



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MILIMANI**

**CIVIL APPEAL NO. 1010 OF 2013**

- SAMMY MWANGANGI.....1<sup>ST</sup> PLAINTIFF
- MUSYOKA ILIMA .....2<sup>ND</sup> PLAINTIFF
- JOSEPH KARANJA.....3<sup>RD</sup> PLAINTIFF
- PAUL KIMENYA.....4<sup>TH</sup> PLAINTIFF
- BEN MUNYWOKI.....5<sup>TH</sup> PLAINTIFF
- JOSEPH MUTHIANI.....6<sup>TH</sup> PLAINTIFF
- KYULE MWIMBI.....7<sup>TH</sup> PLAINTIFF
- FRANCIS MUSAI.....8<sup>TH</sup> PLAINTIFF
- PHILIP MAINGI.....9<sup>TH</sup> PLAINTIFF
- DANIEL OGEMBO AKAMA.....10<sup>TH</sup> PLAINTIFF
- JOHN MUTHUSI MWEMA.....11<sup>TH</sup> PLAINTIFF

=VERSUS=

**DEPOSIT PROTECTION FUND BOARD (LIQUIDATOR OF  
 THABITI FIANCE COMPANY LIMITED).....DEFENDANT  
 NATIONAL BANK OF KENYA LIMITED.....INTERESTED PARTY**

**RULING**

1. The Defendant/Applicant brought a Notice of Motion dated 16<sup>th</sup> July 2014, in which it seeks orders that the proceedings in the present suit be stayed until taxed costs in the **Milimani ELC case No. 122 of 2012 (O.S) Sammy Mwangangi & 10 others Vs Thabiti Finance Company Limited & 2 others** are paid.
2. The Respondents had filed Milimani ELC 122 of 2012 against Thabiti Finance Company Limited and 2 others seeking to be registered as owners of LR Nos. 209/11544 and **11545**. Thabiti Finance Company Limited was under liquidation. A preliminary objection was raised by the advocates for *Thabiti Finance*

*Company Limited* that it was sued while it was under liquidation without leave to do so as required under the law. The preliminary objection was upheld and the Respondents suit was struck out with costs to ***Thabiti Finance Company Limited***.

3. Thabiti Finance Company Limited's Advocates proceeded to tax the bill in respect of the suit which had been struck out. The costs were taxed at ***Kshs.255,497/=***. Thabiti Finance Company Limited demanded for its costs but the Respondents did not pay. The Respondents instead went ahead to file the present suit on similar grounds as in the suit which had been struck out.

4. The applicant now contends that it is fair that the proceedings in this suit are stayed pending payment of the taxed costs.

5. The Respondents opposed the applicant's application based on a Replying Affidavit sworn by Sammy Mwangangi on 14<sup>th</sup> October 2014. The Respondents contend that the applicant has available means of executing for its taxed costs in the suit that was struck out and that the filing of this application is only intended to delay the finalization of the present suit.

6. I have considered the applicant's application as well as the opposition to the same by the Respondents. I have also considered the submissions by the applicant's advocate. This application was brought under the provision of order 25 Rule 4 of the Civil Procedure Rules. Order 25 of the Civil Procedure rules deals with withdrawal, discontinuance and adjustments of suits. Sub sections 4 of the aforesaid order provides as follows:-

***“ If any subsequent suit is brought before payment of the costs of the discontinued suit, upon the same , or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid”.***

7. The suit in ELC No. 122 of 2012 was never discontinued or withdrawn. It was struck out upon a preliminary objection being raised. The circumstance under which it was struck out is not envisaged under the provisions of Order 25 of the Civil Procedure Rules. The applicant cannot therefore bring the application under those provisions. There are other avenues open for the applicant to recover its costs. It cannot seek to recover the same by staying of these proceedings.

8. The applicant cited the case of **Patrick Kigera Mathia Kimani & another Vs Dr Peter Mungai Ngugi & 2 others Nrb HCC No. 431 of 2010**. This case is not relevant in this matter as the issue in that case was discontinuance of a suit which had been filed in Nairobi RMCCC No. 1931 of 2010. This decision was squarely on the provisions of Order 25 Rule 4 of the Civil Procedure Rules unlike in this case where the previous suit had been struck out. I therefore find that this application lacks merit. The same is hereby dismissed with costs to the Respondents.

It is so ordered.

Dated, Signed and Delivered at ***Nairobi*** this ***26<sup>th</sup>*** day of ***April 2017***

**E. O. OBAGA**

**JUDGE**

In the absence of the advocates who were aware of date and time of delivery of Ruling.

Court Assistant: Hilda

**E. O. OBAGA**

**JUDGE**