



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 710 OF 2009.

WILIAMS & KENNEDY LIMITED.....PLAINTIFF

- VERSUS -

POST BANK CREDIT LIMITED (IN LIQUIDATION)

Thro' DEPOSIT PROTECTION FUND

BOARD-LIQUIDATION.....1ST DEFENDANT

JUMCHEM HEALTH CARE LIMITED.....2ND DEFENDANT

JUMA MUCHEMI.....3RD DEFENDANT

OFFICIAL RECEIVER & PROVISIONAL LIQUIDATOR

**RURAL URBAN CREDIT FINANCE LIMITED (IN LIQUIDATION.....
PROPOSED INTERESTED PARTY/APPLICANT**

RULING

1. The application before me has been brought by the **OFFICIAL RECEIVER AND PROVISIONAL LIQUIDATOR OF RURAL URBAN CREDIT FINANCE LIMITED (IN LIQUIDATION)**. It is an application for leave to have the applicant enjoined in this suit, as an **INTERESTED PARTY**.
2. The nexus between the applicant and the case is said to be the **SUIT PROPERTY L.R. No. 5989 I.R. No. 35802 NAIROBI**.
3. On 3rd December 1984 a Receiving Order was made in **WINDING UP CAUSE No. 31 of 1984**. Pursuant to that Receiving Order, the applicant was appointed as the Interim Liquidator of the **RURAL URBAN CREDIT FINANCE LIMITED (IN LIQUIDATION)**.
4. According to the Applicant, the Receiving Order was registered against the Title of the suit property **L.R. No. 5989 I.R. No. 35802 NAIROBI**.
5. The Applicant submitted that pursuant to the registration of the Receiving Order against the Title, all transactions involving the suit property were null and void *ab initio*. Therefore, the applicant believes that if he is given a chance to become a party to these proceedings, he would prove that the disposal; the sub-division; the mortgaging; and all other dealings with the suit property were a nullity.
6. One of the transactions that the applicant intends to prove to be a nullity, is the Transfer to the 3rd

- Defendant, **JUMA MUCHEMI**, of the property **L.R. No. 5989/5/R**.
7. The applicant states that its interest in the suit property arose from a Constructive Trust, which would be affected adversely if the court were to proceed to make any orders, that would affect the title and the status of the property, in the absence of the applicant.
 8. It was the applicant's case that he ought to be given the opportunity to put forward his case herein, because it is only then that the Court would be able to completely determine the questions in dispute in this suit.
 9. What is the issue that would be of interest to both the applicant and the parties in this suit?
 10. I understand the applicant to be saying that it is the question concerning the ownership of the property.
 11. The genesis of that claim was **NGANGA GICHARU**, who used to be a **DIRECTOR** and a **GENERAL MANAGER of RURAL URBAN CREDIT FINANCE LIMITED**.
 12. **NGANGA GICHARU** sought and was granted a loan of Kshs. 2,500,000/- for use to purchase a house. The loan was to be provided by **RURAL URBAN CREDIT LIMITED**.
 13. The property in issue belonged to the 1st Respondent, **WILLIAMS AND KENNEDY LIMITED**. So, in order to enable Gicharu to buy the property, Rural Urban Credit Limited paid the deposit to **WILLIAMS AND KENNEDY LIMITED**. The deposit was in the sum of Kshs. 250,000/-.
 14. The applicant asserts that after it paid the deposit, Gicharu had the shares of **WILLIAMS AND KENNEDY LIMITED** transferred to the names of **NGANGA GICHARU** and his wife **EUNICE WANJIRU GICHARU**.
 15. The applicant entrusted to Gicharu the Charge Instrument which was to be registered against the Title. But Gicharu failed to have the charge registered, even though he had between February 1984 and December 1984, to do so.
 16. On 3rd December 1984, Rural Urban Credit Finance Limited was placed under receivership. The Receiving Order was made in **WINDING UP CAUSE No. 31 of 1984**. Thereafter, the Receiving Order was registered against the Title on 3rd December 1985.
 17. After Rural Urban Credit Finance Limited was put under receivership, Gicharu allegedly left the company, carrying with him the files relating to the transactions involving the suit property.
 18. When the Receiver became aware of the actions of Gicharu, he caused a caveat to be registered against the Title on 22nd February 1995.
 19. The Receiver filed Hccc No. 582 of 1995 against **NGANGA GICHARU**. That suit was still pending in court, although the applicant complained that the court file had gone missing.
 20. As far as the applicant was concerned, **NGANGA GICHARU** is seeking to hide behind the corporate veil of **WILLIAMS AND KENNEDY LIMITED**, to perpetuate its fraud against **RURAL URBAN CREDIT FINANCE LIMITED (IN LIQUIDATION)**.
 21. It is the applicant's contention that **WILLIAMS AND KENNEDY LIMITED** have used the Title of the suit property to obtain a loan of Kshs. 9,000,000/- from **POST BANK CREDIT LIMITED**, whilst having ensured that the charge in favour of the applicant was never registered.
 22. The applicant was convinced that the actions of **NGANGA GICHARU**, and by extension **WILLIAMS AND KENNEDY LIMITED**, were calculated to defeat the Constructive Trust which had arisen in favour of the applicant.
 23. It was for that reason that the applicant perceived himself as an essential party to these proceedings.
 24. If the applicant was enjoined to the suit, he believes that none of the parties would be prejudiced, as the trial of this case had not yet begun.
 25. Mr. Njuguna, the learned advocate for the plaintiff, **WILLIAMS AND KENNEDY LIMITED**, submitted that the applicant had failed to demonstrate any interest in the case, which was capable of raising a cause of action.
 26. The plaintiff is a limited liability company, whereas the applicant was making allegations against **NGANGA GICHARU**, who was not a party to the suit.
 27. As the Title of the suit property was registered in the name of the plaintiff, it was the contention of the said plaintiff that there were no rights which the applicant was seeking to ventilate against the company.
 28. The plaintiff also faulted the applicant for failing to seek leave of the court to make the application to be enjoined to the suit. As far as the plaintiff was concerned, the provisions of Section 228 of

