of [James Kamau Mutuura v Daniel Mbugua & 3 others](#) [2015]e KLR.
7. Citing section 65 and 66 of the [Co-operative Society Act](#) No 12 of 1997, they submit that the 2nd third party herein ceased to exist upon liquidation and hence any claim for and/or against it can only be



pursued in the name of the appointed liquidator and not through a suit as against Ngundu Farmers o-op Society Ltd.

8. The defendant filed written submissions dated September 23, 2022. She submits that notwithstanding the position taken in the cases cited by the 2nd third party, this court can invoke the “oxygen principle” and allow her time to properly institute the proceedings against the liquidators in lieu of striking the suit against the 2nd third party.

Analysis

9. The issue for determination is whether the 2nd third party’s notice of preliminary objection is merited. In *Oraro v Mbaja* [2005] eKLR the court stated as follows regarding a preliminary objection: “I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement with learned counsel, Mr Ougo, that “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”
10. In the case of *Mukisa Biscuits Co Ltd v West End Distributors Ltd* (1969) EA 696 the court stated thus as per Sir Charles Newbold;

“.....A preliminary objection is in the nature of what used to be a demurer. It uses pure point of Law which is argued on the assumption that all factors pleaded by the other side are correct. It cannot be used if any fact has be ascertained or if what is sought is exercised of judicial discretion”.
11. It is not disputed that the 2nd third party was placed under liquidation on February 9, 2009 and that no leave was sought when the defendant sought to enjoin the liquidator published in Kenya Gazette Notice No 2767 of 2012.
12. Section 432 (2) of the *Insolvency Act* is worded as follows:

“When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the court and subject to such conditions as the court considers appropriate.”
13. It is not disputed that no leave was sought herein. In *Republic v Official Receiver and Liquidator & another Ex parte Transmatter Kenya Company Limited* [2020]eKLR, the court stated, “ any action commenced without any such sanction would be fatally defective and incompetent in law. Both under the *Insolvency Act* and the *Companies Act*, where a company or a society is under liquidation, it is mandatory to obtain leave to commence a suit against such a party.”
14. For the reasons stated above, the preliminary objection dated April 21, 2022 is merited. The defendant’s suit against the 2nd third party should be struck out for failure to comply with section 432 (2) of the *Insolvency Act*.
15. The costs be borne by the defendant.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 26TH DAY OF JULY 2023.

L. KOMINGOI



JUDGE.

IN THE PRESENCE OF:

N/A for the Plaintiff.

N/A for the Defendant.

N/A for the Third Parties.

Court Assistant – Mutisya.

