



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 27 OF 2018**

**DAVID WABWENI WAFULA.....PLAINTIFF**

**VERSUS**

**PETER WAFULA KHAEMBA.....1<sup>ST</sup> DEFENDANT**

**CHASE BANK (K) LIMITED.....2<sup>ND</sup> DEFENDANT**

**INDOMITABLE AUCTIONEERS.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is a Ruling on a **Preliminary Objection** dated 3/4/3018 raised by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in this suit.
2. The essence of that Preliminary Objection is that the suit against it offends the provisions of **Section 56(2) of the Kenya Deposit Insurance Act, Laws of Kenya**.
3. The background to the Preliminary Objection is that the plaintiff filed a plaint on the 13<sup>th</sup> March, 2018 seeking the following orders:
  - a. A **DECLARATION** that the action of the 1<sup>st</sup> and 2<sup>nd</sup> defendants in registering the charge on or about 18/9/2015 over the suit land without involving the plaintiff when the plaintiff had already purchased a portion of the land measuring 50 by 100 feet was **illegal and fraudulent**.
  - b. A **permanent injunction** to restrain the defendants either by themselves or their agents or servants or any other person from disposing of the land or interfering with the plaintiff's ownership thereof in respect of the 50x 100 feet portion.
  - c. An **order cancelling the charge registered over the main title in respect of the suit land**.
4. The replying affidavit sworn on 3/4/2018 by Kevin Kimani the legal manager of the 2<sup>nd</sup> defendant was filed on 8/4/2018. In it he avers that the suit land had been initially charged to **K-Rep Bank** thereafter the loan facility was taken over by the 2<sup>nd</sup> defendant who registered a charge over it dated **10/9/2015** for an even higher amount. Subsequently the 1<sup>st</sup> defendant defaulted and the 2<sup>nd</sup> defendant recalled his loan account on **26<sup>th</sup> August, 2016**. Still, the 1<sup>st</sup> defendant defaulted in compliance with the terms of the recall letter and the 2<sup>nd</sup> defendant moved to enforce its rights under the charge, issued the necessary notices and contracted the 3<sup>rd</sup> defendant to sell the suit property purely for the purpose of recovery of the sums owed by the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant avers that its due diligence included a search and it never revealed existence of any sale or transfer between the plaintiff and the 1<sup>st</sup> defendant. The deponent also avers that during the visit to the site for valuation before the intended sale, there was no indication on the ground that any sale had been hived off as there was not even a fence over any portion of the suit property that could suggest as much to the viewer. The deponent states that the agreement purported to be the sale agreement between the 1<sup>st</sup> defendant and the plaintiff has not been stamped in accordance with the provisions of **Section 19(1) of the Stamp Duty Act** and therefore is of no evidential value. The 2<sup>nd</sup> defendant avers that the plaintiff should instead pursue the 1<sup>st</sup> defendant for monetary damages and in any event.
5. As I have stated before the essence of that Preliminary Objection is that the suit against it offends the provisions of **Section 56(2) of the Kenya Deposit Insurance Act, Laws of Kenya**.
6. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed their submissions on the preliminary objection on the **29<sup>th</sup> May, 2018**.
7. They contend that the 2<sup>nd</sup> defendant was placed under receivership by the Governor of the Central Bank of Kenya pursuant to **Sections 43(1) (2) and 53(1)** of the Act effective from 7/4/2016 and was under receivership at the time of the filing of the instant suit. According to

them the plaintiff therefore ought to have sought the leave of the court to commence these proceedings and his failure to do so is fatal to the suit.

8. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants cite the celebrated case of *Mukisa Biscuit Manufacturing Company Limited vs West End Distributors* to support their statement that the preliminary objection meets the standards required of a preliminary objection. They aver that it is an undisputed fact that at the time of the institution of this suit the 2<sup>nd</sup> defendant was still under receivership.

9. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants also rely on the dicta of the Hon. **Lady Justice Nzioka** in **Andrew Gikuni Muchai vs Chase Bank Limited and another High Court Civil Suit Number 241 of 2016. ( unreported)** for the proposition that the appointment of a receiver is chiefly meant to protect that assets and liabilities and business affairs of a bank with the aim of protecting the interest of its depositors creditors and members of the public, and that the essence of seeking leave is to verify that the applicant has a valid claim which they need pursue against the institution and by extension the corporation, in order to create an environment of orderliness and decency and avoid a floodgate of actions .

10. They also rely on **George Mureithi And Others Vs Kenatco Taxis Limited (In Receivership) 2016 (eKLR)** for the proposition that the provisions of **Section 56(2)** are couched in mandatory terms. In addition they cite the case of **Amos Peter Omusotsi Vs Bulleys Tanneries Ltd (Under Receivership) 2016 eKLR** on the same point and urge that the suit be struck out.

11. The plaintiff's submissions on the preliminary objection were filed on the **31<sup>st</sup> July 2018**.

12. The plaintiff urges that **Section 56** of the Act is under part VI which is headed "*Receivership, liquidation and winding up*" and that **sections 43-53** govern and deal with receivership while **sections 54 – 59** deal with liquidation. **Section 56** falls under the latter category. The plaintiff avers that no evidence has been presented that the 2<sup>nd</sup> defendant is under liquidation to warrant the invocation of **section 56** yet the preliminary objection is premised on liquidation. For this the plaintiff cites the case of *Ashok L Doshi and Another Vs Central Bank of Kenya and Another 2016 eKLR*.

13. Secondly the plaintiff emphasizes that **Section 56** specifically bars the commencement of injunction or other proceedings against the institution's assets without the sanction of the court. He distinguishes these asset based proceedings from the instant suit for an injunction against disposal of the suit land which he insists is not an asset of the 2<sup>nd</sup> defendant within the meaning of **Article 56(2)** and therefore submits that leave is not hence needed. He relies on the case of *North West (K) Limited vs Kenya Deposit Insurance Corporation and Another (2018) eKLR*.

14. The third argument is that the appointment of a receiver does not divest the institution of its corporate stature as there is nothing in those provisions that insulate the institution from being sued. He quotes **Section 45** of the Act.

15. The plaintiff's last argument is that **Section 56** is a successor of **Section 288** of the **Companies' Act** which related to winding up orders and appointment of an interim liquidator and not a receiver manager.

16. With respect to the plaintiff's first argument I am at a loss how the headings can override the wording of the substantive sections of the statute which are so express in their barring of proceedings against the institution. In any event the plaintiff's unilateral classification of the sections within the Part VI and their effect is not supported by any authority. The arguments on the preliminary objection are, contrary to the averment of the plaintiff, not based on liquidation, but on receivership. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants aver that the institution was placed under receivership. In my view the placing of a provision of the law such as **Section 56(2)** under the same part which provides for all the three situations: receivership, winding up and liquidation is significant in that it is deemed to apply in respect of all the three situations. The case law relied upon by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is quite on point: the courts were considering institutions under receivership and the plaintiff's argument that no evidence of liquidation has been presented is not correct. I am persuaded by the decisions in the cases quoted by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants that the provisions covers even institutions that are under receivership and I will not deviate from them.

17. Concerning the second argument by the plaintiff, I note that the provisions of **section 56 (2)** include a bar against institution of proceedings against "the institution." The argument therefore can not stand. Proceedings of all kind against the institution without court sanction are barred.

18. I now turn to the plaintiff's third argument. **Section 45** of the Act stipulates as follows:

**“45. Submission by institutions**

**(1) Where control of an institution has been assumed under Section 44(2)(b)-**

**(a) the institution and its officers shall-**

**(i) immediately submit its assets, liabilities, businesses and affairs to such control; and**

**(ii) provide the Corporation and, if the control is assumed by the appointed person, to such appointed person, all such facilities as may be required to carry on the businesses and to manage the assets, liabilities and affairs, including disposal of assets, of the institution;**

**(b) the Corporation or the appointed person, as the case may be, shall-**

(i) remain in control of the assets, liabilities, businesses and affairs of the institution concerned; and

(ii) carry on the businesses and manage the assets, liabilities and affairs of that institution in the name and on behalf of that institution including disposal of assets until such appointment is revoked by the Corporation.

