



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS CAUSE NO. 685 OF 2012

**THE DEPOSIT PROTECTION FUND BOARD AS LIQUIDATOR OF
PRUDENTIAL BUILDING SOCIETY (IN LIQUIDATION).....APPLICANT**

VERSUS

- JAMES M. KAHUMBURA.....1ST RESPONDENT**
- WILSON KIPKOTI.....2ND RESPONDENT**
- LUCY N. KAHUMBURA.....3RD RESPONDENT**
- PRUDENTIAL DEVELOPERS LIMITED.....4TH RESPONDENT**
- HAZEL PROMOTIONS LIMITED.....5TH RESPONDENT**
- LE VOGUE HAIR & BEAUTY SALON LIMITED.....6TH RESPONDENT**
- BRISKY PROPERTIES LIMITED.....7TH RESPONDENT**
- INTERSTATE COMMERCIAL AGENCIES.....8TH RESPONDENT**
- PACIFIC HOLDINGS LIMITED.....9TH RESPONDENT**
- PELICAN ENGINEERING & CONSTRUCTION CO.....10TH RESPONDENT**
- STANDARD ASSURANCE (K) LTD.....11TH RESPONDENT**

RULING

1. This Ruling is in relation to the applications filed by the following 3 persons;
 - a. **JAMES M. KAHUMBURA;**
 - b. **HAZEL PROMOTIONS LIMITED; and**
 - c. **PACIFIC HOLDINGS LIMITED.**
2. Each of the applicants has served the **DEPOSIT PROTECTION FUND BOARD** (*in its capacity*

- as the Liquidator of **PRUDENTIAL BUILDING SOCIETY**), with their respective Requests for the particulars of various claims made against them.
3. The Liquidator declined to give the particulars because it believes that the applicants were not entitled to them.
 4. Having failed to persuade the Liquidator to provide particulars, each of the applicants have filed applications seeking orders to compel the Liquidator to provide the particulars.
 5. It is the applicants' request that the court do specify a time-frame within which the Liquidator should provide the particulars.
 6. If the Liquidator should fail to provide the particulars within the specified time-frame, the applicants ask that the substantive Application, which the Liquidator had lodged against them, should be dismissed or should be struck out.
 7. The applicants also ask the court to award them the costs of the applications, as well as the costs of the suit.
 8. According to the applicants, it was the intention of the Liquidator to conduct the prosecution of the substantive action in secrecy. Such secrecy, if it were to be allowed, would mean that the applicants stood to be ambushed at every turn, by the Liquidator.
 9. The applicants believe that fairness can only be attained if the Liquidator was compelled to provide the particulars which the applicants have asked for.
 10. The 5th applicant (**HAZEL PROMOTIONS LIMITED**) says that it is only by making available the particulars, that the Liquidator would have got rid of the element of surprise which it currently retains.
 11. Unless the element of surprise was removed altogether, the 5th applicant says that it would be unable to make any proper preparations for the trial, as it would be unaware of the evidence which it ought to prepare, for the trial.
 12. Once the Liquidator provided particulars, the applicants also say that they would be obliged to give particulars of their respective Defences.
 13. The obligation imposed on parties, to provide particulars of their respective pleadings was said to have been imposed by Order 10 Rule 4 (1) of the Civil Procedure Rules.
 14. For instance, if the applicants wished to plead such defences as Release; Payment; or the Statute of Limitation, they believe that that could only be done after the Liquidator had provided particulars of the claims against the applicants.
 15. Why do the applicants think that the particulars sought are vital?
 16. It is because the Liquidator had indicated that the alleged breaches of trust and the alleged breaches of trust and breaches of statute, were said to have occurred prior to 2003.
 17. Therefore, without particulars, the 1st applicant (**JAMES KAHUMBURA**) says that he cannot be expected to answer to allegations which date back almost 30 years.
 18. By way of example, the 1st applicant says that if he was told what the principal sum was, out of the total claim of Kshs. 1.2 Billion, he would then be able to ascertain whether or not to raise such defences as;

i. ***In duplum Rule;***

ii. ***Unconscionable Interest; or***

iii. ***The limit imposed by Sections 323 and 324 of the Companies Act, which only permitted the recovery of the principal sum.***

