



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 421 OF 2014 (Formerly ELC No. 375 of 2011)

GEOFFREY KIPKOECH.....PLAINTIFF

VERSUS

UAP PROVINCIAL INSURANCE COMPANY LIMITED.....1ST DEFENDANT

WILFRED RIITHO NJERU as INTERIM LIQUIDATOR OF LAKESTAR

INSURANCE COMPANY LIMITED (IN LIQUIDATION).....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff commenced this suit on 28th July 2011; in the Environment and Land Division of; the High Court as; **ELC No. 375 of 2011**. The suit was subsequently transferred to Commercial and Admiralty Division (as it then was), now Commercial and Tax division of the High Court and was allocated **High Court Civil Suit No. 421 of 2014**.

2. The Plaintiff is seeking for judgement against the Defendants jointly and severally for;

a) A declaration that the sale by the 2nd defendant to the 1st defendant and subsequent transfer in favour of the 1st defendant of all that parcel of land known as Land Reference Number 209/13453 Upper Hill, Nairobi, in the year 2005, is null and void.

b) An order do issue directing the 1st defendant to re-transfer and hand over all that parcel of land known as; Land Reference Number 209/13453 to Lakestar Insurance Company Limited (In liquidation).

c) A permanent injunction restraining the 1st defendant, its servants, agents, and/or employees from entering into, trespassing into, developing, constructing and/or erecting any building, house, and/or any structure, charging, mortgaging, transferring, selling by private treaty, and/or public and/or dealing in any manner whatsoever with all that parcel of land known as Land Reference Number 209/13453 Upper Hill, Nairobi.

d) General damages.

e) Costs and interest.

3. The Plaintiff averred that, he is a shareholder, director and contributor of; Lakestar Insurance Company Limited (In Liquidation), (herein "the company"). He incorporated the company together with his co-director; Zephania Juma Ajowi, in 1996, to offer Insurance services.

4. On 1st July 2002, the Commissioner of Insurance appointed; a Statutory Manager to run the affairs of the Company and on 27th June 2003, the High Court ordered for the winding up of the Company vide **Winding Up Cause No. 21 of 2003**. As a result, the 2nd Defendant; was appointed as an Interim Liquidator; pursuant to the provisions of; **Section 235 (2) of the Companies Act**, (chapter 486), Laws of Kenya (herein repealed Act). He took over the affairs of the Company with effect from; 30th June 2003 until 14th February 2012, when he was restrained through a ruling delivered in the **High Court Civil Suit No. HCCC No. 363 of 2008**.

5. The Plaintiff avers that, pursuant to the provisions of; **section 237 (a) of the Companies Act**, as read together with **Rules 47(6) and 48**

of; the **Companies (Winding up) Rules, 1978**, the 2nd Defendant was required, before taking office, upon appointment, to take out security and/or be gazetted. However, when the Plaintiff inquired from the Official Receiver as to whether the 2nd Defendant had complied, he was informed vide a letter dated 3rd May 2010, that the 2nd Defendant had not complied. The Plaintiff argues that, as a consequent of non-compliance, the 2nd Defendant was in the office, illegally and unlawfully, and was incapable of discharging any of the functions of an Interim Liquidator of the Company.

6. That subsequently, on 5th April 2005, the 2nd Defendant purporting to exercise the powers of the Interim Liquidator, placed an advertisement in the Standard daily newspaper; inviting bids from the public for the Sale of the Company's property; **L.R No. 209/13453** Upper Hill, (herein "**the suit property**"). On 19th April 2005, the 1st Defendant bid for the suit property in the sum of; Kenya Shillings Fifty Million (Kshs 50,000,000), and on 29th April 2005, the 1st Defendant enhanced its bid to; Kshs. Fifty-Five Million (Kshs. 55,000,000).

7. On 31st May 2005, the 2nd Defendant wrote to the 1st Defendant's and Jet Black Kenya, another bidder, that had also bid for the suit property, informing them that, their respective bids had tied at; Kshs. 55,000,000. The 2nd Defendant set the date of; 3rd June 2005, at noon as a deadline to receive enhanced final bids. On 3rd June 2005, the 1st Defendant enhanced its bid to Kshs. 57.5 Million while Jet Black Kenya, enhanced its bid from to; Kshs. 58.2 Million.

