



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
IN THE MATTER OF THE COMPANIES ACT CAP 486 (NOW REPEALED)
AND
IN THE MATTER OF THE INSOLVENCY ACT 2015
WINDING UP CAUSE NO. 1 OF 2005
IN THE MATTER OF AFRICAN SAFARI CLUB LIMITED (IN LIQUIDATION).

RULING

1. The Official Receiver through a Notice of Motion application dated 16th October, 2019 brought under the provisions of Sections 433 and 734 of the Insolvency Act, 2015, Sections 3 & 3A of the Civil Procedure Act, Sections 4 & 29 of the Contempt of Court Act, 2016 and other enabling provisions of the law seeks the following orders -

- (i) That the directors of African Safari Club Limited (in liquidation) be compelled to furnish the Official Receiver with the statement of financial position of the company;
- (ii) That failure to comply with prayer 1 above, a warrant of arrest be issued against the directors of African Safari Club Limited for contempt of Court and they be penalized under the Contempt of Court Act, 2016;
- (iii) That in the alternative to order 2 above, the directors of African Safari Club Limited be fined in accordance to subsection (sic) 433(8) and (9) of the Insolvency Act, 2015;
- (iv) Costs of the application be awarded to the applicant; and
- (v) That the Court be pleased to grant any other relief that it deems fit and just.

2. The application is anchored on the grounds in support of it and on the affidavit sworn on 16th October, 2019 by Beatrice Osicho, State Counsel. On 20th January, 2020, Murtaza Hatimali Hassanali and Renato Fabrizio Bachmann filed replying affidavits sworn on the same day in response to the application herein.

3. In written submissions filed on 16th March, 2020 by Ms. Beatrice Osicho, for the Official Receiver, she stated that following the winding up of the African Safari Club Limited through a Court order on 19th June, 2014, the Official Receiver was appointed the Liquidator. She further stated that the directors of the African Safari Club were supposed to file a statement of affairs with the Liquidator upon issuance of the winding up order but they had neither presented themselves to the Official Receiver nor provided a statement of affairs.

4. She relied on Section 433 of the Insolvency Act, 2015 which provides that if the Court has made a liquidation order or appointed a provisional Liquidator in respect of a company, the Official Receiver may require some or all of the prescribed persons to make out and submit to the Official Receiver a statement of affairs relating to the company

5. She indicated that through a letter dated 11th July, 2019, the Official Receiver reached out to one of the directors of the African Safari Club, namely, Renato Bachmann, requesting for a statement of affairs within 21 days from the said date but the said director blatantly ignored and/or refused to comply with the Official Receiver's request for the said information.

6. She further indicated that the information sought from the directors was about the company and was crucial because it is only with the said information that the Official Receiver can assess the true status of the company and proceed to liquidate it. She pointed out that the company's assets and liabilities could not be determined without the directors providing a true statement of affairs.

7. Ms. Osicho submitted that the refusal by the directors to provide the Official Receiver with the statement of affairs of the company had crippled their efforts to carry out the liquidation process and for the said reason, the directors were in contempt of Court and warrants of arrest should be issued against them. She further submitted that Courts punish for contempt of Court to insulate its processes for purposes of compliance, so that the rule of law and administration of justice are not undermined. She relied on the case of **Carey v Laiken** [2015] SCC17, where the Court held that contempt of Court rests on the power of the Court to uphold its dignity and processes. She also stated that the rule of law is directly dependent on the ability of the Courts to enforce their processes and maintain their dignity and respect.

8. It was submitted by Ms. Osicho that Section 433(8) and (9) of the Insolvency Act, 2015 provides that a person who without a reasonable excuse fails to comply with an obligation imposed by or under the said Section commits an offence and is on conviction liable to a fine not exceeding Kenya Shillings Five Hundred Thousand.

ANALYSIS AND DETERMINATION.

9. This Court has considered the issues raised in the present application, the affidavit in support and in opposition thereof and the written submissions by the Official Receiver. The issue that arises for determination by this Court is whether the respondents are in contempt of Court.

10. Ms Osicho in her affidavit deposed that a winding up order was issued against the African Safari Club and that the Official Receiver was appointed as the Liquidator therein on 19th June, 2014. She stated that in compliance with the provisions of the Companies Act, Cap 486 Laws of Kenya (now repealed) and the Insolvency Act, 2015, the directors were supposed to file a statement of affairs with the Liquidator upon the issuance of a winding up order.

