



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**CIVIL SUIT NO. 88 OF 2017**

**CHARITY WANGUI NGUMO ..... PLAINTIFF**

**-VERSUS-**

**CHASE BANK LIMITED (*In Receivership*) ..... 1<sup>ST</sup> DEFENDANT**

**ANTIQUE ACTIONS AGENCIES ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff filed a plaint dated **23<sup>rd</sup> May, 2017** seeking among other orders, a declaration that the charge dated 12<sup>th</sup> August, 2014 between the plaintiff and the 1<sup>st</sup> defendant over land Title number **Magutu/Gatei/438** (“the suit property”) is null and void with no legal effect, and a permanent injunction to restrain the defendants from interfering with the suit property. Contemporaneously with the plaint, the plaintiff filed a notice of motion whereby interim orders were granted by consent on 9<sup>th</sup> November 2017, *restraining* the defendants from interfering with the suit property pending the hearing and determination of the application.

2. On the date of hearing of the notice of motion, the defendants informed the court that they had filed a notice of preliminary objection (P.O.) dated **22<sup>nd</sup> July, 2017** on the grounds that the plaintiff's suit and by extension the application were fatally defective for failure to seek leave of the court to commence and continue proceedings against a Company under receivership, contrary to **Section 56(2)** of the Kenya Deposit Insurance Act, 2012 (KDIA).

3. On 9<sup>th</sup> November, 2017 directions were taken that the P.O. and motion would be disposed of by way of written submissions. The defendants filed their written submissions on **26<sup>th</sup> January, 2017** while the plaintiff filed hers on **9<sup>th</sup> February, 2018**.

4. In their submissions, the defendants stated that the 1<sup>st</sup> defendant was placed under receivership by the Governor of Central bank of Kenya pursuant to **Sections 43 (1)(2) and 53(1)** of the KDIA, 2012 effective **7<sup>th</sup> April 2016**. It was their contention that the plaintiff had failed to obtain leave before filing the suit and the notice of motion; that failure to obtain leave from the court as required under **Section 56 (2)** of the KDIA, 2012 went to the root of the matter and was fatal. This was emphasised by the courts in the following cases relied on by Counsel for the defendants; **Andrew Gikuni Muchai -vs- Chase Bank Ltd & another** (High Court Civil Suit No. 241 of 2016 (unreported), **George Mureithi and others -vs- Kenatco Taxis Limited** (In Receivership) (2016) eKLR, and **Amos Peter Omusotsi -vs- Bulleys Tanneries (under receivership & another** (2016) eKLR.

5. In the submissions filed on behalf of the plaintiff, it was submitted that the provisions of the Environment and Land Court Act 2012, do not require a litigant to seek leave before filing a suit to enforce property rights. It therefore follows that the provisions in the KDIA, 2012 cannot fetter the jurisdiction of the court to hear, determine and adjudicate on the property rights of the plaintiff. It was submitted that **Section 56(2)** of the KDIA, 2012 would be contrary to the constitution if it limited the jurisdiction of the court or the enjoyment of the plaintiff's rights as protected under the constitution. It was further submitted that the 1<sup>st</sup> defendant is not under liquidation; rather the 1<sup>st</sup> defendant was placed under receivership and Kenya Deposit Insurance Corporation (KDIC) appointed the receiver; under such circumstances, there was no need to apply for leave to court to commence proceedings against a company under receivership as held in the case **Ashok L. Doshi and another -vs- Central Bank of Kenya and another** (2016) eKLR. They urged the court to dismiss the P.O as it was raising procedural technicalities and did not go to the jurisdiction of the court.

6. The definition of a preliminary objection was well set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd** (1969) EA 696, where **Newbold, V.P**, observed as follows:

**" Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained**

**or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”**

7. Applying the above test, it is not disputed that the 1<sup>st</sup> defendant was placed under receivership by the Central bank of Kenya effective 7<sup>th</sup> April, 2016. It is also not disputed that before filing this suit, leave to commence proceedings against the 1<sup>st</sup> defendant was not sought. The issue raised by the defendants in their preliminary objection is a point of Law and I find the objection properly before court and I will therefore proceed and consider it.