8. The Plaintiff avers that, instead of the 2nd Defendant declaring Jet Black Kenya as the successful bidder, he left the bids open, and on or about 31st May 2005, ten months after the close of receipt of bids, he unlawfully, illegally and without any just cause, invited the 1st Defendant to improve its bid and waited until 14th June 2005, when, 1st Defendant miraculously or strangely enhanced the bid to Kshs. 59 million. Subsequently, the 2nd Defendant paid the purchase price and the suit property was transferred and registered in its favour.

9. The Plaintiff argues that, the 2nd Defendant committed a fraud by failing to re-invite the public to participate in the purchase of the suit property and by secretly inviting the 1st Defendant to improve its bid. That, as at 29th April 2005, the highest bidder was; Keysian Limited with a bid of; Kenya Shillings Sixty-Eight Million (Kshs. 68,000,000). Additionally, the 2nd Defendant failed to give all pertinent information in the advertisement carried out in the year 2004, concerning the suit property. Further, he neglected, refused and/or failed to carry out any valuation of the suit property. That, the purchase price paid was far below the market price and/or the actual value of the suit property, in that as at 31st December 2001, the book value of the suit property was; Kshs. 146, 830, 724.

10. The Plaintiff further states that, the 2nd Defendant failed to obtain an approval of the High Court before the sale. As a result of the aforesaid, the Plaintiff seeks for order that the purported sale be declared null and void, as the 2nd Defendant lacked capacity to pass any good title to the 1st Defendant and the title purportedly passed is null and void.

11. However, the Defendants filed a joint statement of defence dated 14th September 2011 and averred that, the suit is scandalous, frivolous, vexatious, and does not disclose a reasonable cause of action against them. Therefore, it should be struck out.

12. Further the suit is an abuse of the court process on grounds that:

- a) *Pursuant to section 238(5) of the repealed Act, no defect or irregularity in the appointment or qualification of the 2nd defendant as an interim liquidator of the company could vitiate any act done by him, as such;*
- b) *Without prejudice to paragraph (a), the plaintiff qua shareholder does not have the locus standi, to institute the suit herein challenging the acts of the 2nd defendant as the company's interim liquidator;*
- c) *The plaintiff has no independent and separate right either in his name or his own right, to sustain an action for the recovery of an asset of the company which he is a shareholder; and*
- d) *The suit herein is time barred pursuant to the provisions of the Limitation of Actions Act, cap 22 Laws of Kenya.*

13. The 2nd Defendant averred that, at all times, he acted in good faith. He informed the two highest bidders that, their bids were equal and requested them to enhance the same. He accepted the highest bid in light of the urgent need for funds to meet the colossal debt that the Company owed its creditors Further, the majority of Company creditors were ordinary members of the public. That, the debts accrued as a result of the gross mismanagement and fraud by the directors and/or shareholders of the Company including the Plaintiff.

14. He denied selling the property at a price below the market price and averred that, as an Interim Liquidator of the Company, he had the power to sell, real and personal property of the Company by public auction or private contract and transfer the whole part or thereof to any person or Company.

15. Further, he could do all such acts including but not limited to; ascertaining and accepting a forced sale value of such property and could execute in the name and on behalf of the Company, all deeds, receipts and other documents so as to effect the sale. He could also do all such other things necessary for winding up the affairs of the Company and distribute its assets, including land.

16. The Defendants argued that, even if the Plaintiff had the legal standing, he is not entitled to the discretionary remedies he seeks, on the grounds of fraud or misfeasance he committed, following which he has become indebted to the Company for an amount in excess of Kshs. 200,000,000.

