



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 481 of 2006

JOHN GACHOKI NDENGE.....PLAINTIFF

VERSUS

KIAMBU DANDORA FARMERS COMPANY LIMITED.....1ST DEFENDANT

DEPOSIT PROTECTION FUND AS LIQUIDATOR OF

POST BANK CREDIT LTD. (IN LIQUIDATION).....2ND DEFENDANT

R U L I N G

The 2nd Defendant, hereinafter referred to as the Deposit Protection Fund, has raised a Preliminary objection dated 10th August, 2007 against the Plaintiff's suit on the following grounds.

- 1. That the Plaintiff's suit against the 2nd Defendant is fatally defective and a nullity as leave to institute the same was not obtained as required under section 228 of the Companies Act, Chapter 486 Laws of Kenya.**
- 2. The Plaintiff's suit against the 2nd Defendant is incurably and fatally defective and null *ab initio* the same having been instituted more than six years after the date on which the cause of action accrued and therefore statute barred.**
- 3. The Plaintiff's suit against the 2nd Defendant is materially and incurably defective the same having been instituted against the Deposit Protection Fund as Liquidator of Post Bank Credit Limited (In Liquidation) contrary to Section 36 of the Banking Act, Chapter 488 Laws of Kenya which expressly stipulates that it is only the Deposit Protection Fund Board and not the Deposit Protection Fund which has perpetual succession and therefore the capacity of being sued or suing in its corporate name or in the name of an institution under liquidation.**

Ms. Karanja for the 2nd Defendant argued the preliminary objection. Mr. Ojienda for the Plaintiff opposed the preliminary objection on behalf of his client.

The brief facts of the case are that the Plaintiff filed the suit initially against Kiambu Dandora Farmers Company Limited on 15th December, 2003. Subsequently the Plaintiff filed a Chamber Summons application dated 16th April 2004, seeking leave to amend the plaint as per the draft amended plaint. In the draft amended plaint, the Plaintiff was proposing to join the Deposit Protection Fund as Liquidator of Post Bank Credit Limited (In Liquidation) as 2nd Defendant. That application was granted by consent

before the Deputy Registrar of this court on the 16th November, 2004 and the Plaintiff was granted fifteen days within which to file and serve the amended plaint.

The 2nd Defendant subsequently filed the preliminary objection which is the one under consideration. The first ground of objection is that the suit against the 2nd Defendant is fatally defective and a nullity as leave to institute the same was not obtained as required under the Companies Act. Mr. Ojienda for the Plaintiff opposed the preliminary objection. Counsel argued that the 2nd Defendant was made a party to the suit by consent of both Defendants' Advocates. Counsel argued that by consenting to the application to enjoin the 2nd Defendant to the suit, the 2nd Defendant negated the issue now raised since, at the time the consent was given those issues were alive and ought to have been raised at that stage.

Section 228 stipulates as follows:

“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.”

The above section is framed in mandatory terms and it clearly says that no action or proceeding shall be proceeded with or commenced. Mr. Ojienda's argument seems to suggest that the 2nd Defendant's Advocate, by consenting to the amendment that brought in the 2nd Defendant into the suit, waived the application of the statutory provision and that therefore section 228 does not protect the 2nd Defendant. Counsel has not cited any case to support that proposition and I am not aware of any which allows a party to waive the application of section 228 of the Companies Act.

Miss Karanja for the 2nd Defendant relied on a case from this court **Welcome Properties vs. Jackson Kamau Karuga & 2 Others Misc. Appl. No. 70 of 2001**. Ringera, J., as he then was, dealt with the application of section 228 of the Companies Act. The argument by the Respondent in the application before the judge was that the suit was against the Liquidator and that no leave was required to institute the suit against it under section 228 of the Companies Act. The learned Judge came to the conclusion that the company itself which was in liquidation was a necessary party in the suit and that it was therefore necessary to obtain leave to sue it and that failure to do so rendered the proceedings a nullity ab initio.

In the instant application it is not disputed that Post Bank Credit Limited is in liquidation and that the Deposit Protection Fund Board was appointed the Liquidator of the Bank. Under section 228 of the Companies Act leave must be obtained before proceedings are commenced against a company in liquidation. What the Plaintiff in this instant suit ought to have done is to file a miscellaneous case and in it make an application under Section 228 of the Companies Act, to institute proceedings against Deposit Protection Fund Board as liquidator of Post Bank Credit Limited. That leave ought to have been obtained before an application to amend the plaint was brought in the relevant suit. At the time that the consent to amend the plaint was granted before the Deputy Registrar, that leave to institute the proceedings against the 2nd Defendant ought to have been in place. Mr. Ojienda's argument that the 2nd Defendant waived the application of section 228 of the Companies Act to the instant suit is untenable. That amendment should not have been sought before the leave to institute the proceedings against the Board was secured. The 2nd Defendant would have been right to assume that the necessary leave to institute the proceedings against it had been obtained before the application was made. The issue of waiver therefore does not arise. The proceedings instituted against the 2nd Defendant were a nullity ab initio and they should be struck out.

