



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT NO. 64 OF 2012
(CONSOLIDATED WITH HCC NO 331 OF 2011)

RAPHAEL KIPSOI ARAP KORIR.....PLAINTIFF

VERSUS

MUSKIE LIMITED1ST DEFENDANT

BENJAMIN KISOI SILA T/A LEGACY

AUCTIONEERING SERVICES.....2ND DEFENDANT

LEGACY CONNECTIONS LIMITED.....3RD DEFENDANT

R.N. NYARIKI T/A BASELINE AUCTIONEERING..... 4TH DEFENDANT

POST BANK CREDIT LIMITED..... 5TH DEFENDANT

RULING

1. The Plaintiff filed a Complaint dated **6th March, 2012** seeking a declaration that the sale of **Njoro Ngata Block 2/100** ("the suit property") was fraudulent and a permanent injunction to restrain the defendants from interfering with the suit property. Contemporaneously with the complaint, he filed a Notice of Motion wherein he was granted interim orders *ex parte* restraining the defendants from interfering with the suit property pending the hearing and determination of the application.

2. Before the notice of motion could be set down for hearing, the 5th defendant filed a Notice of Preliminary Objection dated **11th June, 2012** on the grounds that the plaintiff's suit and by extension the application were fatally defective, for failure to seek leave of the court to institute proceedings against a Company in liquidation, contrary to **Section 228 of the Companies' Act and Section 35 of the Banking Act**.

3. On **9th October, 2012** directions were taken that the preliminary objection be disposed of by way of written submissions. The 5th defendant filed their written submissions on **31st October, 2012** while the 4th defendants filed theirs on 8th November, 2012. The plaintiff, 1st, 2nd and 3rd defendants did not file any submissions to the preliminary objection.

4. In their submissions, the 5th defendant relied on **Section 228 of the Companies' Act and Section 35 of the Banking Act**. It was their contention that failure to obtain such leave as required under Section 228 of

the Companies Act went to the root of the matter and was fatal. This was emphasised by the courts in the following three cases relied on by Counsel for the applicant; **Deposit Protection Fund Board v Kamau & another (1999) 2EA 67, Simba Airlines Ltd v Heritage Bank Limited (2002) 1 EA 302 and Bisai & Another v Kenya Commercial Bank & others (2002) 2 EA 346.**

5. The submissions filed by the 4th defendant were copy and paste the 5th defendant written submissions. In addition they submitted that once the suit against the 5th defendant (principle) was dismissed, then the cause of action against the 4th defendant dies. On that basis they urged the Court to dismiss the suit as against the 4th defendant.

6. The definition of a preliminary objection was well set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, where **Newbold, V.P.**, observed as follows:

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 the facts pleaded by the other side are correct. It cannot be raised if any fact had 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 the issue. The improper practice should stop"

7. Applying the above test, it is not disputed that the 5th defendant was put in liquidation by the Central bank of Kenya on **28th May, 1993** by gazette notice **No. 2370 of 1993**. It is also not disputed that before filing this suit, leave to commence proceedings against the 5th defendant was not sought. The issue raised by the 5th defendant in their preliminary objection is a point of Law and I find the objection properly before court and I will, therefore proceed and consider it.

8. **Section 228** of the Companies Act requires that leave of the court be sought before seeking to institute proceedings against a company in liquidation. It states;

"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."

9. **Section 35** of the banking Act provides:

"If an institution becomes insolvent, the Central Bank may appoint the Board established under section 36 to be a liquidator of the institution; and the appointment shall have the same effect as the appointment of a liquidator by the court under the provisions of Part VI of the Companies Act and references in that Act to "the relevant date" and "commencement of the winding up" shall be deemed to be references to the date on which the Board is appointed as liquidator"

10. The wording of the two sections is couched in mandatory terms. Under **Section 228** of the Companies Act failure to seek leave of the court before commencing proceedings against a company in liquidation in my view simply means that the suit cannot be sustained as against that party. I cannot emphasize this better than my brother **Mwera J** did in one of the authorities relied on by counsel for the 5th defendant, **Bisai & Another vs. Kenya Commercial Bank Limited**, where he held as follows: -

"in order to commence any action or proceedings against the 3rd defendant which was in liquidation, the plaintiffs were obliged mandatorily by , the Companies Act to first obtain leave from the court. That the leave ought to be sought before bringing an action or proceedings and not after and cannot operate retrospectively. That non obtaining of the said leave is of a very fundamental nature, and not merely procedural. It went to the jurisdiction of the court. That the

appointment of liquidator under section 35 of the Banking Act, (Chapter 488) has the same effect as the appointment of a liquidator by the Court under part V1 of the Companies Act. Simba Lines Limited vs. Heritage Bank Ltd. [2001] LLR at page 1439 (CAK applies)

11. For the reasons stated above, I find I have no option but to strike out the suit as against the 5th defendant and hope that the plaintiff will take the appropriate action and bring on board the necessary parties in this suit.

12. The upshot of the foregoing is that the preliminary objection dated **11th June, 2012** has merit and is allowed with costs.

Orders accordingly.

Dated, Signed and delivered at Nakuru this 17th day of October, 2014.

L N WAITHAKA

JUDGE