



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 116 OF 2017

KUZA FARMS &

ALLIED LIMITED.....PLAINTIFF/APPLICANT

VERSUS

DUBAI BANK KENYA LIMITED

(IN LIQUIDATION)..... DEFENDANT/RESPONDENT

R U L I N G

1. The plaintiff filed this suit on 3/4/2017 together with a notice of motion of even date. The notice of motion was filed under certificate of urgency. It seeks the following orders:-

(1) That this application be and is hereby certified urgent and heard exparte on priority basis in view of its urgent nature and service of the same be dispensed with in the first instance.

(2) That sanction be granted to the applicant in terms of Section 56(2) of the Kenya Deposit Insurance Corporation Act to commence and/or continue this suit against the respondent and apply for injunctive reliefs and the suit and application filed herewith be deemed as duly filed with sanction of this court.

(3) That pending the hearing and determination of this application interpartes, a temporary injunction be and is hereby issued restraining the defendant/respondent (hereinafter “the respondent”), its servants, employees and/or agents from selling, transferring, disposing of, interfering with and/or in any other manner whatsoever altering or dealing with the applicant’s property known as LR. No. Kaisagat/Chepkoilel Block 6/Sambut 7 within Trans-Nzoia County.

(4) That pending the hearing and determination of this suit, a temporary injunction be and is hereby issued restraining the defendant/respondent (hereinafter “the respondent”), its servants, employees and/or agents from selling, transferring, disposing of, interfering with and/or in any other manner whatsoever altering or dealing with the applicant’s property known as LR. No. Kaisagat/Chepkoilel Block 6/Sambut 7 within Trans-Nzoia County.

(5) That this honourable court do grant such further and/or alternative relief as it may deem fit and just in the interests of justice.

(6) That the costs of this application be provided for.

2. The notice of motion and the suit are strenuously opposed by the defendant who on 24/7/2017 filed a replying affidavit and exhibits both in a bundle running into 434 pages. In addition, the defendant filed grounds of opposition on the same date. After the matter went through some preliminary steps the court was informed by Mr. Muchiri, counsel for the defendant that there was a preliminary objection to be raised by the defendant. On 24/8/2017 this court directed that such a preliminary objection be filed and served upon the plaintiff within 7 days. It also directed that the preliminary objection be canvassed together with the application.

3. It is only logical and proper that the preliminary objection raised by the defendant herein should be determined first. The notice of preliminary objection dated 2/8/2017 raises the following two grounds:-

1) That the plaintiff/applicant's suit and application dated 3rd July, 2017 are premature and bad in law for failing to seek the court's prior sanction under Section 56(2) of the Kenya Deposit Insurance Act 2012.

2) That the plaintiff/applicant's suit is bad in law having been instituted by the director of a company in receivership without seeking the consent and/or approval of the receiver managers appointed over the plaintiff/applicant on 4th November, 2016.

4. In his submissions Mr. Muchiri for the defendant urged that under Section 56(2) a duty is imposed upon the applicant to seek this court's sanction before instituting any proceedings. Counsel argued that that provision is not permissive. He cited the cases of *Kwanza Estates Ltd – vs- Dubai Bank Ltd*. In the defendants written submissions on this point, it is argued that the filing of the plaint and the application now before court are premature and akin to putting the cart before the horse “by seeking injunctive relief and thereafter to institute these proceedings”. He quotes the provisions of Section 56(2) of the KDIC Act 2012 which states as follows:-

“No injunction may be brought or any other action or civil proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the court”.

5. It has been argued that Section 56 (2) of the Act exists, first, to prevent the institution in liquidation being sued without just cause thereby putting it into unnecessary expense thus straining the little resources the innocent depositors would otherwise be entitled to upon distribution. Secondly, it is argued only those cases that are deemed as meritorious at the application stage may be allowed to continue to trial. It is pointed out that not every applicant for leave is given leave.

6. It is also contended that the applicant has not demonstrated that it deserves leave to institute proceedings as against the respondent. The defendant points out, and rightly so, that the orders giving the plaintiff injunctive relief already granted in this matter make no reference to leave having been granted, and on that point alone the application dated 3rd July, 2016 and the plaint of even date ought to be all dismissed for having contravened the provisions of Section 56(2) of the KDIC Act.