(2) Throughout the period of control of an institution, there shall be vested in the Corporation or in the appointed person, as the case may be, all the powers of the institution, and of its directors, under the constituent documents of that institution, or exercisable by the institution or its directors under any law, regardless of whether such powers are exercisable by resolution, special resolution or in any other manner.

(3) During the period of control of an institution-

(a) no director of the institution shall, either directly or indirectly, engage in any activity in relation to the institution, except as may be required or authorized by the Corporation or the appointed person, as the case may be; and

(b) no remuneration of whatever nature shall accrue or be payable to any director of the institution, except such as may be approved in writing by the Corporation or the appointed person as the case may be, in relation to any activity required or authorized as aforesaid by the Corporation or the appointed person, as the case may be.

(4) An exercise of the power under section 44(2)(b) shall not confer on, or vest in, the Corporation or the appointed person, as the case may be, any title to, or any beneficial interest in, any asset of the institution.

(5) Where the Corporation or the appointed person has assumed control of an institution, the Corporation or the appointed person shall-

(a) be deemed to be acting as the agent of the institution in carrying on the businesses and managing the assets, liabilities and affairs of the institution or in carrying out any transaction relating to the institution or its assets, businesses and affairs, including disposal of assets; and

(b) not, by reason of having assumed control of the institution or any action taken by it, be held to have assumed or incurred any obligation or liability of the institution for its own account.

(6) Any person who contravenes the provision of subsection (1) or (3) commits an offence and is liable to a fine not exceeding five hundred thousand shillings or to imprisonment not exceeding three years or to both and shall, in addition be liable to an additional fine not exceeding ten thousand shillings for every day the contravention continues.”

19. With respect to submissions by counsel for the plaintiff I do not see how this Section can affect the provisions of **Section 56(2)** so as to obviate the need for the court’s sanction. It merely provides for submission of the institutions to the Corporation after the Corporation has been notified by the Central Bank of Kenya that an institution has ceased, or, is likely to cease, to be viable.

20. In respect of the plaintiff’s last argument which is that **Section 56** is a successor of **Section 288** of the **Companies’ Act** which related to winding up orders and appointment of an interim liquidator and not a receiver manager, I must state that I have already dealt with the plaintiff’s first argument hereinabove which I have dismissed, and to me the first argument and the third argument have no difference: they try to cast doubt on the applicability of **Section 56(2)** to situations in which an institution has been only placed under receivership in contrast to where the institution is under liquidation. The fourth argument therefore also fails.

21. The plaintiff has acknowledged that the 2<sup>nd</sup> defendant was under receivership at the time of the commencement of the instant suit. This is apparent from the pleadings and he has confirmed so. There is no other issue for the court to investigate in view of this admission and in view of the case law cited and analysed above. The overriding purpose of the bar against proceedings being commenced against institutions as pronounced by **Nzioka J** in the case of **Andrew Gikuni Muchai Vs Chase Bank Limited and another High Court Civil Suit Number 241 of 2016. (Unreported)** applies to all the three situations of receivership, liquidation and winding up. The plaintiff has not demonstrated otherwise in his submissions.

22. The plaintiff’s suit goes against the very provisions of the **Section 56(2)** of the Act and I must strike it out. The preliminary objection raised by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants has merit.

23. I hereby strike out the plaintiff’s entire suit and order that he shall meet the costs of all the defendants in this suit.

**Dated, signed and delivered at Kitale on this 26<sup>th</sup> day of September, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**26/9/2018**

Coram: Before Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Teti for the plaintiff

N/A for the defendant

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**26/9/2018**