- the Companies Act, made it clear that leave had to be sought first.
29. The plaintiff further submitted that Section 224 of the Companies Act was not relevant to this case because the applicant had never owned the suit property.
 30. The plaintiff pointed out that for a period of over 31 years, there was no charge which the applicant had registered against the title. Therefore, in the absence of an explanation for the inordinate delay in coming to court, the plaintiff asked the court to reject the application for joinder.
 31. Considering that the suit had been set down for trial by the time the applicant came to court, I was told that that must be deemed to be an attempt, by the applicant, to defeat the Overriding Interest, which is to do justice efficiently.
 32. Mr. Mwiti, the learned advocate for the 2nd defendant, **JUMCHEM HEALTH CARE LIMITED**, pointed out that if the alleged Charge instrument had been registered, it would have been in respect to **L.R. No. 5989/5**, which was **9.999 HECTARES** in size. The said size is clear on the face of the Title document exhibited by the applicant.
 33. In view of the surrender of various portions of that original piece of land to the Government, the 2nd defendant pointed out that the original parcel of land was no longer in existence.
 34. The 2nd Defendant's case was that it only purchased the remaining portion of land on 23rd May 2007. Therefore, the 2nd Defendant reasoned that it would be extremely prejudicial to it, as an innocent purchaser, to be saddled by the Applicant's claims.
 35. Even when the appointment of the Receiver was registered against the Title, the 2nd Defendant points out that that registration was not backed by any Charge in favour of the Applicant. I presume that that is why the 2nd Defendant was asserting that it was an innocent purchaser, as it did not have notice of the Applicant's claim over the property, at the time of purchase.
 36. The 2nd Defendant conceded that if the land belonged to the Company at the time when the Receiver was appointed, any disposition of the land would have been void after the commencement of the winding-up of the company. But the 2nd Defendant in this case was making its claim against a Director of the plaintiff. Therefore, the 2nd Defendant deems the claim against the Director to be a distinct suit, which was separate from this case.
 37. As the Applicant and the Director, Mr. Gicharu, were already litigating in Hccc No. 582/1995, the 2nd Defendant did not understand why the Applicant would still wish to also be enjoined to this suit.
 38. On his part, Mr. Mutiso, the learned advocate for the 3rd Defendant, **JUMA MUCHEMI**, submitted that no useful purpose would be served by enjoining the Applicant to the suit.
 39. The first reason for so submitting was that the claim against the Director of the plaintiff was already time-barred.
 40. Secondly, the Applicant was said to have been indolent in pursuing the claim. The Applicant's indolence is said to have extended upto Hccc No. 582 of 1995, which had not been pursued to its logical conclusion.
 41. The 3rd Defendant pointed out that the Applicant had alleged that the delay in finalizing the other case was because the court file had gone missing. To support the loss of the court file, the Applicant had annexed a letter which he had written to the court on 17th March 2015.
 42. As that letter had been written fairly recently, and because it was not filed in court until the lapse of one month, the 3rd Defendant described the actions of the Applicant as constituting a belated attempt to delay this case, which had been scheduled for trial.
 43. On behalf of **POST BANK CREDIT LIMITED IN LIQUIDATION**, Mr. Owiti Advocate informed the court that the said 1st Defendant did not oppose or support the application.
 44. After the Respondents had made their submissions, Mr. Onyancha Advocate, pointed out that the property was registered in the name of the plaintiff, **WILLIAMS AND KENNEDY LIMITED**. As the Applicant had purchased shares of **WILLIAMS AND KENNEDY LIMITED**, the Applicant submitted that that implied that the land in question belonged to the Applicant. According to the Applicant, any sale of the property after the Winding-Up Order was registered against the Title, was a nullity.
 45. The Applicant submitted that it did not need to seek leave to bring the application because the Applicant was the Receiver. As far as the Applicant was concerned, it is only those persons who

