



Okeyo & 2 others v Mithika & 3 others; Mutirithia Investments and Services Limited & another (Interested Parties) (Environment & Land Case 537 of 2013) [2022] KEELC 15073 (KLR) (15 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15073 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 537 OF 2013
MD MWANGI, J
NOVEMBER 15, 2022**

BETWEEN

**ISAAC ODHIAMBO OKEYO 1ST PLAINTIFF
JANE MUKAMI WAIRIMU 2ND PLAINTIFF
JANE NJERI MAINA 3RD PLAINTIFF**

AND

**JOSHUA MITHIKA 1ST DEFENDANT
EZEKA HOME DEVELOPERS INVESTMENT CO LTD 2ND DEFENDANT
KENYA DEPOSIT INSURANCE CORPORATION 3RD DEFENDANT
KIMWE PROPERTY MANAGERS LIMITED 4TH DEFENDANT**

AND

**MUTIRITHIA INVESTMENTS AND SERVICES LIMITED INTERESTED PARTY
MUGANDA WASULWA & ALVIN MUGANDA T/A KEYSIAN
AUCTIONEER INTERESTED PARTY**



RULING

1. The 3rd Defendant, Deposit Protection Fund Board in its Preliminary Objection dated the 13th July, 2022 seeks that the Plaintiffs suit as against it and the cross-actions against it by the co-defendants be struck out on the basis that;

‘The Suit and cross-actions against the 3rd Defendant were filed contra-statute without the sanction of this Honorable Court as prescribed under Section 56 of the [Kenya Deposit Insurance Act](#), Cap 487 C of the Laws of Kenya and are therefore a nullity.’

2. The Preliminary Objection was opposed by the Plaintiffs, the 1st Defendant and the 1st Interested Party.
3. It is important to analyze the pleadings filed by the parties herein in order to contextualize the basis of the Preliminary Objection by the 3rd Defendant.
4. The Plaintiffs in their Further Amended Plaint dated the 4th November, 2021 the pray for Judgement against the Defendants for;
 - a. An injunction to permanently restrain the Defendants severally and/or singularly whether by themselves, their servants and/or agents from disposing off and/or alienating, entering and/or from interfering with the Plaintiffs ‘use and enjoyment of the suit premises that is to say; LR. No. 10821/ 76 (Original No: 10821/48/2) located South West of Thika Municipality also referred to as Thika/Juja/ Kalimoni/ 10821/76.
 - b. A declaration that the Plaintiffs and the respective members of Ezeka Kamuguti- Self Help Group are the beneficial owners of parcel known as Thika/Juja/Kalimoni/ 10821/76.
 - c. The Honorable Court declares that the auction held on 10th May, 2013 irregular and unlawful.
 - d. The Honorable court orders that the Transfer dated 14th August, 2013 and resultant title to the 4th Defendant Kimwe Properties Managers Limited be nullified and canceled forthwith.
 - e. The Honorable court do order that the Plaintiffs herein and the members of Ezeka Kamuguti Self Help Group be allowed to redeem the parcel LR No. 10821/76 by paying a total amount of Kshs. 1, 500,000/= to the 3rd Defendant herein being the amount agreed between the 1st Defendant and 3rd Defendants in their correspondence.
 - f. That the Honorable Court do order that upon redemption of the property by the Plaintiffs herein and the members of Ezeka Kamaguti Self Help Group; the 1st defendant and the 3rd Defendant facilitate the transfer and registration of the parcel LR No. 10821/76 to the Plaintiffs and members of Ezeka Kamaguti Self Help Group.
 - g. That in default of the 1st and 3rd Defendants facilitating the transfer, the Deputy Registrar be authorized to execute respective documents transfers to facilitate the transfer of parcel LR. No. 10821/76 to the Plaintiffs and the Members of Ezeka Kamaguti Self Help Group.
 - h. The honorable court orders the Land Registrar, Thika to cancel and/or revoke Title issued to the 4th Defendant, Kimwe Property Managers Limited and/or any other title irregularly obtained.
 - i. Costs of this suit