19. In any event, the claim of Kshs. 1.2 Billion was said to constitute Special Damages, which therefore required the Liquidator to provide a specific pleading, before being allowed to lead evidence to prove it: that is the position taken by the 1st applicant.
20. Meanwhile, the 9th applicant (*Pacific Holdings Limited*) pointed out that the Liquidator had not pleaded any fault; breach of law; breach of trust; or fraud, against it.
21. Therefore, the 9th applicant believes that there would be no way that the court therefore find it personally liable for the debts or the liabilities of the Company.
22. In any event, until and unless the court were to find the 1st and 2nd Respondents liable, the 9th applicant believes that the Liquidator's action against it was premature.
23. In my considered opinion, the submission contending that the Liquidator's action against

- PACIFIC HOLDINGS LIMITED** was premature, is not and cannot be in furtherance of the application for particulars. I so find because whether or not particulars were to be provided, would not determine the question concerning the contention that the claim was premature.
24. Secondly, as it is already being said, by the applicants, that the alleged breaches took place prior to 2003, it would not be necessary for the Liquidator to provide any more specific particulars, before the applicants can decide to put forward the defences premised on the statute of limitation.
 25. Thirdly, even if the liquidator was to provide particulars today, that would not reduce the period of 30 years, during which the claims relate to. It is a red-herring to suggest that an order requiring the Liquidator to provide particulars could make it any easier for the applicants to answer allegations which date back almost 30 years.
 26. In civil cases generally, it is now a requirement that parties should make full disclosure of their respective cases at the earliest opportunity.
 27. The importance of such full disclosure is to ensure that the parties knew the nature and scope of the case which they were required to meet.
 28. The applicants have premised their respective applications on the Civil Procedure Rules.
 29. If the said Rules were applicable to the case at hand, the court would have had no hesitation in telling the Liquidator to provide the particulars.
 30. But it is to be noted that these proceedings were instituted pursuant to the provisions of Sections 323 and 324 of the Companies Act, as read together with Rule 60 of the Companies (*Winding Up*) Rules. Those Rules specify the procedure to be utilized when an application is made to court pursuant to Section 323 (1) and (2) and Section 324 of the Companies Act.
 31. Therefore, by dint of the provisions of Rule 203 of the Companies (*Winding-Up*) Rules:

“In all proceedings in or before the court, or any Judge, magistrate or officer thereof, or over which the court has jurisdiction under the Act or these Rules, where no other provision is made by the Act or these Rules, the practice, procedure and regulations in such proceedings shall, unless the court otherwise directs, be in accordance with the rules and practice of the court”.

32. Clearly, when Companies (*Winding-Up*) Rules specify the applicable procedure, that implies that any other Rules were inapplicable. In the event, the provisions of the Civil Procedure Rules were not applicable to the proceedings before me.
33. Finally, and in any event, the process which the Liquidator has instituted is primarily an investigative one.
34. The Liquidator may be called upon to give evidence about the basis for its alleged suspicion that the applicants herein and the other Respondents to the substantive Motion, had possession of assets belonging to the Prudential Building Society (*in Liquidation*).
35. Secondly, because the respondents were deemed to have held positions from where they had control of assets belonging to the company; and whereas the Liquidator was of the view that the assets of the company had dissipated, it was the Liquidator’s case that the respondents may have information which could be useful in the proposed investigations.
36. It is only after the investigations were concluded that the court would be in a position to ascertain whether or not the respondents were to be held answerable or accountable to such assets as may have “*got lost*” when the respondents were in positions of trust, in respect to the assets of the company.
37. At this stage, it is premature to conclude that the court would, as much as conclude, that the respondents were liable. There is a real possibility that unless the Liquidator leads evidence to connect the respondents to assets of the company, which cannot now be accounted for, the respondents may have nothing to answer to.
38. But it is also possible that the respondents may provide information which could assist the court in resolving the mystery concerning how the assets of Pioneer Building Society were lost, causing grief to the persons who had entrusted their money to the said Building Society.
39. If the respondents do not have any useful information, which could assist the Liquidator and the court in the process of investigations, and if the Liquidator does not link the respondents to assets which ought to have remained with the Building Society, that would be the end of the matter.
40. The point I am making is that, at this stage, the respondents do not have, in the case before me, a

claim in the nature of a Plaint, which the Liquidator had the onus of proving.
41. In conclusion, the applications for particulars are without merit. The same are dismissed, with costs to the Liquidator.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of April 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Ohenga for Oyatsi for the Applicant

Mureithi for Sagana for 1st, 3rd & 6th Respondents.

No appearance for 2nd, 4th & 11th for the Respondents.

Mureithi for Ondieki for 5th Respondent.

Esuchi for Okeyo for 8th & 10th Respondents.