



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 1060 OF 2016

GITERE KAHURA INVESTMENT LTD.....1ST PLAINTIFF/APPLICANT

KENYA BOX BODY BUILDERS.....2ND PLAINTIFF/APPLICANT

-VERSUS-

KENYA PLANTERS COOPORATIVE UNION LTD...1ST DEFENDANT/RESPONDENT

REGENT AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. Vide Notice of Motion dated the **28th of January 2021**, the Plaintiffs/Applicants herein have sought for the following Reliefs;

- i. Leave be granted to amend the 1st Defendant's name to read Kenya Planters Cooperatives Union (in Liquidation).
- ii. Leave be granted to the Applicants as provided for under **Section 432 (2) of the Insolvency Act, 2015**, to proceed with their claim as against the 1st Defendant which is in Liquidation.
- iii. The Cost of this Application be provided for

2. The subject Application is premised on the various Grounds contained at the foot thereof and same is similarly supported by an affidavit sworn by one **David Wakangu Gitere**, who avers that same is a Director of the 1st Plaintiff/Applicant, as well as an appointed administrator of one **Gitere Kahuha**, now deceased, who is said to own a substantial chunk of land currently registered in the name of the 2nd Plaintiff/Applicant.

3. Upon being served with the subject Application, the 1st Defendant proceeded to and filed Notice of Preliminary Objection dated the **29th March 2021**, as well as a Replying affidavit sworn on the **7th October 2021**, respectively.

DEPOSITIONS BY THE PARTIES:

APPLICANTS' CASE

4. Vide Supporting affidavit sworn on the **28th January 2021**, one **David Wakangu Gitere**, has averred that the Applicants herein are the registered owners and proprietors over and in respect of **L.R No's 48721/1 and 4872/2**, respectively, which are located within the neighborhood of Ruiru Town in Kiambu County.

5. It is further averred that on or about the **8th August 2016**, the 2nd Defendant/Respondent herein, under instruction of the 1st Defendant/Respondent, proceeded to and issued Notices directed to the Plaintiffs/Applicants and whereby the 2nd Respondent, sought to realize, sell and dispose of the suit properties.

6. The deponent has further averred that the Notices by the 2nd Defendant/Respondent, purport that the Plaintiffs/Applicants took out loan facilities with the 1st Defendant/Respondent and thereafter mortgaged the suit properties in favor of the 1st Defendant/Respondent.

7. Besides, it is averred that the notices are geared towards the Sale and/or alienation of the suit properties, allegedly to recover the sum of **Kes.212, 527, 533.99/=** only, which sum is said to be due and owing from the Plaintiffs.

8. Nevertheless, the deponent avers that the said debt, which is claimed by the 1st Defendant, is unknown to the Plaintiffs/Applicants and therefore same is neither due nor owing.

9. Be that as it may, the deponent has averred that pursuant to the notice dated the **8th August 2016**, the Defendants herein are keen to sell and/or dispose of the suit properties, which action is bound to prejudice and/or otherwise occasion irreparable loss to the Plaintiffs/Applicants.

10. Owing to the foregoing, the deponent has averred that the Plaintiffs/Applicants herein, were constrained to and indeed filed the subject suit, whereby same are challenging both the indebtedness claimed by the 1st Defendant/Respondent as well as the foreclosure notices issued by the 2nd Defendant/Respondent.

11. However, the deponent further avers that during the pendency of the suit, the 1st Defendant/Respondent was placed under liquidation and in this regard the subject proceedings cannot be continued with and/or prosecuted unless the court grants leave in line with the provisions of **Section 432 (2) of the Insolvency Act, 2015.**

12. In view of the foregoing, the deponent has therefore implored the court to proceed and grant the leave and thereby breath life into the subject proceedings.

RESPONDENTS CASE:

13. The Defendants/ Respondents herein have opposed the subject Application by filing two sets of Documents, namely, the Notice of Preliminary Objection dated the **29th March 2021**, as well as the Replying affidavit dated the **7th October 2021**.

14. Pursuant to the Notice of Preliminary Objection, the Defendants have contended as hereunder;

I. The continuation of the proceedings herein is in breach of the provision of **Section 228 of the Companies Act, Chapter 486 Laws of Kenya (now repealed)** and/or **Section 432 (2) of the Insolvency Act No. 18 of 2015**, has no leave has been obtained by the Plaintiffs to proceed with the suit against the 1st Defendant/Respondent under who is under liquidation.

II. The suit should be stayed in accordance with **Section 228 of the Companies Act Chapter 486 Laws of Kenya (now repealed)** and/or **Section 432 (2) of the Insolvency Act. 2015.**

III. The suit and the Plaintiffs application dated **28th January 2021** are in breach of **Sections 52 to 60 of the Co-operatives Society Act**.