- j. Interests on (i) above
5. The Defendants in their statements of defence denied the allegations leveled against them by the Plaintiffs. The 3rd Defendant on its part filed an Amended Defence amended on 30th November, 2021.
 6. The 1st Defendant on his part aver that the 1st Defendant was the sole registered proprietor of the suit property before the same was sold through a public auction to the 4th Defendant by the 3rd Defendant in exercise of its statutory power of sale.
 7. It is alleged that on 12th November, 1997, Euro Bank Limited (in liquidation) advanced to the 1st Defendant a loan and an overdraft facility of Kshs. 5,000,000/= through a legal charge over the suit property. The 1st Defendant defaulted in servicing the loan and the overdraft facilities prompting the Bank to recall the facilities vide the Letter dated 3rd August, 1998.
 8. The Bank was later placed under liquidation. As a result of the default by the 1st Defendant, the Bank exercised its statutory power of sale through the 3rd Defendant. That all the legal processes including Notices were duly issued to the 1st Defendant before the suit property was duly transferred to the 4th Defendant, who was the highest bidder during the auction.
 9. Therefore, any purported subdivision or sale of the suit property after the creation of the charge in 1997 without the consent of the Bank was illegal, fraudulent, null and void. The 3rd Defendant urges the court to dismiss the suit with costs as it lacks merit.
 10. The 1st Defendant in his Defence and Counterclaim contests that he is still the registered owner of the suit property and denies selling it to the 2nd Defendant. He denies being privy to any transaction between the Plaintiffs and the 2nd Defendant.
 11. He asserts that the 3rd Defendant's exercise of its statutory right over the suit property is a contractual matter purely between the 1st Defendant and the 3rd Defendant. The Plaintiffs by virtue of the doctrine of privity of Contract would have no basis to institute proceedings against the 1st Defendant regarding the suit property. Therefore, the intrusions and developments on the suit property by the Plaintiffs amounts to trespass.
 12. In his Counterclaim, the 1st Defendant prays for judgement to be entered declaring that the Plaintiffs have unlawfully trespassed onto the Suit property, immediate delivery of possession of the suit property to the 1st Defendant, and order of eviction and dismissal of the Plaintiffs' suit with costs.
 13. Pursuant to the Court's ruling on the 22nd February, 2022, the 1st and 2nd Interested Parties were introduced as such to this suit. The 1st Interested Party filed a cross-claim as against the 3rd Defendant and the 2nd Interested Party. The 1st Interested Party alleges that it sought a loan of Kshs. 500,000 and an overdraft of Kshs. 3,000,000/= from Euro Bank (now under liquidation). That 1st Defendant willingly offered the suit property in favour of the Bank to secure the 1st Interested Party's indebtedness.
 14. It was upon default that the Bank recalled the facilities and the outstanding amounts on both facilities was Kshs. 4,671,844.15. The 1st Interested Party paid a total of Kshs.6,846,279/= to settle the outstanding amount.
 15. It states that when the Bank went into liquidation and the 3rd Defendant took over as the liquidator, the 3rd Defendant frustrated its efforts to clear the outstanding loan amounts. The 3rd Defendant later purported to its exercise statutory power of sale in respect of the suit property. The said sale according to the 1st Interested Party was irregular, unlawful, illegal and fraudulent.



16. The 1st Interested Party therefore prays that this honorable court enters judgement against the 3rd Defendant and the 2nd Interested Party for a declaration that the 1st Interested Party had fully settled its indebtedness towards Euro Bank, and that by virtue of the in duplum rule the 1st Interested Party ceased to owe the 3rd Defendant. Further, that the statutory power of sale against the suit property never crystallized; therefore, the purported sale of the suit property to the 4th Defendant was null and void.

Court's Directions

17. The Court directed that the Preliminary Objection by the 3rd Defendant be canvassed by way of written submissions. The 3rd Defendant filed its submissions dated the 20th July, 2022, while the 1st Defendant and the 1st Interested Party filed joint submissions dated the 21st July, 2022. The Plaintiffs filed theirs dated the 12th October, 2022. The court has had occasion to read all the submissions filed.

The 3rd Defendant's Submissions

18. The 3rd Defendant submitted that it only acted as an agent of the Bank under liquidation while exercising the statutory power of sale. It therefore did not assume the liability of the Bank. Therefore, claims against the Bank cannot be extended to the 3rd Defendant save for liability for damages suffered by a party as a result of the 3rd Defendant's independent, unlawful or illegal action. Thus, the Liquidator as an agent, should not be sued in its own name as it acts in a representative capacity.
19. It is the 3rd Defendant's further submission that the Plaintiffs' ought to have sought the leave of Court before commencing the suit as provided in Section 56(2). It relied on the case of *Dickson Jomo Kebatta –vs- Deposit Insurance Corporation in Liquidation of Middle Africa Finance Ltd (2017) eKLR*.
20. Counsel for the 3rd Defendant prayed that the Preliminary Objection be allowed and the Plaintiff's suit and the cross actions against it be declared as improperly instituted and be struck out with costs.