17. The case proceeded to a full hearing. The Plaintiff's called; **(PW1), David Muiru, the Managing director** of; Gimco Limited, Real Estate Company, which deals with Property valuation and Management services. He testified that, he is a registered valuer and member of Institute of Surveyors of Kenya. That, between 4th and 7th October 2013, he was engaged by the Plaintiff, who is also the Managing director of; Lakester Insurance Company, carry out a valuation assessment of; L.R. No. 209/13453 Upper Hill Road.
18. He was instructed to come up with a historical value of the property as at; 31st December 2004 and 30th June 2013. He obtained the relevant map of the property and visited it. He noted that, the previous building on the suit property had been demolished and a commercial building was under construction. He embarked on historical information on the property and noted that, the property had been transferred the Plaintiff Company for, a sum Kshs. 48,000,000. It had been valued by Llyod Masika Valuers Limited, on 16th March 2000, in the sum of; Kshs. 100, 000,000. It was sold to the 1st Defendant at Kshs. 59,000,000 on 10th November 2008.
19. That, he analysed the value of land measures 2.167 acres in the year 2004 and found it cost Kshs. 66,125,000 per acre, hence the total cost for the land only in respect to this matter was Kshs. 143,292,875. He testified that, he also considered the building developed on the plot at that time of valuation and established the value as Kshs. 13,409,000. That both land and building came to a value of Kshs. 156,700,000, as indicated in his report. He concluded that the total value of the suit property in the year 2013, was Kshs. 866,800,000.
20. He termed the figure of; Kshs. 63,000,000 indicated in the report indicated by; Acumen Valuers in the report dated 4th July 2003, as the value of the suit property, as low, in that, the Plaintiff purchased the land at; Kshs. 48,000,000, and therefore the value of the property in Upper Hill could not be Kshs. 64,000,000, four (4) years later but more than double. That, from his experience, the 1990s to 2000s, property in the Upper Hill area escalated by more than 10% per annum. From the year 2003, a property in the area would make a 40% growth.
21. However, in cross examination, the witness told the court that, he did not have an opportunity to evaluate the report by Acumen Valuers, before testifying but he noted that, the author did not explain how he arrived at the figure therein. Similarly, he conceded that, he did not have the copy of valuation report by, Llyod Masika Valuers and neither did he discuss it with them.
22. In further cross examination he stated that, in preparing his report, he compared the suit property with properties within a radius of; 1 kilometre from the suit property. That, his instruction was to establish the book value valuation. He conceded that, he was aware of proceeding in court and the valuation was to assist the proceedings.
23. In cross examination by the 2nd Defendant, he stated that in the year, 1999 the inflationary rate was 6% and that 6% of 48,000,000 is the Kshs 2.5 million. However, the 6% is the inflation rate and not the rate of escalation, which is 10%, which translates to Kshs 4.8 million of 48,000,000. He explained that, the term "market value" is the value of the asset upon sale, while the book value is; the price paid for a particular asset at the time of acquisition. Thus, the book value does not change, while the market value may change with time.
24. The Plaintiff also testified in support of his own case. He relied on and adopted his statement and a bundle of documents filed in court, on 28th July 2011 and a further bundle of documents filed on 5th December 2011. He literally, reiterated the averments in the plaint. In cross examination, he stated that, the report by Acumen Valuers Limited, did not have a seal, rendering it invalid. However, he confirmed it was signed.
25. He conceded that, clause 13 of the Statutory Manager's report, shows the details of the director's loans and at clause 13.3, it states that, he owed the company; Kshs. 26,294,385.79 as at 30th June 2002. However, in re-examination he stated that, he was prosecuted and was not convicted. He further averred that, there were other bidders, Keysian Auctioneers, Realty, Jet Black, and Premier, who were frustrated during the sale process, but conceded he did not have evidence to support that allegation.
26. The first Defendant's case was supported by the evidence of; its Group Company Secretary. She adopted her witness statement dated 21st May 2015, and documents which had earlier been filed by Mr. Maina. She also literally reiterated the averments in the defence. In cross examination she stated that, by a letter dated 19th April 2005, the 1st Defendant wrote to; M/S Rachier Amollo Advocates, making an initial offer of; Kshs. 50,000,00, for the suit property but it was later increased to Kshs. 59,000,000. That on 2nd June 2005, Jet Black Kenya, enhanced its bid to Kshs. 58, 000,000. Hence the 1st Defendant was the highest bidder.
27. The 1st Defendant also called, Grace Caren Wakaba, a Surveyor practising in the firm of; N.W. Realite Limited. She relied on her statement filed in court, on 22nd May 2015. She testified that, she was instructed by the 1st Defendant to value the suit property; L.R. No. 209/13453 and provide historical values of the property. Her instructions were to establish the value of the suit property in years 2004 to 2005. She valued the property and established that, the fair open market value for the suit property sale was Kshs. 55,000,000, as indicated in her report dated 13th April 2015. That, to be objective, she took into account information from newspaper adverts and valuations done by other registered valuation firms in respect of a similar property.
28. In cross examination, she stated that, she used digger classified adverts in the standard newspaper and the other residential property for comparison. That, she was not aware of change of user of the property from residential to commercial, and neither did she establish the tenure of the suit property. She testified that, even if she did not base the valuation on the demolished buildings, the value of the demolished buildings may not be very relevant, if they had to be brought down or if were old. That in that case, the value of the land is the most important since demolition is also costly and may bring down the price.
29. That she did not consider the value of the property in 1999, since that year did not constitute part of her instructions. Finally, she stated that she was not even aware that the property had been sold at Kshs. 59,000,000.
30. The 2nd Defendant, Wilfred Ritho Njeru, testified in support of his own case, relying on two filed affidavits sworn dated 25th January 2011 and 23rd January 2015 respectively. He testified that, he was appointed as a Liquidator of the company by the court; on 26th January

