



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**MILIMANI COMMERCIAL & TAX DIVISION**

**MISC. CIVIL CASE NO. 507 OF 2016**

**KUZA FARMS & ALLIED LTD.....APPLICANT**

**VERSUS**

**DUBAI BANK KENYA LTD (IN LIQUIDATION).....RESPONDENT**

**RULING**

1. The subject Application herein is a Notice of Motion Application dated 11<sup>th</sup> November 2016. It is brought under the provisions of Section 56(2) of the Kenya Deposit Insurance Act No. 10 of 2012 Section 228 of the Companies Act Cap 486 Laws of Kenya and Order 51 Rule 1 of the Civil Procedure Rules, 2010; Section 1A, 1B, and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya; and all other enabling provisions of the law. It is supported by the grounds on the face of it and the Affidavit sworn by Shakhhalaga Khwa Jirongo, the Director of the Plaintiff/Applicant, Kuza Farms & Allied Ltd.
2. The Applicant is seeking for orders that the Honourable Court do grant sanction to the Applicant to commence civil proceedings and seek injunctive relief against the Respondent in respect of the intended appointment of Receiver Manager over the applicant's farm and business situated on L.R. No. Kaisagat Chepkoile Block 6/Sambut/7 Trans-Nzoia County and the costs of the Application be provided for.
3. The Applicant's case is that the Respondent Dubai Bank (K) Ltd, (in liquidation) has commenced the process of appointing a Receiver Manager over the business and Farming activities of the Applicant whose property is situated on L.R. No. Kaisagat Chepkoile Block 6/Sambut/7 within Trans-Nzoia County. The Appointment of the Receiver Manager will totally ruin and paralyze the Applicant's business mainly agroforestry, dairy farming, poultry and large scale maize production. It will also occasion untold hardship to the Applicant's employees whose livelihood will be brought to a halt.
4. That the Applicant is aggrieved by the actions of the Respondent as it serious disputes the accounts with the Respondent and intends to institute a forensic audit on being furnished with accounts documents which have been demanded from the Respondent Bank. The Appointment of the Receiver Manager will enable the Respondent circumvent the intended forensic audit, while taking unfair and unlawful control of the management of the Applicant by proxy. Being aggrieved by the said action, the Applicant's intends to file a suit and an Application for injunctive relief before this Court on the urgent basis.
5. As the Respondent a banking institution is in liquidation, leave of the Court is necessary in terms of Section 56(2) of the Kenya Deposit Insurance Corporation Act, Cap 487 Laws of Kenya (herein "the Act") before the filing of any proceedings. That the Application is a procedural step necessary to enable

the Applicant exercise its constitutional right to access the Court and it is only fair and just that the orders sought be granted. The grant of the orders sought for herein will not prejudice the Respondent.

6. The Application was opposed based on the Replying Affidavit sworn by Adam Boru dated and filed on 5<sup>th</sup> December 2016. In a nutshell, he deposes to the facts that, the Respondent issued a Guarantee in so far as the year 2011 on the Applicant's behalf and in November 2011, Kshs.18 million was demanded by KP&LC Company and paid by the Respondent on account of performance Bond it had given on behalf of the Applicant which had failed to perform its contractual obligations to KPLC. In the year 2012, the Applicant was indebted to the Respondent in the sum of Kshs.451,913,225.68. When the Applicant was served with a demand letter, Mr. Jirongo acknowledged the receipt of the Respondent's letter dated 20<sup>th</sup> December 2012 and replied stating that, he was in the process of disposing of land in Mintini (Mombasa) to pay the Respondent Kshs.100,000,000. In the year 2013, a valuation of the Applicant's property established the value as 61million, whereas the trees were valued at Kshs.638million. On 10<sup>th</sup> June 2013, the Applicant wrote to the Respondent to the effect that, it was arranging a sale of his company indebtedness of Kshs.400million to another bank. The Respondent has paid to CBK, a penalty sum of Kshs.1,000,000. In the year 2014, the Applicant through Mr. Jirongo wrote to the Respondent on 27<sup>th</sup> November 2014, and informed the Respondent of his proposal to settle the unserviced facilities with the Respondent by making a payment of Kshs.250,000,000 to the Respondent.

On 19<sup>th</sup> May 2015, the Respondent wrote to the Applicant, giving a 15% rebate on the Kshs.1,044,899,796 to the Applicant and its related companies owed to the Respondent.

7. The Respondent argued that, the Applicant is guilty of non-disclosure of material facts, as it did not disclose all these facts detailed above to the Court in its affidavit in support of this Application. That a Party who seeks relief from a Court especially ex parte has a duty to disclose all material facts. Therefore, the Applicant is clearly underserving of the orders sought for herein. Reference was made to the case of *Motor vessel Lillian "s" (1989) KLR*, where the Court of Appeal held that, a person making an ex parte Application is under a duty to make the fullest disclosures of all the material facts, within his knowledge.