1st Defendant's and 1st Interested Party's Submission

21. The 1st Defendant and the 1st Interested Party identified issues for determination as;
- i. Whether the 1st Defendant's Amended cross-action dated 18th November, 2021 and the 1st Interested Party's cross-claim dated 14th March, 2022 can proceed independently in the event that the Plaintiffs' suit is withdrawn on the basis of the Preliminary Objection.
 - ii. Whether Section 56 of the *Kenya Deposit Insurance Act*, Cap. 487C of the Laws of Kenya is applicable in this particular suit.
 - iii. Who should bear the costs of the 3rd Defendant's Preliminary Objection dated 13th July, 2022.
22. On the first issue, the 1st Defendant and 1st Interested Party submitted that their cross-claims should proceed to further hearing should the main suit be dismissed. That the cross-claims exist as a separate suit hence separable from the main proceedings as provided for under Order 7 Rule 13 of the Civil Procedure Rules. They relied on the case of *Trustees (Registered) Eldoret Churches Urban Project Trust Fund –vs- National Land Commission & 3 Others (2022) eKLR*, where the court held that a cross-claim can continue to exist independently.
23. As to whether the *Kenya Deposit Insurance Act*, Cap 487C, Laws of Kenya is applicable in this case, they submitted that the provisions of the said Act were not applicable to the cross-claims. This was so because the cause of action in the cross-claim arose in March 2012 and May 2013 before the



operationalization of the Act, which was assented to on 9th May, 2012 and commenced on 1st July, 2014. Therefore, the provisions of the Act cannot be applied retrospectively to the cross-claims.

24. On the third issue as to who should bear the costs of the 3rd Defendant's Preliminary Objection, they submitted that the 3rd Defendant should bear the costs of the Preliminary Objection for the reason that it ought to have raised the Preliminary Objection when it was sued as a Defendant and not when the hearing of the suit was about to commence.

Plaintiffs' Submission

25. The Plaintiffs' on their part submitted that the issues for determination in respect of the Preliminary Objection were;
- A. Whether the sanction as under Section 56(2) was required in instituting the suit against the 3rd Defendant, and
 - B. What the consequences of failure by the 3rd Defendant to plead the issue of the court's sanction in its defence were.
 - C. Finally, the import of Section 56(2) of the *Kenya Deposit Insurance Act*.
26. On the first issue as to whether sanction under Section 56(2) was required in instituting the suit against the 3rd Defendant, the Plaintiffs submitted that the 3rd Defendant was brought on board pursuant to the court's directions issued on the 26th September, 2013. That indeed the 3rd Defendant filed a Defence denying the claim and provided a step to step guide on the process they undertook in selling the suit property.
27. Further that it was evident that the suit herein was against the 3rd Defendant in its capacity as a corporation and not against Euro Bank which is in liquidation. The issues therefore do not require the sanction of the court prior to instituting the suit as provided for under Section 56(3) of the Act. The corporation is a body corporate with the right to sue and be sued as stated in Section 4 of the Act.
28. The second issue was on the consequence of failure by the 3rd Defendant to plead the issue of Court's sanction in its Defence. The Plaintiffs submitted that the 3rd Defendant did not plead as an issue in its Statement of Defence the failure by the Plaintiffs to seek leave of the court prior to filing the suit. The 3rd Defendant was therefore estopped from raising it 9 years later. They cited the case of Stephen Onyango Achola and Another –vs- Edward Hango Sule and Another (2004) eKLR where the Court of Appeal held that the failure by the Respondent to specifically plead the issue of limitation in its defence denied them the opportunity to rely on it later on. It cannot be a basis of a Preliminary Objection nor can it be relied on during the trial of the suit unless the defence is amended to include it as an issue. Cases must be decided on the basis of issues pleaded.
29. The final issue for determination according to the Plaintiffs was on the import of Section 56(2) of the *Kenya Deposit Insurance Act*.
30. The Plaintiffs submitted that the essence of Section 56(2) of the Act on seeking leave before commencing a suit, is to verify that the applicant has a valid claim against the institution so as to ensure orderliness, decency and avoid a floodgate of actions, which may involve matters placed under suspension as a result of the liquidation process.
31. Consequently, the 3rd Defendant having filed a Defence and participated in the proceedings for more than 9 years was a confirmation of the validity of the claim herein. The Plaintiffs therefore pray that the Preliminary Objection by the 3rd Defendant be dismissed with costs.



Issues for Determination

32. I have considered the Notice of Preliminary Objection, the submissions and authorities placed before me by the learned counsel for the parties herein. In my opinion, the only issue for determination is whether the Preliminary Objection raised by the 3rd Defendant is on a point of law, and if so, whether it has merit.

Analysis and Determination

33. In the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* [1969] EA 696 Law J.A and *Newbold P* (both with whom Duffus VP agreed held thus at pages 700 and 701, respectively – Law JA:

“So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the court, or a plea of limitation or submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.” (emphasis added).

34. *Newbold VP* on his part held as follows-

“A 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 increases costs and, on occasion, confuse the issues. This improper practice should stop.”

35. Section 56(2) of the *Kenya Deposit Insurance Act* (No. 10 of 2012) provides as follows: -

“No injunction may be brought or any other action or civil proceedings may be commenced or continued against an institution or in respect of its assets without the sanction of the Court.”

36. From the foregoing, the Preliminary Objection raised herein is a proper point of law for consideration as such.

37. The question that follows then is whether the Preliminary Objection is sustainable?

38. It is not in dispute that the 3rd Defendant was appointed as a Liquidator for Euro Bank (In liquidation) pursuant to section 43(1) (2) and 53 (1) of the *Kenya Deposit Insurance Act*.

39. It is evident from the pleadings that the 1st Interested Party was a customer of Euro Bank (in Liquidation) and sought a loan and an overdraft from the Euro Bank. That 1st Defendant offered the suit property to secure the 1st Interested Party’s indebtedness. A charge was subsequently registered over LR. No. 10821/ 76 (Original No: 10821/48/2) located South West of Thika Municipality also referred to as Thika/Juja/ Kalimoni/ 10821/76.

40. It was upon failure to service the said loan and overdraft facility that the 3rd Defendant exercised the Bank’s statutory power of sale over the charged property and sold it by public auction to recover the loan arrears. This was off course after Euro Bank had been placed under liquidation.



41. The sale took place by way of an auction and the transfer of the suit property to the 4th Defendant was effected prompting the Plaintiffs to file this case. The matter has been pending in court for over 9 years now.
42. The 3rd Defendant has now raised the instant preliminary objection arguing that the Plaintiffs' claim as well as the cross-actions by the 1st Defendant and the 1st Interested Party were improperly instituted in contravention of the provisions of section 56(2) of the *Kenya Deposit Insurance Act*. The 3rd Defendant contends that the Plaintiff ought to have sought leave of Court first before commencing the instant suit as against the 3rd Defendant. It submits that the failure to do so rendered the suit and the cross-actions incurably defective.
43. On the other hand, the Plaintiffs' contention was that that they had not instituted the suit against the Institution (Euro Bank) which was the institution in liquidation, but against the Corporation (3rd Defendant herein) as defined under Section 4 of the Act. It was therefore not necessary for them to seek leave of the court to institute the suit against the Corporation.
44. The *Kenya Deposit Insurance Act* which was enacted in 2012 restricts enforcement of orders against any institution under liquidation. Section 56 of the said Act provides as follows: -
- i. No cause of action which subsisted against the directors, management or the institution prior to liquidation shall be maintained against the Liquidator.
 - ii. No injunction may be brought or any other action or civil proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the Court.
 - iii. No attachment, garnishment, execution or other method of enforcement of a Judgment or order against the institution or its assets may take place or continue.
45. Section 2 of the Act defines an institution to mean:
- ‘A bank, financial institution or mortgage finance company as defined in the *Banking Act* (Cap. 488), or a microfinance bank as defined in the *Microfinance Act*, 2006 (Cap. 493D), or any other deposit taking entity licensed by the Central Bank.’
46. In my view, Section 56(2) relates to suits brought against Institutions under receivership or liquidation and not against the corporation. Section 4 of the Act establishes the corporation as an entity with perpetual succession capable of suing and being sued in its own right as a body corporate.
47. The Plaintiffs' suit and the cross-actions herein seek injunctive orders against the disposal of the suit property (after) the 3rd Defendant exercised the statutory power of sale. The actions complained of are against the 3rd Defendant not against the bank in liquidation. Whether or not the 3rd Defendant is culpable is a matter that can only be determined after evidence has been adduced and the court has had the opportunity to consider the same.
48. Based on the foregoing, I agree with the Plaintiffs and the 1st Defendant and 1st Interested Party that leave was not required to institute the suit against the 3rd Defendant. I am further persuaded by the findings in the case of Northwest (K) Limited v Kenya Deposit Insurance Corporation (Official Receiver for Chase Bank Ltd) & another [2018] eKLR as cited by the Plaintiffs' Counsel.
49. My finding is that the Plaintiffs' suit herein as well as the cross-action by the 1st Defendant and the 1st Interested party were properly instituted.



50. I therefore find that the 3rd Defendant's Preliminary objection is unmerited and dismiss it with costs accordingly.

Dated, signed and delivered at Nairobi this 15th day of November 2022

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Kariuki Ovesi for the Plaintiffs.

Mr. D. Kiragu for the 3rd Defendant also h/b for Mr. Mudanya the 2nd Interested party.

Mr. Muturi Nicholas for the 4th Defendant.

N/A for the 1st & 2nd Defendant & 1st Interested Party.

Court Assistant – Hilda.

M.D. MWANGI

JUDGE

