



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC.NO. 289 OF 2018

SHOKAT EBRAHIM ALI MOHHO OMAR.....PLAINTIFF

VERSUS

INTEGRAR AUCTIONEERS (K)CO

KENYA FINANCE BANK (IL)

THE LAND REGISTRAR MOMBASA

THE HON. ATTORNEY GENERAL.....DEFENDANTS

RULING

1. Before me for determination is the preliminary objection dated 31st January, 2019 raised by the 2nd defendant on the sustainability of the suit herein on the following grounds:

- 1. That the suit herein is incompetent for failure to comply with mandatory statutory provisions as to the filing of civil proceedings against an institution under liquidation .**
- 2. That no leave of court was obtained prior to the filing of this suit as against the 2nd defendant/respondent and thus the proceedings are a nullity.**
- 3. That the plaintiff has no legal capacity to sue on behalf of the estate of the late Sakinabhai Ali Mohamed.**
- 4. That the filing of suits against institutions under liquidation is a matter regulated by law and relevant rules of procedure and this suit offends the same.**
- 5. That the plaintiff's suit is incompetent, misconceived, bad in law, in bad faith, frivolous and vexatious.**

2. In the course of these proceedings the notice of motion dated 10th December, 2018 by the plaintiff was withdrawn with costs to the 2nd defendant. On 16th October, 2019, directions were taken that the preliminary objection be disposed of by way of written submissions. The 2nd defendant filed their written submissions on 21st November, 2019 while the plaintiff and the other defendants did not file any submissions within the time granted or at all.

3. In their submissions, the 2nd defendant stated that the plaintiff's suit is primarily pegged on alleged misdeed of the 2nd defendant. The 2nd defendant stated that it was placed under liquidation by the Central Bank of Kenya vide Gazette Notice No. 6269 of 8th November, 1996 under Section 35 (1) of the Banking Act. It is the 2nd defendant's contention that the plaintiff had failed to obtain leave before filing the suit and because of that failure, the suit should be struck out with costs. The 2nd defendant's counsel relied on the case of **Donald Smith Earle – v- Central Bank of Kenya & Another, Imperial Bank Limited (Interested Party) (2019)eKLR; Kuza Farms and Allied Limited –v- Dubai Bank of Kenya Limited (in liquidation) Kitale ELC No. 116 of 2017; and David Wabweni Wafula –v- Peter Wafula Khaemba & 2 Others (2018)eKLR.**

4. The 2nd defendant further submitted that the suit is frivolous, vexatious, bad in law, in bad faith, misconceived and failed to disclose that the deceased had another suit pending against the 2nd defendant, namely HCCC No. 667 of 1994. That having brought the suit on behalf of the estate of the deceased, the plaintiff was under duty to disclose to the court the existence of the prior suit and that the suit herein is sub

judice. It is the 2nd defendant's contention that the multiplicity of suits against the 2nd defendant is vexatious and thus is in bad faith and is tantamount to abuse of court process. The 2nd defendant's counsel relied on the case of **Trust Bank Limited –v – Amin Company Ltd & Another (2000)KLR 164 (cited in Kivanga Estates Limited –v- National Bank of Kenya Limited (2017)eKLR.)** The 2nd defendant urged the court to uphold the preliminary objection and dismiss the suit with costs.

5. I have considered the submissions in respect to the preliminary objection under considerations. The main issue to determine is whether the plaintiff ought to have obtained leave of the court before instituting this suit against the 2nd defendant. It is not in dispute that the 2nd defendant is in liquidation with the Kenya Deposit Insurance Corporation being the liquidator. Section 56 (2) of the Kenya Deposit Insurance Act 2012 requires that leave of the court be sought and obtained before commencing civil proceedings against an institution under receivership, liquidation or winding up. It states 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”.

6. The wording of the above Section is couched in mandatory terms. Institution in Section 1 of the Act is defined as bank, financial institution or mortgage finance company. In this case, institution is the 2nd defendant. Indeed, in the plaint, the plaintiff describes the 2nd defendant as “in liquidation”. It is clear from the above provision of the law that sanction of the court was necessary before suit was filed or presented. I note that the plaintiff has not filed my submissions in opposition of the preliminary objection herein. I must also add that the plaintiff has in the instant case, failed to show that leave of the court was sought and obtained before the suit herein was commenced.

7. As a consequent of the aforesaid, I find that the suit herein is incompetent. Having found that the suit is incompetent, the same is therefore not sustainable. I therefore allow the preliminary objection and strike out the suit against the defendants with costs

DATED, SIGNED and DELIVERED at MOMBASA this 20th day of July 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE