



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**MISCELLANEOUS CIVIL SUIT 392 OF 2011**

**TIMOTHY NDUVI**

**MUTUNGI.....PLAINTIFF**

**AND**

**WILSON K. KIPKOTI.....1<sup>ST</sup>**  
**DEFENDANT**

**SIGAL INVESTMENT LIMITED.....2<sup>ND</sup>**  
**DEFENDANT**

**STANDARD ASSURANCE KENYA LIMITED (UNDER STATUTORY  
MANAGEMENT).....3<sup>RD</sup> DEFENDANT**

**PRUDENTIAL BUILDING SOCIETY (UNDER  
LIQUIDATION).....4<sup>TH</sup> DEFENDANT**

**DEPOSIT PROTECTION FUND BOARD.....5<sup>TH</sup>**  
**DEFENDANT**

**ALLOYS APPELL KWENGU.....6<sup>TH</sup>**  
**DEFENDANT**

**REGISTRAR OF TITLES.....7<sup>TH</sup>**  
**DEFENDANT**

**RULING**

The Plaintiff filed two applications by way of Originating Summons dated 12<sup>th</sup> September 2011 and 15<sup>th</sup> September 2011, in which eight substantive prayers were sought. At the hearing of the applications on 16<sup>th</sup> February 2012 and 26<sup>th</sup> March 2012, the Plaintiff abandoned the Originating Summons filed on 15<sup>th</sup> September 2011, and all the prayers in the Originating Summons dated 12<sup>th</sup> September 2011 except prayer 2, which is seeking leave to commence proceedings/suit against the 3<sup>rd</sup> and 4<sup>th</sup> Defendant and/or against all the other Defendants in terms of an annexed draft plaint.

The grounds for the Plaintiff's application are that the Plaintiff did not file the suit herein in time because he relied on the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' assurance that his ownership of the suit property was safe, and the same would be transferred to him. The Plaintiff also stated that in any event, he was in occupation of the suit property and he also had full trust in the said Defendants. Further, that the Plaintiff only came to know his ownership of the suit plot was threatened when his caretaker, one James Okoba, was served with a letter on 17<sup>th</sup> May 2011 by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant threatening to evict the Plaintiff from the suit plot, and when the said caretaker was also given a copy of a certificate of title dated 26<sup>th</sup> April, 2011 indicating the suit plot herein had been transferred to the 6<sup>th</sup> Defendant. The Plaintiff also states that he has to obtain leave to commence suit against the 3<sup>rd</sup> and 4<sup>th</sup> Defendant as they are in liquidation and/or under statutory management by the Central Bank of Kenya, and leave of this court must be granted to the Plaintiff as provided for in section 228 of the Companies Act.

The facts giving rise to the application are detailed out in the Plaintiff's supporting affidavit sworn on 12<sup>th</sup> September 2011, and in summary are that the Plaintiff claims that he is the owner and/or beneficial owner of a one acre piece of land situated at Karen within Nairobi known as LR. 1160/658, which is now referred to as I.R. No. 4895 or 4895/40 in the Certificate of Title dated 26<sup>th</sup> April 2011 that was issued to the 6<sup>th</sup> Defendant. The Plaintiff also claims that in or about 1998, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in conjunction with the 3<sup>rd</sup> and 4<sup>th</sup> Defendants who were still are the legal and/or beneficial owners of L.R. No. 1160/640 (IR NO. 4895) sub-divided the said land into six one-acre plots, and agreed to surrender one acre to the Plaintiff as payment in kind to him for services he rendered to them. The Plaintiff's one acre was, as per the subdivision plan, referred to as LR. No. 1160/658.

The Plaintiff states that he took exclusive possession of the said plot and has commenced development of a residential house. While the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were in the process of sub-dividing and transferring the said plot to the Plaintiff, the 4<sup>th</sup> Defendant was placed under statutory management and later in liquidation by the Central Bank of Kenya, and the statutory manager subsequently took possession of Title Deed to L.R No. 1160/640. The Plaintiff deponed that he had made numerous consultation with all the Defendants and in particular the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> in order to have the one acre piece of land known as LR. 1160/658 transferred to him, and has now reliably learnt that the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendant have conspired and fraudulently re-surveyed and/or re-subdivided L.R No. 1160/640 and sold the Plaintiff's suit plot herein to the 6<sup>th</sup> Defendant. After the filing of the application herein the 1<sup>st</sup> and 2<sup>nd</sup> Defendant filed a suit and was granted eviction orders as against the Plaintiff, who was accordingly evicted from the suit premises on 25<sup>th</sup> September 2011. These facts are also deponed to in the Plaintiff's Reply to the Replying Affidavit filed on 5<sup>th</sup> March 2012 and the Replying Affidavit by James Okoba filed on 15<sup>th</sup> February 2012.

The Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a Notice of Preliminary Objection dated 19<sup>th</sup> September 2011, in which they object to the Plaintiffs application and suit, and seek the same to be dismissed with costs. The grounds for the objection are that this court has no jurisdiction under the Limitation of Actions Act to extend time for filing a claim arising under contract or in the circumstance set out in the pleadings filed by the applicant, and because the entire proceedings offend the provisions of section 3 (3) of Law of Contract Act and are frivolous. The Plaintiff filed Grounds of Opposition to the Preliminary Objection dated 5<sup>th</sup> March 2012, and stated that the Preliminary Objection has no has no legal basis or merits, is frivolous, vexatious, an abuse of the Court process and meant to delay the expeditious disposal of the Application herein, and that the grounds stated therein do not meet the legal requirements of a Preliminary Objection.

At the hearing of the Preliminary Objection, Mr Njuguna the Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants relied on his written submissions dated 31<sup>st</sup> October 2011 and legal authorities cited therein. The Advocate argued that the Plaintiff's claim is based on contract and is time barred under section 27 and 28 of the Limitation of Action Act, and that the application also offends the provisions of section 3(3) of the Law of Contract Act which requires a contract for the disposition for land to be in writing, as the Plaintiff has not attached any agreement for sale. The Advocate prayed that the Originating Summons be struck

out with costs. Mr. Havi, the 6<sup>th</sup> Defendant's Advocate associated himself fully with Mr. Njuguna's arguments and reiterated the facts in the Replying Affidavit sworn by the 6<sup>th</sup> Defendant on 20<sup>th</sup> September 2011. Mr. Mwangi, the 4<sup>th</sup> and 5<sup>th</sup> Defendants' Advocate, submitted that he did not wish to take any sides with regard to the Preliminary Objection.

The Plaintiff's Advocate Mr. Nyamai on his part opposed the Preliminary Objection, and submitted that he was not seeking to file the suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant out of time, as the said suit was within time. Further, that he had withdrawn the prayers seeking to file out of time for this reason, and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Preliminary Objection was therefore no longer of relevance as it was filed before the said withdrawal. The Plaintiff's Advocate also argued that in any event the Plaintiff was evicted from the suit premises on 25<sup>th</sup> September 2011.

The said Advocate submitted that he was only seeking leave to commence a suit against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, who are currently under statutory management/liquidation in compliance with section 228 of the Companies Act. The Advocate also contended in the written submissions dated 22<sup>nd</sup> March 2012 that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants have claimed an interest in the property as shown in the caveat emptor they published in the *Nation* newspaper of 14<sup>th</sup> April 2011 which is attached as Annexure "TNM7" to the Plaintiff's Supporting Affidavit, and have also filed H.C.C.C No. 663 A of 2008 in relation to the suit property. Finally, the Advocate submitted that the Preliminary Objection raised will not dispose of all the issues raised in the draft Plaintiff, which issues extend beyond the alleged contract.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. The first issue before this Court is whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's Preliminary Objection is overtaken by events as alleged by the Plaintiff, and if not, whether the Plaintiff is barred under the Limitation of Actions Act and Law of Contract Act from bringing the suit. I am of the opinion that if the Preliminary Objection properly raises a pure point of law as held in **Mukisa Biscuit Manufacturing Co. Ltd v Westend Distributors Ltd (1969) E.A. 696**, it is immaterial whether the Plaintiff has withdrawn his prayers and the objection must be upheld. In the above-cited case it was held that a preliminary objection raises pure points of law which are argued on the assumption that all the facts pleaded are correct, and it cannot be raised if any facts have to be ascertained or what is sought is the exercise of judicial discretion.

The real question therefore is whether the issues raised by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant are pure points of law. It is my view that the issues raised of when the Plaintiff's cause of action arose, and the legal basis for his claims have been raised prematurely as there is no suit before this Court that has been filed by the Plaintiff. Even if this Court was to rely on the draft Plaintiff annexed by the Plaintiff, I am of the view that these are issues on which evidence will have to be led for the Court to make a determination, and are therefore not pure points of law. The Preliminary Objection therefore fails.

The outstanding issue for determination is that of leave to commence suit against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. 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. It was 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 the fact of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants statutory management/liquidation has not been disputed, leave is hereby granted to the Plaintiff to commence proceedings and/or a suit against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

Each party shall meet their own costs.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_19<sup>th</sup>\_\_\_\_ day of \_\_\_\_June\_\_\_\_, 2012.

**P. NYAMWEYA**

**JUDGE**