



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 299 OF 2011

PETER HARIS KIMATHI KINYUA AND

KARIMI MUTUMA KINYUA (Being Legal Representatives of

HENRY KINYUA (Deceased).....PLAINTIFFS

VERSUS

KENYA PLANTERS CO-OPERATIVES UNION LTD

(IN LIQUIDATION).....DEFENDANT

RULING

There is a Judgment in favour of the plaintiffs against the defendant delivered on 28th July, 2016. That Judgment remains unsettled. By an application dated 17th July, 2020 the plaintiffs have moved the court to be granted leave to execute the decree against the defendant forthwith. The grounds upon which the order is sought are contained in the face of the application together with an affidavit sworn by the 1st plaintiff.

The application is opposed and there is a replying affidavit sworn by Stephen Kamau Njoroge, the Chairman of the liquidation team of the defendant. . The defendant was placed under liquidation on 2nd August, 2019. Both parties have filed submissions.

It is the plaintiffs' case that they have furnished the defendants joint liquidators with the proof of debt. This however was returned with the manuscript alleging the claim was filed out of time.

The plaintiffs then wrote to the joint liquidators seeking information on the notice for creditors to prove their debts and when such period lapsed. It is the plaintiff's case that there was no response from the defendant. It is also the plaintiffs' case that, the defendant/ judgment debtor's assets are being transferred to a new entity while the decree remains unsatisfied. This transfer of assets will seriously prejudice the plaintiffs and beneficiaries of the deceased's estate.

The reason upon which the application is resisted is that the orders sought cannot be granted in contravention of express provisions of law. The defendant states that the defendant was placed under liquidation which was gazetted and which expired on 23rd February, 2020 but has now been renewed. It is also the defendant's case that invitation was made to the public for anyone who had a claim against the defendant to lodge the said claim within a period of 30 days. Those with claims are said to have lodged the same. Those claims, it is stated, are being processed for settlement according to the law.

It is the defendant's case that the plaintiffs' claim is not among those presented for consideration and settlement. The plaintiffs are therefore not serious on this matter in a judgment of which was given in 2016 yet they have done nothing until the liquidators came in.

The defendant has stated that the liquidators are supposed to have prepared a schedule of debtors and scheme of distribution for approval by the Commissioner of Cooperatives Development. However, this has not been done nor has there been any final report to the Commissioner for advice and guidance. It is also denied that liquidators have been transferring or are in the process of transferring the assets terming this fictitious, malicious and not bona fides.

Further, the defendant states are no freely available assets or property of the defendants that are not encumbered and the plaintiff application is premature.

The application is brought under Sections 64 (1) of the Co-operatives society Act No. 12 of 1997, 432 (2) of the Insolvency Act No. 18 of 2015 and Order 51 Rule 1 of the Civil Procedure Rules. Both parties have filed submissions and cited some authorities.

The defendant has not denied that the plaintiffs requested for notice calling for creditors was not responded to. At the same time, if it was the defendant's position the plaintiff's proof of debt was out of time, the deponent of the replying affidavit cannot say with the same breath that the claim is premature.

The plaintiff's claim is substantial. As late as 11th April, 2019 the matter was before the Deputy Registrar for taxation. Parties had consented to proceed by way of written submissions but the Deputy Registrar noted that when it came up for mention on 30th January, 2019 to confirm filing of submissions, the defendant did not attend neither did it file any submissions.

That notwithstanding, going by the material presented, on a balance of probability, which is the standard of proof in such matters, the plaintiffs have justified their quest for leave to execute the decree against the defendant as prayed. I say so because execution against the defendant whether or not in liquidation is akin to execution under the Company's Act Section 288 now Section 432 (2) of the Insolvency Act. – see **Michael Kodowe Karisa vs. African Safari Club (In Liquidation through its Liquidator Official Receiver) Interested Party UAP Provincial Insurance Company Ltd (2019) e KLR.**

Under that section, the court has the discretion to grant leave for a party to proceed with a suit against a company placed under liquidation. This is not in conflict with the Co-Operatives Society Act. The objection raised by the defendant is self-defeating for reasons that I have observed above. I am persuaded therefore that the orders sought in the motion dated 17th July, 2020 should be granted. The applicant shall have the costs of this application.

Dated, signed and delivered at Nairobi this 23rd Day of March, 2021.

A. MBOGHOLI MSAGHA

JUDGE