8. The Respondent submitted that, If the Applicant has not sought for further credit facilities from the Respondent since 2009, it would not have executed further charges: Further charge, second further charge, third Further Charge, over its property as detailed under paragraph 14(d) and (f), paragraph 16(g) and (i) of the Replying Affidavit by Boru. It would also not have executed a debenture after 2009, in particular, "Further Debenture" in 2011 (*see paragraph 14(c) of Boru's Affidavit*). That in the given circumstances, the Applicant is merely speculating as to the existence of the cause of action. That is informed by the numerous admission of the debt through various letters; one dated 22<sup>nd</sup> December 2012 and 10<sup>th</sup> June 2013. That for one to obtain an injunction, one must have a cause of action. Reference was made to the case of *The siskina 1977 EA 3 All ER 803* where Lord Diplock stated that a right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. That to allow the Application herein, would have the effect of elevating the Applicant's claim to that of a preferential creditor.

9. I have considered the Application in total. The same is anchored on the provisions of Section 56(2) of the Act. That section states that:

***"No injunction may be brought or any other or civil proceedings may be commenced against an institution or in respect of its assets without the sanction of the Court."***

10. The question is this: Why is it necessary to seek the leave or sanction of the Court? According to the Applicant, the Draft pleadings annexed to the Affidavit in support of the Application, shows that, the Applicant has an arguable cause of action, based on facts inter alia, that, the placement of the Applicant under "*Receivership is unlawful, wrongful and invalid ab initio*". That the Applicant does not owe the Respondent any money secured by a Debenture dated 3<sup>rd</sup> August 2009. It has not been issued with a Notice pursuant to Section 351 (1) (a) of the Companies Act, and the Debenture has not become

enforceable in terms of clause 17 thereof. Thus, the Applicant argues that it has an arguable cause of action. The Applicant further submitted that, the Act, does not place any conditions or limitations upon the Court in granting the sanction to an Applicant as herein. Therefore, the Court is to exercise its wide and unfettered judicial discretion based on the normal parameters of fairness, transparency, justice reasonableness and the need not to derive the aggrieved parties from Court without a hearing. That the Applicant has a constitutional and administrative right to access to justice.

11. However, the Respondent maintained that it is incumbent upon the Applicant to establish that it indeed has a cause of action as against the Respondent. That Section 56(2) does not provide an automatic grant of leave to an Applicant.

12. In my considered opinion, the essence of seeking leave and/or sanction of the Court to commence civil proceedings pursuant to Section 56(2) of the Act, is inter alia to evaluate the merit of the alleged claim to be instituted. As rightfully submitted, the intention is to weed out frivolous cause of actions. The question that arises is: How can the Court rule at this stage, that the Applicant intended cause of action is frivolous and/or lacks merit. The provisions of Article 48 of the Constitution also comes into play, that the state shall ensure “*access to justice for all persons*”. The Respondent have indeed raised very salient points in the Replying Affidavit by Boru, and in their submissions. However, I find that, the matters deponed to, and the submissions filed are very useful if the same were considered in the intended Notice of Motion Application by the Applicant. I have intentionally not delved there into in details so that if the intended suit/Application are allowed, then I can use the materials at that time. The delicate balance herein is to weigh the consequences of denying the Applicant an opportunity to be heard, and allowing the same. I am of the view that, if I allow the Application, the Respondent will have a second bit on the cherry, as they will still be heard on the intended pleading sought to be heard. If I deny the Applicant the opportunity to be heard, then they will be prejudiced, as their “*story*” however “*hopeless*” it may be deemed to be will remain, untold and/or unheard.

13. It is against this background I make the following orders:

***i. The Application is allowed in terms of prayers 2.***

***ii. The costs be in the cause***

***iii. To protect the Respondents interest, I order the Certificate of urgency Application, the Notice of Motion, and the Complaint, annexed to the Affidavit in support of this Application be filed (upon payment of the requisite Court filing fees) and served within 7 days of this order.***

***iv. Upon service of the same, the Respondent to file/serve the response thereto within 14 days of service.***

***v. The Applicant will then file/serve any further Affidavit alongside their submissions within 10 days of service.***

***vi. The Respondent will then file response submissions within 7 days of service.***

***vii. The timelines herein must be adhered to strictly.***

***viii. If the Applicant fails to file the pleadings herein, as per order (iii) above, the orders granted him and any other interim interlocutory orders will stand vacated without further reference to Court.***

14. Those then are the orders of the Court.

**Dated, signed and delivered on this 23<sup>rd</sup> day of June 2017 at Nairobi.**

**G. L. NZIOKA**

**JUDGE**

**In Open Court in the presence of:**

No Appearance for the Applicant

Mr. Onyango holding brief for Mr. Muchiri for the Respondent

Teresia - Court Assistant