- wanted to institute proceedings against a company that was in liquidation, who needed to first obtain leave of the court.
46. Secondly, the Applicant explained that he could not have come to court earlier because he had not been aware of this case until Mr. Mutiso advocate drew his attention to the case.
47. Mr. Mutiso confirmed that he had raised an objection in Hccc No. 582 of 1995. The said objection was founded upon the existence of this case.
48. Finally, the Applicant conceded that the original Title was no longer in existence. However, he hoped to demonstrate that the sub-divisions of the original parcel of land; the mortgages and other dealings with the land were all nullities. That was the reason why the Applicant wished to be given the opportunity to be enjoined to the suit.
49. On the issue of the delay in the part of the Applicant I find that the same had been properly explained, to the satisfaction of the court. I so find because the Applicant could not have been expected to apply to be enjoined to a case which they did not know about.
50. There is no allegation of any delay at all, from the date when the Applicant first became aware of the case.
51. Secondly, by dint of the provisions of Section 224 of the Companies Act;

“In a winding up by the court, any disposition of the property of the company, including thing in action, and any transfer of shares or alteration in the status of the member of the company, made after the commencement of the winding up, shall, unless the court otherwise orders, be void”.

52. The Applicant’s case is that it will demonstrate that the disposition of the original Title was void as the same was done after the commencement of the winding up proceedings against the plaintiff.
53. The parties who obtained Title of the portions carved out from the original Title, appear to suggest that they were innocent purchasers for value, without notice. That may well be the position, but it would have to be proved through evidence.
54. At this stage, the Court does not have proven facts, which could inform any substantive pronouncement on the competing rights.
55. Thirdly, there is the issue of the claim being time-barred.
56. In my considered opinion, the decision about whether or not any specific claim was time-barred should be pegged on the said specific claims. In effect, the joinder of the Applicant to the suit would not deprive any of the other parties of their legitimate rights. Therefore, if the Applicant were to put up a claim against any of the parties, each such party would be entitled to put forth their respective defence, including the assertion that the claim or claims were time-barred. In effect, the joinder of the Applicant to this case would not occasion undue prejudice to any of the other parties.
57. In **JOSHUA C. CHERUTICH & ANOTHER Vs. DANIEL NKU. Hccc No. 42 of 2000**, Kimaru J. rejected the application of **DR. WENWA AKINYI ODINGA** to be enjoined to the suit, as an interested party. In his determination the learned Judge noted as follows;

“In the instant case this court has already heard and concluded the plaintiff’s case. The plaintiffs’ have closed their case. This court is waiting to hear the case for the defence. If this court were to allow the applicant’s application, it would create confusion and lack of clarity in the court’s proceedings. As stated earlier, it would not assist in the determination of the dispute which has already been partly heard by this court”.

58. In contrast to that case, the trial of this case is yet to commence. Of course, the trial date had already been fixed, and the trial would have commenced if the Applicant did not bring this application.
59. In other words, the present application resulted in the trial being put-off. To that extent, the application has caused some delay in the commencement of the suit.
60. In the case of **JOSHUA C. CHERUTICH, (above-cited)** the Court made the following observations;

“The applicant’s fear that this court may issue orders adverse to her once this case is determined, is far fetched to say the least. The plaintiffs are seeking orders to be awarded a specific portion of land which does not include the portion of land which the applicant is claiming in her suit. No orders can therefore be issued by this court that would affect the parcel of land claimed by the applicant”.

61. In contrast to that case, the Applicant is hoping to demonstrate that all the dealings with the original Title, after the issuance of the Winding Up Order, were a nullity. If the Applicant were to persuade the court, about his case, then the subject matter of the suit would be directly affected by the orders to be made in this case.
62. It would thus only be prudent to have on board those persons who would either impact upon the others or those who would feel the impact of those others.
63. If it means that a person was told that his claim was without merit or that his claim was time-barred, that would bring finality and closure to any such claim.
64. But did not the Applicant require leave of the Court before commencing this application or any other proceedings?
65. Section 228 of the Companies Act stipulates as follows;

“When a winding-up order has been made or an interim liquidator has been appointed under section 235, no action or proceedings 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”.

66. To the extent that the applicant may wish to commence action against **POST BANK CREDIT LIMITED (IN LIQUIDATION)**, he would need to seek leave of the court.
67. However, because there is neither any winding-up order or interim liquidator in relation to the other respondents, the Applicant did not require leave of the Court to commence action against them.
68. In the final analysis, I do hereby grant leave to the Applicant to be enjoined to this case as an Interested Party.
69. The Applicant will meet the costs of its application. In other words, none of the respondents is to pay to the applicant, the costs of the application. But the applicant will also not pay costs of that application to any of the other parties.
70. I so order because the respondents cannot be faulted for opposing the application, albeit, unsuccessfully.
71. Immediately after this Ruling is delivered, the Court will give a hearing to each of the parties, concerning the further Directions which would be necessary to move forward the case.

DATED, SIGNED and DELIVERED at NAIROBI this 22nd day of September 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Mwachiro for Njuguna for the Plaintiff

Ouma for Odera for the 1st Defendant

Mwiti for the 2nd Defendant

Karanja for Mutiso for the 3rd Defendant.

Onyancha PROPOSED INTERSTED PARTY/APPLICANT

Collins Odhiambo – Court clerk.