IV. The Suit and the Plaintiffs Application dated the **28th January 2021**, are an abuse of the court process.

15. Other than the Preliminary Objection, whose contents have been alluded to, the Defendants/Respondents also filed a Replying Affidavit, through their appointed advocates, whereby it was averred as hereunder;

16. On or about the year **2019**, the Commissioner for Co-operative Development placed the 1st Defendant herein under liquidation and thereafter proceeded to and appointed various liquidators, to manage the affairs of the 1st Defendant.

17. Nevertheless, the deponent has further averred that following the placement of the 1st Defendant under liquidation, some farmers filed Judicial review proceedings vide **Nairobi HCC JR NO. 263 of 2019**, whereby same sought orders to quash the decision to place the 1st Defendant under liquidation.

18. It has been averred further that the Judicial Review Proceedings, was heard and disposed of whereby the court proceeded to and granted an Order quashing the Decision to place the 1st Defendant under Liquidation.

19. Be that as it may, the deponent has averred that upon the quashing of the decision to place the 1st Defendant under liquidation, the Commissioner for co-operatives developments and other affected persons proceeded to the Court of Appeal and filed **Civil Application no. 76 of 2020**, whereby the Applicants sought orders of stay of the decision of the High Court which quashed the liquidation order.

20. It was further averred that following the filing of the said Application, the Court of Appeal proceeded to and rendered a Ruling on the **19th March 2021**, whereby the Court of appeal issued several directions, *inter-alia* that there be an order maintaining the status quo ante.

21. Owing to the foregoing, the deponent has therefore contended that the subject Application is therefore an abuse of the Due Process of the court.

SUBMISSIONS BY THE PARTIES

22. The subject matter came up for Mention on various dates and in particular, the **24th May 2021**, whereby directions were given to the effect that the Application dated the **28th January 2021**, be disposed of by way of written submissions.

23. Pursuant to and in line with the directions of the court, the Plaintiffs/Applicants herein proceeded to and filed their written submissions, which are essentially dated the **19th May 2021**.

24. However, the Defendants/Respondents herein sought for and obtained more time, within which to file their written submissions, both in respect of the Notice of Preliminary objections and in respect of the Application filed by the Plaintiffs/Applicants.

25. Nevertheless, instead of filing the written submissions, the Defendants herein later on sought for Leave of the court to allow same to file a Replying Affidavit. Consequently, Leave was indeed granted to facilitate the filing of the Replying Affidavit.

26. For coherence, the Defendants proceeded to and indeed filed the Replying affidavit, which was sworn on the **7th October 2021**, and whose details have been alluded to herein before.

27. Notwithstanding the foregoing, the Defendants herein did not file their written submissions and the Court was therefore constrained to and scheduled the subject matter for Ruling, on the basis of the Documents and Affidavits, which had hitherto been filed.

ISSUES FOR DETERMINATION:

28. Having reviewed the Notice of Motion Application, the Supporting Affidavit thereto, the Replying Affidavit on behalf of the Defendants, as well as the Notice of Preliminary Objection dated the **29th March 2021**, the following issues are germane for determination;

I. Whether the provisions of the law which have been quoted and relied upon can anchor the Preliminary Objection and therefore enable the subject Application to disposed of in Limine.

II. Whether the Orders by the Court of Appeal vide **civil application No. 76 of 2020**, affect and/or bind the subject proceedings.

III. Whether the Applicants herein have satisfied the legal basis for the grant of leave under the provisions of **Section 432 of the Insolvency Act, 2015**.

ANALYSIS AND DETERMINATION:

ISSUE NUMBER 1

Whether the provisions of the law which have been quoted and relied upon can anchor the preliminary objection and therefore enable the subject application to disposed of in Limine.

29. The preliminary objection by and/or on behalf of the Defendants is anchored on three (3) sets of statutes, namely,

a. Section 228 of the Companies Act Chapter 486 Laws of Kenya

b. Section 432 of the Insolvency Act, 2015

c. Sections 52 to 60 of the Co-operative Societies Act

30. Owing to the various provisions that have been cited, it is necessary to address and/or deal with the issues raised, in a sequence. In this regard, I propose to deal with the provisions of **Section 228 of the Companies Act, Chapter 486 Laws of Kenya**.

31. As pertains to the said provisions, it is worthy to note and recall that **the Companies Act, Chapter 486, Laws of Kenya**, which the Defendants have alluded to was repealed in its entirety and replaced by another Act namely **Companies Act, 2015**.

32. Owing to the repeal of the entire Act, namely the **Companies Act, Chapter 486 Laws of Kenya**, it is not possible to now invoke and rely on **Section 228 of the Companies Act, Chapter 486 Laws of Kenya**, either in the manner proposed by the Defendants or at all.