11. She averred that after obtaining a record of the company's directors and shareholders from the Companies' Registry, the Liquidator made several attempts to trace the said directors and discovered that one of the directors is deceased, two of the directors had flown back to their respective countries and two directors namely; Renato Bachmann and Murtaza Hatimali Hassanali were currently residing in Kenya. That to date, the Official Receiver had not received any response from Renato Bachman with regard to the provision of the statement of affairs despite having requested him for the same through a letter dated 11th July, 2019.

12. She further deposed that liquidation is a Court process and failure to comply with the directions of the Official Receiver amounts to contempt of Court under Section 29 of the Contempt of Court Act.

13. In the replying affidavit by Murtaza Hatimali Hassanali, in opposition to the Official Receiver's application, he deposed that he is not a director of African Safari Club Limited since he resigned from directorship of the said company through a letter dated 23rd June, 2008. He deposed that his resignation was effective from 18th September, 2008 and that it was duly accepted by the company vide a resolution dated 19th September, 2008.

14. He further deposed that his resignation was duly registered at the Companies' Registry vide a notification of change dated 20th September, 2008 and filed on 30th September, 2008. He stated that even the documents filed by the Official Receiver in support of the application herein and the latest search did not contain his name as one of the directors of the company.

15. Mr. Murtaza Hatimali Hassanali averred that as at 19th June, 2014 when the winding up order against the company was made, he was no longer a director of the company having ceased from directorship with effect from 18th September, 2008. He averred that he was not liable to furnish the Official Receiver with the financial statement of the company or to discharge any duty pertaining to the company.

16. In the replying affidavit by Renato Fabrizio Bachmann, in opposition to the Official Receiver's application, he deposed that he was a director at African Safari Club Limited from 1998 until 2nd September, 2008 when he left the company's employment. That he tendered his resignation from directorship of the company to the Chairman of the board of directors vide a letter dated 19th November, 2008, which was copied to the then Company Secretary, Africa Registrars Nairobi, who confirmed receipt on 3rd December, 2008.

17. He averred that the Board Resolution dated 30th April, 2012, formed the basis of deletion of his directorship directly with the Registrar General. He indicated that the foregoing was followed by a letter dated 8th May, 2012 which he addressed to the Registrar General requesting for his name to be deleted as a director of the company. He further stated that he received a confirmation of receipt of the said letter on 6th September, 2012 through receipt serial No. 0C0488035 from the Registrar General in respect to Form 203A.

18. He stated that he ceased being a director of the African Safari Club Limited from 19th November, 2008. He further stated that knowledge of the company's assets lay with the defunct Chairman and main shareholder K.J. Ruedin, and the then Director Administrative, director Ms. B. Hutzli. He denied having any record of the company. He indicated that he was not in a position to provide any information relating to the company's affairs.

19. It is worth noting that the High Court of Kenya in **Kenya Human Rights Commission v Attorney General & another** [2018] eKLR, nullified the Contempt of Court Act in its ruling delivered on 9th November, 2018. This Court therefore reverts to Section 5 of the Judicature Act which had been repealed by Section 38 of the nullified Contempt of Court Act No. 46 of 2016 as the law under which to punish for contempt of Court. That was the position taken by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others**, [2014] eKLR where it was held that-

“This section was repealed by section 38 of the Contempt of Court Act of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the Judicature

Act, which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the Judicature Act.”

20. Section 5 of the Judicature Act was also restated by the Court of Appeal in the **Christine Wangari Gachege case (supra)** as follows-

“the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applied by virtue of section 5(1) of the Judicature Act which provided that:

(1). The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of justice in England, and that power shall extend to upholding the authority and dignity of the subordinate courts.”

21. The law that governs contempt of Court proceedings in Kenya is the English law applicable in England as at the time the alleged contempt is committed. On 1st October, 2012, the Civil Procedure (Amendment No. 2) Rules, 2012 came into force. Part 81 which relates to applications and proceedings in relation to contempt of Court provides different procedures for different forms of violations-

(i) Rules 81.4 relates to committal for “breach of a judgment, order or undertaking to do or abstain from doing an act.”