The 2nd ground of objection is that the Plaintiff's suit against the 2nd Defendant was incurably and fatally defective on account of limitation, having been brought more than six years after the cause of action arose. Miss Karanja for the 2nd Defendant urged that the case against the 2nd Defendant was based on a contract of sale dated 31st May, 1996. Counsel argued that the suit against the 2nd Defendant was instituted on 19th November, 2004, which was more than 8 years from the date the cause of action arose. Mr. Ojienda's argument was that the cause of action arising against the 2nd Defendant cannot be

separated from that against the 1st Defendant. He argued that as against the 1st Defendant the cause of action is a continuing trespass and that, that continuing trespass is connected to the cause of action against the 2nd Defendant and that therefore there can be no limitation of time.

Section 4(1) (a) stipulates that:

“The following actions may not be brought after the end of six years from the date on which the cause of action accrued –

(a) actions founded on contract.”

I have looked at the amended plaintiff. Under paragraph 7 of the amended plaintiff the Plaintiff avers:

“The Plaintiff thereafter executed sale agreement with the 2nd Defendant’s agents dated 31st May, 1996 and paid the balance of the purchase price being Kshs.950,000/= to the 2nd Defendant’s agents.”

Under Paragraph 9 the Plaintiff avers:

“The Plaintiff avers that the above property was thereafter transferred to him and was issued with a title deed.”

Paragraph 13 and 14 the Plaintiff avers:

“13. The Plaintiff claim against the 1st Defendant is for indemnity against any loss, claims, destruction, improvement or development that may occur in the suit property as a result of the Defendant’s continued trespass to the said property.

14. The Plaintiff further claim against the 2nd Defendant indemnity from any and/or loss arising out of the claim of the 1st Defendant or its agents, servants.”

Considering the above averments in the plaintiff, it is my view that whether the suit is debarred by limitation under section 4(1) of the Limitation of Actions Act is a matter that could require to be ventilated through evidence. Section 4(1) of the Limitations of Actions Act states that actions may not be brought. It leaves room for parties to put to test whether the suit is barred by limitation under that section or whether there are exemptions to the application of that section. It is not possible at this stage to determine whether the suit is barred by limitation since from the averments in the plaintiff, the claim against the 2nd Defendant is not only based on the contract entered into between the Plaintiff and the company in liquidation, but is alleged to be based on a continuing breach by the Defendants. I will leave it at that.

The last ground of opposition is that the suit against the 2nd Defendant is materially and incurably defective the same having been instituted against the Deposit Protection Fund as opposed to the Deposit Protection Fund Board, as provided under section 36 of the Banking Act. Miss Karanja’s argument was that the Deposit Protection Fund Board was created under section 36 of the Banking Act as a body corporate capable of suing and being sued, and that the correct party to have been sued was the board and not the Deposit Protection Fund. Mr. Ojienda on his part submitted that the omission of the word ‘Board’ on the 2nd Defendant’s title and in the plaintiff does not vitiate the proceedings and that it was curable by way of an amendment.

Section 36 (1) of the Banking Act provides:

“There is hereby established a body corporate to be known as the Deposit Protection Fund Board.”

Under that section, it is the Deposit Protection Fund Board which is a legal entity with corporate powers and therefore capable of suing and being sued. The Deposit Protection Fund is not a legal entity and

therefore it is incapable of being sued. It was therefore materially defective and a nullity for the Plaintiff to institute the suit against the Deposit Protection Fund. That defect is not curable by an amendment.

Having come to the conclusion I have, I uphold ground 1 and 3 of the preliminary objection to the suit against the 2nd Defendant dated 13th August, 2007 on grounds:

- 1. That the Plaintiff's suit against the 2nd Defendant was a nullity *ab initio* for having been instituted without the necessary leave under section 228 of the Companies Act.**
- 2. The suit is materially and incurably defective for having been instituted against the Deposit Protection Fund, which is incapable of being sued under section 36 of the Banking Act.**

Accordingly, the suit against the 2nd Defendant is struck out with costs to the 2nd Defendant.

Dated at Nairobi this 21st day of November, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Ms. Wandia holding brief Ms. Karanja for the 2nd Defendant/Applicant

Mr. Morara holding brief Mr. Ojienda for the Plaintiff

LESIIT, J.

JUDGE