33. To my mind, if there was a corresponding Section to the provision of **Section 228 of the Companies Act, Chapter 486, Laws of Kenya (now repealed)**, then it behooves the Defendants to search for same and authenticate the existence of any such corresponding section.

34. Suffice it to say, that the Defendants herein cannot invoke and rely upon a provision of the law which has since been repealed and replaced by another Act. Simply put, the Repeal of any Law or Section of the Law, has the import of obliterating same from the face of the designated Statute.

35. In the premises, it is my finding and holding that the Preliminary Objection based on the provisions of **Section 228 of the Companies Act, Chapter 486 Laws of Kenya (now repealed)** is not only misconceived but is a nullity ab- initio.

36. In support of the foregoing observation, it is imperative to take cognizance of the decision in the case of **Independent Electoral and**

“the declaration that a particular Section of the Law is unconstitutional has the effect of deleting and/or negating the impugned provisions from the Act and same therefore becomes invalid”

37. Based on the foregoing observation, I hasten to add that the repeal of a Section of the law or an Act of parliament, in this case the **Companies Act, Chapter 486 Laws of Kenya**, has the effect of deleting the said Act and therefore same cannot be invoked and/or relied upon.

38. In respect of the provision of **Section 432 of the Insolvency Act, 2015**, it is imperative to observe that the said Section provides for the seeking of leave of the court to either begin new proceedings against an entity that has been placed under liquidation or otherwise to continue with a subsisting suit against an entity that has been placed under liquidation.

39. Perhaps, it is important to reproduce the provisions of **Section 432 (2) of the Insolvency Act, 2015**, which provides as hereunder;

“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”.

40. It is important to note that the subject Application herein is seeking Leave of the court to proceed with the subject suit, which had been filed long before the 1st Defendant was placed under liquidation.

41. To the extent that the said Section allows for Leave to be sought, I cannot see how the same Section of the law, can now be used and relied upon, to ventilate a Preliminary Objection, in the manner propagated by the Defendants herein.

42. Other than the foregoing, the Defendants have also anchored their Preliminary Objection on the provision of **Section 52 to 60 of the Co-operative Societies Act**.

43. Without belaboring the point, I beg to point out that I have examined and appraised myself of the provisions alluded to and the much that I can say, is that same are irrelevant and in applicable to the subject matter before the court.

44. In any event, the only relevant provision as pertains to the procurement and/or grant of leave to commence and/or proceed with proceedings against an entity that have been placed under liquidation, are the provision of **Section 432 of the Insolvency Act, 2015** and not otherwise.

45. In short, I find and hold that the Preliminary Objection by and/or on behalf of the Defendants herein, touches on and/or concerns a matter whereby a court has a discretion on whether or not to grant the leave as sought.

46. Suffice it to say, that where the Subject dispute touches on and/ or concerns the exercise of Discretion, no Preliminary objection can be ventilated and / or be allowed, whatsoever.

47. In support of the foregoing position, it is worthy to take cognizance of the decision in the case of **MUKISA BISCUITS MANUFACTURING CO. LTD –V- WEST END DISTRIBUTORS LIMITED (1969) EA. 696 in which SIR CHARLES NEWBOLD P observed as** hereunder;

“he first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”

ISSUE NUMBER 2

Whether the orders by the Court of Appeal vide civil application No. 76 of 2020, affect and/or bind the subject proceedings.

48. In respect of the second issue, the Defendants herein have contended that to the extent that there are related matters, namely, the Appeal which is pending in the Court of Appeal, the subject matter herein ought not to be proceeded with or at all.

49. On the other hand, the Defendants have also contended that to the extent that the honourable Court of Appeal ordered and/or directed that the status quo ante, in respect the 1st Defendant herein, be maintained and/or observed, it thus means that the 1st Defendant remains in liquidation.

50. Suffice it to observe that decision by the court of appeal vide **Civil Application No. 76 of 2020**, indeed confirmed and/or authenticated that the 1st Defendant herein remains in liquidation.

51. For the avoidance of doubt, the Plaintiff/Applicants herein are alive to the legal status of the 1st Defendant and in particular, the fact that same is under liquidation and thus the Application for leave to continue with the proceedings.

52. Be that as it may, the point to address herein is not whether the 1st Defendant remains in liquidation, but whether the proceedings vide **Civil Application No. 76 of 2020**, and the consequential appeal, if any that was filed, has any relevance and/or application to the subject proceedings.

53. I must point out that in respect of the **civil application no. 76 of 2020**, the issue which was being addressed and/or deliberated upon, touches on whether the decision by the Commissioner for Co-operatives Development and Marketing to place the 1st Defendant in liquidation, was lawful or otherwise.