(ii) Rule 81.11- Committal for “interference with the due administration of justice” (applicable only in criminal proceedings).

(iii) Rule 81.16 – Committal for contempt “in the face of the court”, and

(iv) Rule 81.17 - Committal for “making false statement of truth or disclosure statement.”

22. In the present case, Rule 81.4 which deals with committal for breach of a judgment, order or undertaking to do and/or abstain from doing an act is applicable. The Official Receiver’s contention was that pursuant to Section 433 of the Insolvency Act, 2015, the directors of the African Safari Club Limited were required to file a statement of affairs with it upon the issuance of the winding up order. Section 433 provides as hereunder-

“(1) If the Court has made a liquidation order or appointed a provisional liquidator in respect of a company, the Official Receiver may require some or all of the prescribed persons to make out and submit to the Official Receiver a statement of affairs relating to the company.

(2) Those prescribed persons who are required to make out such a statement shall do so without delay and shall include in it—

a) such particulars of the company's assets, debts and liabilities as are prescribed by the insolvency regulations for the purposes of this section;

b) the names and addresses of the company's creditors;

c) the securities (if any) held by them respectively;

d) the dates when the securities were respectively given; and

e) such further or other information as the Official Receiver may reasonably require.”

23. In a letter dated 11th July, 2019 addressed to Renato Bachman, the Official Receiver requested him for a statement of affairs within 21 days from the said date but the said letter elicited no response. The Official Receiver was unable to proceed with the liquidation process as it was having a difficult time tracing the assets of the company. Ms Osicho indicated that after obtaining a record of the company’s directors and shareholders from the Companies’ Registry, she made several attempts to trace the said directors and discovered that one of the directors was deceased, two of the directors had flown back to their respective countries and two directors namely; Renato Bachmann and Murtaza Hatimali Hassanali were currently residing in Kenya.

24. The said Renato Bachmann and Murtaza Hatimali Hassanali in their respective replying affidavits disclosed that they resigned from the directorship of the African Safari Club Limited on 19th November, 2008 and 18th September, 2008, respectively. This Court has considered the resolution dated 19th September, 2008, the notification of change of directors and the receipt for Kenya Shillings Two Hundred annexed to the replying affidavit of Murtaza Hatimali Hassanali and has come to the conclusion that he ceased being a director of the African Safari Club Limited on 18th September, 2008, which is long before the winding up order was issued on 19th June, 2014.

25. Similarly, after looking at the minutes of a meeting held on 30th April, 2012 by directors and shareholders of the African Safari Club Limited and the receipt for Kenya Shillings Eight Hundred annexed to the replying affidavit of Renato Fabrizio Bachmann, it is evident that effective from 1st May, 2012, he resigned from being a director of the African Safari Club Limited.

26. This Court therefore holds that Murtaza Hatimali Hassanali and Renato Fabrizio Bachmann were not directors of the African Safari Club Limited as at 19th June, 2014 when the company was wound up. Bearing the foregoing in mind and the fact that the Official Receiver’s application seeks orders against the directors of the African Safari Club Limited, this Court cannot compel Murtaza Hatimali Hassanali and

Renato Fabrizio Bachmann to furnish the Official Receiver with a statement of financial position of the company.

27. In light of the foregoing, the issue of contempt of Court against Murtaza Hatimali Hassanali and Renato Fabrizio Bachmann does not arise as they are not in contempt of any Court orders. The Official Receiver averred that two of the directors of the company flew back to their respective countries. Renato Fabrizio Bachmann deposed that persons who have knowledge of the assets of the company are the defunct Chairman and the main shareholder K.J. Ruedin and the then Director Administrative, Ms. B. Hutzli.

28. It is evident to this court that the two directors who are said to have flown back to their respective countries were not served with the present application. Having analyzed the facts herein and the applicable law, this court finds that the application dated 16th October, 2019 as against Murtaza Hatimali Hassanali and Renato Fabrizio Bachmann to be devoid of merit.

29. The upshot is that the said application is hereby struck out. There shall be no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 24TH DAY OF SEPTEMBER, 2021. In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of-

Ms Osicho State Counsel for the applicant

Ms Ogejoh holding brief for Mr. Oluga for the respondent

Mr. Oliver Musundi – Court Assistant.