



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC APPLICATION NO.271 OF 2014

JAMES KAMAU MUTUURA.....APPLICANT

VERSUS

DANIEL MBUGUA.....1ST RESPONDENT

PAUL G. KIGUNDA.....2ND RESPONDENT

NGUNDU FARMERS CO-OPERATIVE

SOCIETY LTD (IN LIQUIDATION).....3RD RESPONDENT

MATHEW NDIRANGU.....4TH RESPONDENT

RULING

The application before this court for determination is the Notice of Motion dated **21st August 2014**, brought under section 64(1) (specifically Section 228 under schedule 1 part (1))of the **Co-operatives Act, Cap 490** and **Order 51 Rule 1** of the **Civil Procedure Rules** seeking for the orders that leave be granted to the applicant to commence proceedings against Ngundu Farmers Co-operative Society Limited(in liquidation).

This application is premised on the grounds stated on the face of the application and on the supporting affidavit of the applicant. Applicant averred that leave of court should be sought when instituting proceedings against a Co-operative Society that is in liquidation and that he wishes to prosecute the 3rd Respondent for selling his part of property known as **Block 126/34/5**.That the 4th Respondent deposited building materials on his property yet he has been in possession of the property since **2005**, when it was allocated to him. He finds the Respondents actions a violation of the law since they cannot take this property from him and therefore wants to sue them.

This application is opposed by the 1st and 2nd Respondents. The 1st Respondent, **Daniel Mbugua**, filed a Replying Affidavit on **16th October 2014**, wherein he stated that the applicant's application is frivolous, bad in law, fatally defective, lacks merit and is brought in bad faith and should be dismissed because there is already an ongoing suit (ELC No 140 of 2011), involving the same litigants in the same capacity with the same advocates on record which suit seeks similar prayers as the present one. That the applicant herein also sought for injunctive orders that were denied by the court and therefore this court should admonish the applicant for filling multiple suits involving the same litigants and in addition, this

application should be dismissed with costs to the Respondents.

The applicant filed his written submissions on **21st November 2014**, wherein he reiterated the contents of his affidavit. He further explained his cause by defending the claim by the Respondents that he had filed multiple suits. He stated that the difference between this suit and **ELC No 140 of 2011** is that the 4th defendant who is a trespasser in that suit was Murage Waichigo while in the present suit the 4th defendant who is the trespasser is **Mathew Ndirangu**. He also added that he sued the Official Liquidator of the 3rd Respondent in **ELC No 140 of 2011** but not in the present suit and concluded that parties are different in both suits.

I have carefully considered the applicants application, the affidavits of the parties herein and the applicant's submissions. The defendants have raised an issue that the plaintiff is guilty of filing multiple suits being this suit and **ELC No 140 of 2011**. I have perused the later and found that in **ELC 140** of 2011, the plaintiff is seeking for orders of a declaration that **LR No Block 126/34/5** belongs to him and also sought for a restraining order. The advocates representing the parties in the said suit are the same as the advocates in the present suit. The 3rd Respondent was placed under liquidation by the Commissioner for Co-operative Development on **29th June 2007** and a Notice to members was posted by the liquidator Paul Uluma on **11th September 2007**.

On the Ruling delivered by Nyamweya J on **19th April 2012**, the judge dismissed the application on two grounds. At the outset after the judge allowed the Respondents' preliminary objection that the proceedings in ELC No 140 of 2011 were a nullity for non compliance with section 228 of the Companies Act and secondly on the grounds that the plaintiff had not met the requirements of **Giela –vs- Cassman Brown Limited**. I am therefore inclined to make a finding that the defendant's claim that the plaintiff had filed multiple suits as feeble.

The key issue for determination is whether the Plaintiff is entitled for leave to commence suit against the 3rd Respondent which is a Co-operative Society Limited. **Section 64 of the Co-operative Societies Act** states that certain sections of the Companies Act specified in Part I and Part II of the Schedule to the Co-operative Societies Act shall apply *mutatis mutandis* in relation to the winding up of a Co-operative Society as they apply to a company registered under the Companies Act. One of the sections of the Companies Act that is listed in Part I of the said Schedule is section 228. **Section 228 of the Companies Act** provides that,

“When a winding-up order has been made or an interim liquidator has been appointed under section 235, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose”

This section of the Act was buttressed further in the Court of Appeal in **Sololo Outlets & 3 Others v National Social Security Fund Board of Trustees (1994) KLR 473** which stated that:-

“Under section 228 of the Companies Act, leave has to be obtained before a suit is filed against a company which is in liquidation”.

The above section clearly requires that leave of this court be granted to institute proceedings against a Company/Co-operative Society Limited which is in liquidation. The facts placed before the Court show that the 3rd Respondent has been put under liquidation which fact is in the public knowledge and which the Court takes the Judicial Notice of the same that indeed Ngundu Farmers Co-operative Society Limited is undeniably in liquidation. As the status of the 3rd Respondent being in liquidation has not been disputed, leave is hereby granted to the Plaintiff to commence proceedings or a suit against the 3rd Respondent.

The upshot of the foregoing is that the applicant's Notice of Motion dated **21st August 2014** is **allowed entirely**. Costs shall be in the cause.

It is so ordered.

Dated, Signed and delivered this **17TH day APRIL of 2015**

L. GACHERU

JUDGE

In the Presence of:-

M/s Waweru holding brief Mr Kinga for the Plaintiff/Applicant

None attendance for the Defendants/Respondents though notified

Hilda: Court Clerk

L. GACHERU

JUDGE