54. To the contrary, the subject matter before the court is not concerned with the legality and/or propriety of the decision to place the 1st Defendant in liquidation, but same is concerned with the desire to proceed with the subsisting proceedings, which were filed before the liquidation order.

55. Simply put, the subject proceedings and in particular the Application is merely seeking leave to continue with the proceedings against the 1st Defendant, whose legal status, has been established by the Court of Appeal to be under liquidation.

56. Essentially, the subject matter herein does not share any similarities with the proceeding before the Court of appeal, save for the fact that the 1st Defendant herein, is a similar party in both the matters, albeit litigating (or sued) in different perspectives.

57. In view of the foregoing, it is my finding and holding that the subject Application herein, does not amounts to an abuse of the Due process of the court and/or at all.

58. On the other hand, it is worthy to note that was placed before the court was a Notice of Preliminary Objection vide which the Defendants also sought for Stay of Proceedings. Consequently, there is another limb and/or nuance to the Preliminary Objection.

59. Nevertheless, I beg to point out that an order for stay of proceedings, which similarly, is discretionary, cannot be sought for by way of a Notice of Preliminary objection.

60. For the avoidance of doubt, a person who seeks to procure an order of stay of proceedings, is obliged to file a suitable Application under the provision of **Section 6 of the Civil Procedure Act**, and thereafter place before the court sufficient material to warrant a favorable finding to that effect.

ISSUE NUMBER 3

Whether the Applicants herein have satisfied the legal basis for the grant of leave under the provisions of Section 432 of the Insolvency Act.

61. The Application before the court is premised on the provisions of **Section 432(2) of the Insolvency Act, 2015** and essentially, what the Plaintiffs/Applicants are seeking is leave to continue and/or proceed with the subject suit which was filed in the year **2016**.

62. It is important to note that the subject dispute arose as a result of the foreclosure notices, which were originated by and/or at the instance of the 1st Defendant herein and which are the subject of challenge.

63. Suffice it to note, that the Foreclosure notices remain alive and capable of being executed by the Defendants herein and the Plaintiffs are keen to authenticate the legality or otherwise of the Foreclosure notices.

64. In my humble view, unless the subject matter is prosecuted and/or proceeded with, the Plaintiff/Applicants against whom the foreclosure notices were issued, shall continue to suffer prejudice and anxiety, which does not portend well for the Cause of justice.

65. On the other hand, given that the subject suit was filed in the year **2016**, long before the liquidation order, it is in the Interest of Justice that same be prosecuted and be brought to a close, without further delay.

66. In this regard, it is important to recall and take cognizance of the provisions of **Article 159 (2) (b) of the Constitution 2010**, which underscores the need to hear and dispose of matters timeously, expeditiously and without delay.

67. Consequently, unless the leave sought is granted, the subject matter herein shall not be prosecuted and/or proceeded with and hence the Plaintiffs constitutional rights, including those Rights and Fundamental Freedoms provided for under **Article 10, 19, 27, 47, 48 and 50 (1), of the Constitution 2010**, shall be infringed upon and/or violated.

68. In view of the foregoing, I am persuaded that the Plaintiffs/Applicants herein are deserving of the Leave sought, to enable same to continue with the subject suit, which has been pending for more than **six (6) years** and which in any event, needs to be adjudicated upon and/or disposed of.

69. In support of the foregoing observation, I beg to adopt the holding in the case of **Peter Harris Kimathi Kinyua & Another (being legal representatives of Henry Kinyua deceased v Kenya Planters Co-operative Union Ltd (in liquidation) (2021) eKLR**, where the court

held as hereunder;

“ Under that section, the court has the discretion to grant leave for a party to proceed with a suit against a company placed under liquidation. This is not in conflict with the Co-Operatives Society Act. The objection raised by the defendant is self-defeating for reasons that I have observed above. I am persuaded therefore that the orders sought in the motion dated 17th July, 2020 should be granted. The applicant shall have the costs of this application”.

FINAL DISPOSITION:

70. Having addressed the enumerated issues for determination, it is now appropriate to dispose of the subject Application and in this regard, the Court makes the following Orders;

a. The Notice of Preliminary Objection dated the **29th March 2021**, be and is hereby Dismissed with cost.

b. The Notice of Motion Application dated the **28th January 2021**, be and is hereby allowed

71. The circumstances leading to the filing of the subject Application were not caused and/or occasioned by the 1st Defendant. Indeed, same are circumstances beyond the comprehension of the 1st Defendant and arose by operation of the law.

72. Based on the foregoing, I am constrained to order that each party shall bear own cost of the Application.

73. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY, 2022

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Ms Mbiriwe h/b for A.G.N Kamau for the Plaintiffs/ Applicants.

Mr. Gitonga Muriuki for the Defendants/ Respondents.