



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**Environmental & Land Case 122 of 2012**

**SAMMY KIMWELE MWANGANGI .....1<sup>ST</sup> PLAINTIFF**

**MUSYOKA ILIMA .....2<sup>ND</sup> PLAINTIFF**

**JOSEPH KARANJA.....3<sup>RD</sup> PLAINTIFF**

**PAUL KIMENYE.....4<sup>TH</sup> PLAINTIFF**

**BEN MUNYWOKI.....5<sup>TH</sup> PLAINTIFF**

**JOSEPH MUTHIANI.....6<sup>TH</sup> PLAINTIFF**

**KYULE MWIMBI.....7<sup>TH</sup> PLAINTIFF**

**FRANCIS MUSAI.....8<sup>TH</sup> PLAINTIFF**

**PHILIP MUSAI.....9<sup>TH</sup> PLAINTIFF**

**DANIEL OGEMBO AKAMA.....10<sup>TH</sup> PLAINTIFF**

**JOHN MUTHUSI MUEMA.....11<sup>TH</sup> PLAINTIFF**

**VERSUS**

**THABITI FINANCE COMPANY LTD .....1<sup>ST</sup> DEFENDANT**

**NATIONAL BANK OF KENYA LTD.....2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF TITLES.....3<sup>RD</sup> DEFENDANT**

**RULING**

The application before the Court is a Notice of Motion filed by the Plaintiffs dated 6<sup>th</sup> March 2011, wherein an order is sought that the Defendants be restrained either by themselves or through their agents, servants, employees, proxies or any one acting on their behalf, from evicting, threatening to evict or in any other way interfering with the Plaintiff's quiet possession and use of the land parcels known as L.R. Nos. 209/11544 registered as grant number 54610 and L.R. Nos. 209/11545 registered as grant number 60913 (hereinafter referred to as the suit properties) until the hearing and determination of the suit filed herein.

The said application is filed pursuant to the provisions of Order 40 Rules (2) 1, and 4(1) the Civil Procedure Rules, and the main grounds are that the Defendants have threatened to forcefully evict the Plaintiffs without proper eviction orders which actions are illegal, and that the Plaintiffs have heavily developed and invested on suit properties and have a legitimate claim over the suit land. These grounds are elaborated upon in a supporting affidavit sworn by the 1<sup>st</sup> Plaintiff on 6<sup>th</sup> March 2012 on behalf of the other Plaintiffs, wherein he states that he is the coordinator of an association known as Mwengenyu Settlement Scheme and that the other Plaintiffs are officials of the group. Further, that the group has a membership of more than 5,000 people and their families are currently living on the suit properties and have been so living on the said properties since their birth, as the Plaintiff's forefathers were workers in a farm in the suit properties.

The Deponent further stated that while the Plaintiffs were living on the suit land the 3<sup>rd</sup> Defendant issued certificate of titles to the 2<sup>nd</sup> Defendant on 10/1/1991 which title the 2<sup>nd</sup> Defendant have charged to the 1<sup>st</sup> Defendant. That upon the aforesaid discovery, the Plaintiffs moved to court to claim the land in HCCC No. 298 of 2003 which was heard before Honorable Justice H. Okwengu (as she then was), and the hearing of the case closed on 20/6/2011 and is pending judgment. The Plaintiffs state that the 2<sup>nd</sup> Defendant published an advertisement in the *Daily Nation* newspaper on 1/03/2012, a copy of which they have annexed, giving them up to 31<sup>st</sup> March 2012 to move out of the suit properties failure to which they would be evicted. The Plaintiffs state that they will suffer irreparable damages in terms of investment if the threatened eviction is carried out.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have raised preliminary objections to the Plaintiff's application. The 1<sup>st</sup> Defendant in a preliminary objection dated 9<sup>th</sup> April 2012 objects to the Plaintiffs' Originating Summons dated 6<sup>th</sup> March 2012 on the ground that the suit herein is incurably defective for having been filed

without leave of court, as required under section 228 of the Companies Act, Cap 486 laws of Kenya. The 2<sup>nd</sup> Defendant in Grounds of Opposition dated 21<sup>st</sup> March 2012 states that the present suit as against the 2<sup>nd</sup> Defendant is *res judicata* and contravenes the provisions of section 7 of the Civil Procedure Act, as the issues in question are directly and substantially the same as the issues raised in HCCC 298 of 2003, which issues have been heard and finally decided by this Court. Further, that no cause of action has been disclosed against the 2<sup>nd</sup> Defendant.

The preliminary objections were heard on 18<sup>th</sup> April 2012, and the respective parties made oral submissions reiterating the above facts. The Advocate for the 1<sup>st</sup> Defendant, Mr. Bwire, relied on the decision in **Bisai and Another vs Kenya Commercial Bank and Others (2002) 2 E.A 346** for his submission that the Plaintiffs were under an obligation to seek leave of the court under section 228 of the Companies Act before they could institute their suit, and the suit filed herein is therefore defective in its entirety and liable for dismissal. Mr. Bwire also referred the Court to the Replying Affidavit filed in Court on 13<sup>th</sup> April 2012 and sworn by Veronika Chika, the 1<sup>st</sup> Defendant's liquidation agent, wherein she depones that the 1<sup>st</sup> Defendant became insolvent and the Central Bank of Kenya on 19<sup>th</sup> December 1994 appointed the Deposit Protection Fund Board as its liquidator, and the said Deposit Protection Fund Board holds all the assets of the 1<sup>st</sup> Defendant including the suit properties.

