



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 NO. 2

- 1.** The 5th defendant, **HAZEL PROMOTIONS LIMITED**, has asked the court to strike out the suit against it. The applicant asserted that the suit did not disclose any cause of action against it.
- 2.** The applicant further asserted that the suit, as presented, was scandalous, frivolous and vexatious.
- 3.** Thirdly, the applicant reasoned that the suit would only serve to un-necessarily drag it through a costly and time-consuming litigation.

4. When canvassing the application, Mr. Ondieki, the learned advocate for the applicant, submitted that whereas the substantive claim in this case was against persons who were previous directors of the **PRUDENTIAL BUILDING SOCIETY**, the 5th defendant was never a director of the Building Society.
5. The only thing which the applicant shared with the other respondents to the case was their Postal Address.
6. Furthermore, whereas the reliefs being sought included the tracing of assets, the applicant pointed out that the Report filed by the substantive Applicant in these proceedings, did not mention the 5th defendant.
7. In those circumstances, the 5th defendant reasoned that the suit cannot be entertained against it.
8. It was further pointed out by the 5th defendant that the pleadings lodged in court, did not disclose anything against the applicant. Therefore, the applicant sought to be discharged from these proceedings.
9. When responding to the application, Mr. Oyatsi, the learned advocate for the Applicant (**the DEPOSIT PROTECTION FUND BOARD AS LIQUIDATOR of PRUDENTIAL BUILDING SOCIETY**), submitted that the Civil Procedure Rules allowed parties to include those who were directly affected and those who may be affected by the case.
10. The DPFb submitted that the 5th defendant was a necessary party to these proceedings as it would be affected.
11. According to **DPFB**, all the money and assets which had been misapplied or been fraudulently obtained or stolen from it, by the 1st and 2nd Respondents, were traced to the 5th defendant.
12. As an example, the **DPFB** identified these 2 assets, which it alleges to have been funded using money stolen or fraudulently obtained from the **DPFB**:
 - a) **NBI/BLOCK/ 77/343; and**
 - b) **NBI/BLOCK 77/344.**
13. The Applicant's position is that if its case is successful against the 1st and 2nd Respondents, the consequential order would be that the 5th Respondent must give-up those 2 assets to the Applicant.
14. The Applicant's submissions are backed by the law on trusts, as was enunciated in **OVERSEAS FINANCE CORPORATION LIMITED Vs THE ADMINISTRATOR GENERAL of TANGANYIKA COUNTRY [1942] IX E.A.C.A.1**, wherein the Court of Appeal said:

“Equity will now go as far as is reasonably practicable to restore the rights of a cestui que trust, whose money or other property has been misapplied for his own benefit by the trustee, by following the stolen money into the hands of a third party who has received it or had the benefit of it without consideration and that not merely to the verge of actual identification but even further, if it can be ascertained either that the money or the commodity which it has bought is the product of or substitute for the original money”.
15. The Applicant's case against the 1st and 2nd Respondents was that they had abused their fiduciary positions whilst they were employees of the Applicant.
16. In effect, those 2 respondents could be deemed to have held positions of trust. Therefore, if the case against them were to be proved, it is possible that the court could ultimately order the 5th defendant to surrender to the Applicant the assets which were the product of the money irregularly removed from the Building Society.

17. In the circumstances, even though there was no direct assertion that the 5th defendant was personally responsible for obtaining the funds from the Building Society, I find that issues may arise which could have an impact of the assets allegedly traced to him.

18. Accordingly, it is necessary that the 5th defendant be accorded an opportunity to participate in the proceedings in this case. By being a party to the case, the 5th defendant will have the opportunity to participate fully in the case.

19. On the other hand, if the 5th defendant was not a party to the case, it may be improper to have the parties proceed, when it was probable that the parties would give evidence and also make submissions which might touch upon the 5th defendant.

20. The 5th defendant is a necessary party, for the proper and conclusive determination of the matters in issue. In the result, the application dated 18th April 2016 is rejected.

21. It will now be the choice of the 5th defendant whether or not to actively participate in the case. But if they should choose to either stay away or to remain passive during the proceedings, the 5th defendant cannot accuse anybody of having deprived him of an opportunity to be heard.

22. The 5th defendant will pay to the Applicant the costs of the application dated 18th April 2016.

DATED, SIGNED and DELIVERED at NAIROBI this 10th day of October 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Ohenga for the Applicant

Miss Mugenya for Sagana for the 1st, 3rd & 6th Respondents

Miss Mugenya for Ondieki for 5th Respondent

Miss Mugenya for Ondieki for 8th & 10th Respondents

Collins Odhiambo – Court clerk.