7. The defendant further states that the plaintiff had been granted leave to institute its proceedings within 7 days and it failed to do so. The leave sought then was to enable the institution of a case seeking to contest its being placed under receivership by the respondent bank. This leave was granted on 23/6/2017 in *Miscellaneous Application No. 507 of 2016 – Kuza Farms Ltd –vs- Dubai Bank Kenya Limited*. In that miscellaneous cause, the applicant herein had come to court under Section 56(2) of the Kenya Deposit Insurance Act No. 10 of 2012, Section 228 of the Companies Act Cap 486 of the Laws of Kenya among other provisions of the law.

8. The prayers sought in the notice of motion dated 11th November, 2016 in Misc. No. 5 of 2016 were as follows:-

(a) That this application be certified urgent and heard ex-parte on priority basis in view of its urgency and service of the same be dispensed with in the first instance.

(b) That this honourable court do grant sanction to the applicant to commence civil proceedings and seek injunctive relief against the respondent in respect of the intended appointment of receiver manager over the applicants' farm and business situated on LR. No. Kaisagat Chepkoile Block 6/Sambut/7 Trans-Nzoia County

(c) That the costs of this application be provided for.

9. In apparent appreciation of the fact that sanction of the court must be sought first before a plaint and an application for injunctive relief could be filed against the respondent, the intended plaint and intended application for injunctive relief were only exhibited in a bundle as Exhibit "SKJ2". The application was determined on 23/6/2017 when the court made, inter alia, the following orders:-

(i) That the application dated 3rd July, 2017 is certified urgent and the same be served upon the respondent for interpartes hearing on 11th July, 2017.

(ii) That it is noted that the date of auction has already passed.

(iii) That however, in order to preserve the status quo, it is hereby ordered that no further proceedings in respect of advertised sale or disposition in any manner of the land subject matter herein shall be undertaken pending the interpartes hearing of the application.

10. It is the third limb of the court's orders above that the applicant herein is said to have failed to comply with during the period provided. The defendant treats this as one of the events that the plaintiff has filed to disclose to this court in the instant suit. I have perused the plaintiff's documents and I find that to be true. That is not all. At paragraph 29 of the supporting affidavit to the instant motion, the deponent, a director of the plaintiff/applicant, who also happened to be the deponent in *NBI Misc. Civil Application No. 507 of 2016 – Kuza Farms & Allied Ltd –vs- Dubai Bank Ltd* (in liquidation) has deposed as follows:

“That I am advised by the plaintiff's advocate on record which advise I verily believe to be true that by dint of the fact that the defendant is under liquidation by the Deposit Insurance Corporation of Kenya leave of this court to prosecute this suit against the defendant is mandatory and I pray that the court to grant such leave as prayed in the application hereto”.

What he failed to state is that such leave is also required in order to commence the suit.

11. This deposition, taken in conjunction with the filing of *NBI Misc. Civil Application 507 of 2016* by the plaintiff herein is a clear admission by the plaintiff that it considered sanction of the court to be necessary before suit was filed or prosecuted. In this court's view, the procedure to be followed in the circumstances surrounding this case should be similar to that employed by the applicant in *NBI Misc. Civil Application No. 507 of 2016 – Kuza Farms & Allied Ltd –vs- Dubai Bank Ltd* (In liquidation). In the instant suit, the suit and the notice of motion seeking injunctive orders have already been filed without the court's sanction. The defendant has rightly pointed out that during the various times that the matter has come up, the court, after granting status quo orders on 6/7/2017 has not granted any sanction to the commencement of the suit or the application for injunctive orders.

12. I find Section 52(2) to be in very clear terms that even before an injunction, or other action or civil proceeding is commenced or (where it had already commenced, it is continued, sanction of court must be sought in advance. I must state in categorical terms that where the plaintiff has, as in the instant case first filed the plaint, and included the prayer for the court's sanction within a notice of motion filed in that commenced suit that mode of approach is quite presumptuous that leave of court would be granted.

13. For the reasons stated above I do not need to consider the rest of the submissions regarding prayers No. 3, 4 and 5 of the motion dated 3/7/2017. I do not also need to consider the second ground in the notice of preliminary objection filed by the defendant. In my view the suit and the injunction have failed a very crucial test. I therefore allow the first limb of the preliminary objection and I strike out both the

plaint dated 3rd July, 2017 and the Notice of Motion of even date with costs to the defendant. I also find it necessary to order that the costs awarded in this suit should be paid personally by the directors of the plaintiff.

Dated, signed and delivered at Kitale on this **20th** day of **December, 2017**.

MWANGI NJOROGE

JUDGE

20/12/2017

Before - Mwangi Njoroge -Judge

Court Assistant - Isabellah

N/A for the parties

COURT

Ruling read in open court in the absence of the parties

MWANGI NJOROGE

JUDGE

20/12/2017