The 2<sup>nd</sup> Defendants' Advocate Mr. Odhiambo in his submissions in addition argued that the suit and application is *res judicata* as there is a ruling given on 16<sup>th</sup> April 2004 in H.C.C.C 298 of 2003 by Honourable Justice Kihara (as he then was) to the effect that there is no cause of action between the Plaintiff and the 2<sup>nd</sup> Defendant, and that no appeal has been lodged against the said ruling. Further, that the Plaintiffs in the present suit are claiming adverse possession which cannot lie against the 2<sup>nd</sup> Defendant.

Mr Musyoki, the Plaintiff's Advocate, submitted that no evidence of the 1<sup>st</sup> Defendant's liquidation had been provided, and the parties and reliefs sought in H.C.C.C 298 of 2003 are different from those in the suit filed herein He also submits that the Plaintiff has filed an amended Plaintiff to include the liquidator of the 3<sup>rd</sup> Defendant in the suit.

I have read and carefully considered the pleadings, evidence and written submissions by the parties to this application. I will first deal with the preliminary objection as to whether this suit and application is a nullity for non compliance with section 228 of the Companies Act. It was held in **Tamil Enterprises Ltd v Official Receiver & Liquidator of Continental Credit Finance Ltd and Others, Nairobi H.C.C.C No 1914 of 199** that a suit is a nullity if it is commenced without leave of the court, in circumstances where section 228 of the Companies Act is applicable. It was also held by the Court of Appeal in **Sololo Outlets & 3 Others v National Social Security Fund Board of Trustees (1994) KLR 473** that such leave is mandatory. As it is not disputed that leave of this Court has not been granted, the only issue for determination is whether section 228 of the Companies Act is applicable to this suit.

Sworn evidence has been provided by the liquidation agent pursuant to section 36(2) of the Banking Act that the 1<sup>st</sup> Defendant is under liquidation, and that the Deposit Protection Fund Board was appointed as the liquidator by the Central Bank of Kenya. The said liquidation could only have been effected pursuant to section 35 of the Banking Act, which provides that If an institution as defined under the Act (bank or financial institution or a mortgage finance company) becomes insolvent, the Central Bank may appoint the Deposit Protection Fund Board established under section 36 of the Banking Act 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.

Section 228 of the Companies Act is found in Part VI of the Companies Act, and 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. It is therefore the finding of this court that section 228 of the Companies Act is applicable to this suit, and the 1<sup>st</sup> Defendant's preliminary objection is upheld.

The suit and application filed herein are therefore struck out as against the 1<sup>st</sup> Defendant.

As regard the second preliminary issue raised of *res judicata*, the 2<sup>nd</sup> Defendant did not produce evidence of the said ruling by Honourable Justice Kihara (as he then was), however this notwithstanding, a perusal of the pleadings in H.C.C.C 298 of 2003 shows that although the parties and cause of action in the said suit are different from those in the current suit, the issue in this application was a specific prayer sought in H.C.C.C 298 of 2003. Section 7 of the Civil Procedure Act is however inapplicable at this stage as there was no evidence produced of a judgment in H.C.C.C 298 of 2003 that would have determined the issue in this application with finality. The preliminary issue raised of *res judicata* therefore fails.

The outstanding issue left to be determined by this Court is whether the orders sought in the application filed herein can lie as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The Plaintiff's suit herein brought by way of Originating Summons filed on 9<sup>th</sup> March 2012 is for adverse possession, and they have brought evidence to show their possession of the suit property. This possession is admitted to by the 2<sup>nd</sup> Defendant in the advertisement in the *Daily Nation* newspaper of the 1<sup>st</sup> March 2012 produced in evidence by the Plaintiffs. The 2<sup>nd</sup> Defendant has also not disputed the statements in the said advertisement in which it is seeking vacant possession of the suit properties, nor their interest in the suit properties as chargee.

I therefore find that the Plaintiffs have established a *prima facie* case as against the 2<sup>nd</sup> Defendant. The issue of whether a cause of action in adverse possession can lie as against the 2<sup>nd</sup> Defendant or whether the final prayers sought in the suit herein are enforceable as against the 2<sup>nd</sup> Defendant can only be determined after a full trial and not at this stage. It is also the finding of the Court that while the orders sought in the present application are enforceable as against the 2<sup>nd</sup> Defendant, they are unenforceable as against the 3<sup>rd</sup> Defendant as the Plaintiff has not brought any evidence of the 3<sup>rd</sup> Defendant's interest or intention to evict them from the suit properties.

For the reasons given in the foregoing it is the order of this Court that the 2<sup>nd</sup> Defendant be restrained either by itself or through its agents, servants, employees, proxies or any one acting on its behalf, from evicting, threatening to evict or in any other way interfering with the Plaintiffs' quiet possession and use of the land parcels known as L.R. Nos. 209/11544 registered as grant number 54610 and L.R. Nos. 209/11545 registered as grant number 60913 until hearing and determination of the suit filed herein or until further orders.

The Plaintiffs shall meet the costs of the suit and application as against the 1<sup>st</sup> Defendant, while the costs of this application as regard the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants shall be in the cause.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_20<sup>th</sup>\_\_\_\_ day of \_\_\_\_June\_\_\_\_, 2012.

**P. NYAMWEYA**

**JUDGE**