



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI COMMERCIAL COURTS**

**Civil Suit 242 of 2003**

**NELSON OTIENO ASINO OMOLLO.....PLAINTIFF**

**VERSUS**

**DAVIDSON KARUNDI NGINI.....1ST DEFENDANT**

**SUBASH CHANDOR NOHL.....2ND DEFENDANT**

**WILLIAM OLOTCH.....3RD DEFENDANT**

**(SUED AS TRUSTEES OF PAN AFRICA INSURANCE COMPANY LIMITED**

**STAFF PROVIDENT FUND)**

**Coram: J. W. Mwera, J**

**Weda for plaintiff/applicant**

**Mugambi for the Liquidator of the Fund**

**R U L I N G**

When the court was about to hear the plaintiff's application dated 2nd May, 2003 which was brought under Order 39 rr. 1(a), 2 2A, 3 of Civil Procedure Rules and Section 3A of the Civil Procedure Act, Mr. Mugambi who told the court that he appeared for the liquidator (Mr. Mboya Advocate) of the Pan African Insurance Co. Ltd. Staff Provident Fund, hereinafter the Fund, began by raising a preliminary point of law which Mr. Weda for the plaintiff answered.

Mr. Weda's client's application for injunctive orders was filed along with a plaint in which that client (the plaintiff) sued three (3) defendants as trustees of the Fund. That between 1993 and 1999 or thereabout the plaintiff obtained loan facilities from the Fund (or Pan African Insurance Co. Ltd. whichever) and his following properties were charged accordingly: NBI/BLOCK 106/57 DAM ESTATE, L.R. NO.209/10775 FLAT NO.79 BLOCK 28B plus NBI/BLOCK 106/57 LANGATA. That at time the plaintiff was employed by Pan African Insurance Co. Ltd. He later left; his mortgages were consolidated and they fell under the Fund. That it claimed some unjustified interest rates on the total debt of Kshs.8,123,283.59 which the plaintiff appeared to dispute. That the Fund then went into voluntary liquidation, whereupon moves were taken to sell the plaintiff's properties to repay the debt. So he moved to court seeking injunctive orders and declarations that the charges over those two properties were invalid etc. Assuming that the paraphrase of the pleadings in the plaint are correct as set out above, it had been

further averred that the three (3) defendants: Davidson Ngini, Subash Nohl and William Olotch were trustees of the Fund during the time of the transactions in question. So judgment and interlocutory orders were sought against these three (3) defendants. The Chamber Summons (above) sought injunction orders against the same three (3) defendants.

Mr. Weda told the court that when his firm sought to serve the present on the three (3) defendants starting with the 1st defendant, Davidson Ngini, he seemed to have verbally intimated to the process server that he was no longer a trustee of the Fund and that the plaintiff would rather consider to serve the firm of M/s Kahuthu & Kahuthu Advocates who had instructed auctioneers to advertise to sell the plaintiff's properties or M/s Mboya Advocate, the fund's liquidator. It was not shown that the other two (2) defendants were served or there was an attempt to do so. Other than Mr. Weda's remarks from the bar it seems as if there was no affidavit of service filed showing the fruitless efforts to serve the 1st defendant. But be that as it may, it transpired that Mr. Mboya (the liquidator) was served; he entered appearance under protest, it was said, and filed an affidavit.

Mr. Mugambi told the court that the defendants were not even the immediate former trustees of the Fund. They were trustees before another lot took over (which was named for the benefit or as a reminder to the plaintiff, who was himself once a trustee of the Fund) and so in that succession, the persons to sue had to be ascertained by the plaintiff otherwise if he got orders sought, they could be in vain. That they could not be enforced against/by the present defendants. He added that after the Fund went into liquidation and Mr. Mboya was appointed liquidator, all this was known to the plaintiff who had not bothered to sue him (liquidator) (see annexure NOAO 8 – a DAILY NATION cutting of 23rd August, 2002 by the plaintiff indicating the liquidator). That after commencement of liquidation, the liquidator took the place of the trustees and that that is the party against whom any suits should be filed and orders directed particularly as at this time of the whole case. Mr. Mugambi added that because the liquidator had not been sued or joined in this suit, he cannot be compelled to obey the injunction orders stopping the sale. He is not a party or an agent (of the defendants). That accordingly this court should not be required to give futile orders that are not directed to relevant party to enforce or to no party at all.

Mr. Weda countered all the above by stating that the defendants are the proper parties to sue as of now because they executed the charges in question here. That the sale of those properties should be halted if the liquidator is facilitating them because, he was not mandated to do so by the trustees. It could be gleaned from this submission that the liquidator may as well be considered a meddler here and so the court has in all fairness to stop the sale, non-joinder or misjoinder of parties notwithstanding.

The above arguments followed what Mr. Mugambi called a point of law so clear that not much research needed to go in it. Mr. Weda on the other hand was of the firm view that what his learned friend put forth could only be resolved by evidence at a trial including whether the present Retirement Benefits Rules (under the Retirement Benefits Act No.3 of 1997) together with its Rules covered/affected it or not. That dealing with such important points and, as it were, disposing of them now at this point was not correct.

After hearing both sides this court is of the view that it is not disposing of the suit now. The suit is not being struck out or dismissed at this point at all. Mr. Mugambi said so. So the plaintiff can still go to the end of it and even get the sought reliefs or other. That is not the court's concern now.

The court however must address matters before it which are in dispute or seeking reliefs as between (or among) parties and do just that. The orders given shall not be futile or in vain. The benefitting party must get them enforced and in case of a default, the court must come along to ensure compliance. So there must be a party seeking reliefs and a party to comply in case the reliefs are granted.

Here the plaintiff has sued the defendants who were trustees of the Fund at the various times he transacted with it to get loans from it. They left their stations and others took over. That is the way of trusteeships. The last lot as trustees gave way to the liquidator who in the whole chain of things is now the man collecting the Fund's assets in order to pay the beneficiaries. The debt owed by the plaintiff is such an asset. Whether the plaintiff's suit against the defendants succeeds in the end or not that is another

matter. But in order to get injunctive orders against them it would be prudent to serve them so that after hearing this application, with their input or without it, the court would if so found, give orders directed to them. The plaintiff has not shown that the defendants were served with this application at all. There is no affidavit of service and he did not ask the court to adjourn the hearing of this application on that ground. Had the liquidator not pointed out (reminded) the plaintiff that the defendants were no longer involved in this matter or even interested at all, the plaintiff would have gone on to ask for ex parte orders.

But that is not enough. The court heard from the bar that the 1st defendant (Davidson Ngini) advised the plaintiff that he was no longer a trustee of the Fund and that Mr. Mboya (liquidator) probably would be the party to serve with the present processes. That then Mr. Mboya was served. But Mr. Mboya is not a party in this matter at all and no efforts were made to make him one. As the liquidator to whom the proceeds of sale of the subject properties will be paid on behalf of the Fund, he is the one to be a defendant here or in whatever capacity, so that if the court orders that the sale should not go on those orders are directed to him to obey. He is not an agent of the defendants in any way.

In the circumstances of this case, the point raised by the liquidator is upheld. The plaintiff has not sued a party towards whom this court's orders sought may be directed and the court will not go on to hear the application of 2nd May, 2002 only to issue orders in vain because there will be no party as of now to comply with them or on the other hand, the defendants were not served at all. The application is dismissed with costs to the Fund. The orders staying the sale given on 6th May, 2003 are vacated.

Orders accordingly. Point upheld.

Delivered on 12th day of May 2003.

**J. W. MWERA**

**JUDGE**