8. **Section 56(2)** of the KDIA 2012 requires that leave of the court be sought before seeking to commence civil proceedings against an institution. It states;

**“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”.**

9. The wording of the above section is couched in mandatory terms. Under **Section 56(2)** of the KDIA 2012, failure to seek leave of the court before commencing proceedings against a company under receivership in my view simply means that the suit cannot be sustained as against that party. I cannot emphasize this better than my two sisters and brother in the three authorities relied on by counsel for the defendants.

10. In the case of **Andrew Gikuni Muchai -vs- Chase Bank Ltd & another** (supra), Nzioka J held;

**“12. I shall now deal with the issue of the validity of the suit herein and the application thereto. Section 43 of the Kenya Deposit Insurance Act, empowers the Central Bank of Kenya, wherever the circumstances require to appoint a Corporation to be the sole and exclusive receiver of any institution. Subsection (2) thereof sets down the circumstances under which such a receiver may be appointed. It is indeed pursuant to this Section 43(1) and (2) that, the Central Bank of Kenya appointed a receiver in respect of Chase Bank Limited, the 1<sup>st</sup> defendant/ respondent herein.**

15. Section 56 relates to stay of proceedings and states that:

**“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”**

16. The applicant counsel argued that these provisions relate to an institution in liquidation. The Respondent submitted to the contrary. In my opinion to answer this question, one needs to appreciate what receivership is all about. In my opinion, receivership in legal terms entails an order/directive where all the property and affairs of an institution are placed in the dominion and control of an independent person known as a receiver. Thus receivership is a preservation process put in place to protect the assets, liabilities and business affairs of a bank with the aim of protecting the interest of its depositors, creditors and members of the public. In this case to preserve the bank’s liquidity, assets, and to find the best way to return it into normal business.

17. The essence of seeking leave to commence a suit, is to verify that the applicant has a valid claim, which they need to pursue against the institution and by extension the corporation. The main aim is thus to create orderliness, decency and avoid a flood gate of actions, which may involve some of the matters placed under suspension. This is informed by the act that when Chase Bank Kenya (in receivership) was placed under receivership, the Kenya Deposit Insurance Corporation declared a moratorium to the Bank’s business to be undertaken by all stakeholders of the bank; including limiting the Bank’s services. A moratorium is a temporary delay or suspension of an activity. The same prohibits a Bank from *inter alia* receiving deposits and making payment, unless it is partially or fully lifted by Kenya Deposit Insurance Corporation. Thus, suits cannot be all commenced *suo moto* without court’s leave and/or sanction. That will create anarchy. I hold that, for a company under receivership, a party suing it must seek court’s leave before commencing a suit against it. Therefore, institution of any proceedings will require the sanction of the court. I therefore do not uphold the applicant’s submissions that, the provisions of Section 56(2) of the Kenya Deposit Insurance Act negates institutions under receivership.

18. As a consequent of the foresaid, I find that, the application herein is incompetent. The entire provisions of part IV of the Act, relates to receivership, liquidation and winding up. Section 56(2) refers to an “institution”, and under Section 2 of the Act, an institution means;

**“a bank, financial institution, or mortgage finance Company as defined under the Banking Act .....**

**That indeed covers the 1<sup>st</sup> defendant herein. That definition does not relate to an ‘Institution’ under liquidation. Having found the application is incompetent, all other prayers there under cannot lie.**

Also see the case of **George Mureithi and others -vs- Kenatco Taxis Limited** (In Receivership) (supra) where Wasilwa J, held that; **“Leave of court is mandatory as seen in the above provision couched in mandatory terms that no proceedings shall be commenced against the company unless leave of court has been sought and object to such terms as the court may impose.”** And in the case of **Amos Peter Omusotsi -vs- Bulleys Tanneries** (under receivership) Supra, where Mbogholi J held; **“The 1<sup>st</sup> defendant is under receivership. No claim can be brought against the company under receivership without leave of court ..... leave having not been sought and granted in this matter, the suit was incompetent *ab-initio*.....”**

11. Having found that the notice of motion is incompetent, all other prayers cannot lie. I therefore allow the preliminary objection and strike out the application and the suit as against the 1<sup>st</sup> defendant with costs.

Orders accordingly.

**Dated, Signed and delivered at Nyeri this 14<sup>th</sup> day of March, 2018.**

**L N WAITHAKA**

**JUDGE**

Coram:

Mr. Thuku for the plaintiff/applicant

N/A for the defendants

Court assistant - Esther