



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISC NO. 3 OF 2021

GEORGE WANYOIKE NJUGUNA AND LEONARD MATHERI NJUGUNA

(Suing as Legal Representatives of the Estate of PAUL NJUGUNA WANYOIKE(Deceased)).....APPLICANTS

VERSUS

DANIEL MBUGUA MARI1ST RESPONDENT

PAUL G. KIGUNDA.....2ND RESPONDENT

NDUNGU FARMERS CO-OPERATIVE SOCIETY.....3RD RESPONDENT

MR. PHILLIP U. ULUMA

(Sued as the Official Liquidator of Ngundu Framers Co-op Society Ltd).....4TH RESPONDENT

JASHO REAL ESTATES5TH RESPONDENT

CAROLINE WAMBUI KINUTHIA6TH RESPONDENT

JOSEPH KIAI7TH RESPONDENT

SIMON M. MUCHOKI8TH RESPONDENT

PATRICK MUREITHI WANJIRU9TH RESPONDENT

CHARLES KAMAU MUCHAI.....10TH RESPONDENT

JOSEPH CHURU KIAI.....11TH RESPONDENT

MARY MUTHONI KARAYA.....12TH RESPONDENT

JAMES KAMAU KARIBA13TH RESPONDENT

PURITY WAITHIRA MAINA14TH RESPONDENT

LYDIA WAIRIMU CHIRA15TH RESPONDENT

NEMESIS KABUNYI16TH RESPONDENT

JACINTA MUTHEU.....	17 TH RESPONDENT
VERONICA WARINGA.....	18 TH RESPONDENT
MILKAH WANGECHI NDERITU.....	19 TH RESPONDENT
BERYL NABWIRE	20 TH RESPONDENT
ALBERT NJAGI	21 ST RESPONDENT
PETER EZAVO	22 ND RESPONDENT
THE CHIEF REGISTRAR OF LAND.....	23 RD RESPONDENT
THE ATTORNEY GENERAL.....	24 TH RESPONDENT

RULING

(EX PARTE)

1. The Applicants herein have filed their Notice of Motion application under the provisions of Sections 432 of the Insolvency Act 2015, Section 228 under Schedule 1 of the Companies Act and Section 64(1) of the Co-operatives Act. The applicants seek leave to commence proceedings against Ngundu Farmers’ Co-operative Society Ltd which is under liquidation, and the official liquidator of Ngundu Farmers’ Co-operative Society Ltd amongst other persons.
2. The Application is supported by the Affidavit of George Wanyoike Njuguna sworn on the 5th August, 2021.
3. The Applicants are the administrators/Legal representatives of the Estate of Paul Njuguna Wanyoike – deceased, by virtue of a Limited Grant of Letters of Administration Ad Litem issued to them in the Githunguri Magistrates Court. The grant is attached to the Supporting Affidavit.
4. The Applicants aver that they have a claim for land against Ngundu Farmers’ Co-operative Society Ltd and the other people named in the application (intended Respondents). The deceased, Paul Njuguna Wanyoike was a member of the Co-operative Society, now in liquidation. It was by reason of his membership that he was allocated a parcel of land that has been encroached onto and transferred to the people named as intended Respondents with the involvement of the Co-operative Society now in liquidation. The applicants as representatives of the Estate of the deceased seek to file a suit claiming the land against the Co-operative Society and the other people involved.

WHY SEEK LEAVE?

5. Section 228 of the Companies Act, 2015 provides that, where winding up orders or an interim liquidator has been appointed under Section 235, no action shall be commenced or proceeded with against the Company except by leave of the Court and subject to such terms as the Court may impose.
6. Section 94 of the Co-operative Societies Act on the other hand provides that certain Sections of the Companies Act, shall apply Mutatis Mutandis in relation to the winding up of a Co-operative Society as they apply to that of a Company. One such Section is Section 228 of the Companies Act.
7. Section 228 of the Companies Act is couched in mandatory terms.
8. In **Bisai & Another –vs- Kenya Commercial Bank Ltd (2002)2 E.A 346**, Mwera J (as he then was) stated that;-

“in order to commence any action or proceedings against the 3rd Defendant (a company in Liquidation), the Plaintiffs were obliged, mandatorily by the companies Act to first obtain leave from the Court. That the Leave ought to be sought before bringing an action or proceedings and not retrospectively.”
9. The Court of Appeal in **Mwethaga –vs.- Thabiti Finance Co. Ltd & Others (C.A. No.120 OF 1998)** reiterated the point that the provisions of Section 228 of the Companies Act are mandatory.
10. For the Applicants herein to file their intended suit against Ngundu Farmers’ Co-operative Society Ltd, they mandatorily must obtain leave of the Court. Commencing such an action without leave would be fatal.
11. The Court is satisfied that the Applicants have demonstrated that they have an actionable cause of action against the intended Respondents who include Ngundu Co-operative Society Limited which is in liquidation.

12. Access to justice for all persons is a fundamental right enshrined under Article 48 of the Constitution of Kenya. The applicants like any other persons in the Republic of Kenya have a constitutional right to institute the intended suit.

13. In view of the provisions of article 48, above, leave to file suit as sought by the applicants herein in my view should generally be granted as of right without imposition of any inhibitive conditions.

14. Accordingly, I allow the Applicants' application in terms of prayers numbers 2 and 3.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER, 2021.

M.D.MWANGI

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

MS. MUYAA FOR THE PLAINTIFFS/APPLICANTS

COURT ASSISTANT: HILDA

M.D.MWANGI

JUDGE