2011. He took over the management of the Company from Ms. Hellen Ouma, the Statutory Manager, who handed over to him handwritten report dated 23rd July 2015. He ceased being a Liquidator in March 2012. By then, had completed process of liquidation, though he had not given a final report.

31. He stated that, there was an attempt to sell suit property in the year 2004, but it could not be sold due to lack of offers. He then advertised it in the year 2005. The offers were to be received by the firm of; Rachier & Amollo Advocates. Four offers were received and he formed a tender committee to deal with the appraisal thereof.

He denied the allegation that the property was not adequately advertised and stated that, the tender advertisements gave full particulars of property and no prospective buyer complained of insufficient advertisement.

32. He further stated that, he received the report prepared by; Acumen Valuers' Report Limited, from Statutory Manager which gave the value of the suit property as; Kshs. 63,000,000. There was no other valuation report on record. He sold the suit property at Kshs. 59,000,000.

33. He admitted that, Keysian Auctioneers offered Kshs. 68,000,000 but stated that, the bid was rejected as it was made on behalf of its client and they refused to disclose the identity of the client for assessment of its financial viability, as such the bid was disqualified. That, Jet Black Limited lost the bid to the 1st Defendant on the ground of financial viability.

34. He testified that the selection of the approved bidder was done by the committee not by him alone. He maintained that, he was not under obligation to accept highest bidder. He denied delaying the process liquidation and attributed the delay to the Plaintiff who filed case after case. He testified the plaintiff owed the company Kshs. 26,294,385.70 through embezzlement and that, he was sued for recovery of Kshs. 34,774,865.79.

35. In cross examination, he denied that, he was removed office due to failure to comply with provisions of repealed Companies Act and maintained that, although the Acumen valuation was done in the year 2003, it was good enough. He maintained that, the property was a commercial property of two acres valued at Kshs. 25,000,000 per acre. That, the Commissioner of Insurance participated in the Tender committee meeting as an observer. He also admitted that, he did not call for creditors and/or shareholders meeting when he took over the Company as Liquidator.

36. However, he could not recall when 1st Defendant paid the purchase price. He averred that, Kshs 40,000,000, was realized from the sale after all other costs were deducted. He maintained that, Jet Black offer was Kshs. 58,200,000 and the 1st Defendant offer was Kshs. 57,500,000 but enhanced to Kshs, 59,000,000. That, Keysian Auctioneers bid did not disclose its client to enable the committee verify the client financial capacity but declined.

37. Finally, he stated that, there was a decree dated 19th May 2005; in **HCCC No. 1016 of 2002**, filed by the Statutory Manager to recover Kshs. 34,774,865 from Plaintiff and a warrant of arrest has been issued against him.

38. At the close of the case, the parties filed their final submissions. I have considered the evidence adduced and the submissions tendered and I find that the following issues have arisen for determination;

- a) *Does the Plaintiff have the locus standi to institute this suit and/or recover the "suit property" on behalf of the company;*
- b) *Did the 2nd Defendant act in contravention of the provisions of the repealed Companies Act and the Companies (Winding up) Rules; If so, does it invalidate the sale and transfer of the suit property; and/or did the 2nd Defendant need to seek court's authority before the sale;*
- c) *Did the 2nd Defendant lawfully, legally and/or properly sell the property to the 1st Defendant and transferred a valid title thereto;*
- d) *Is the suit time barred;*
- e) *Has the Plaintiff proved his case and/or should the court grant the orders sought; and*
- f) *Who should bear the costs.*

39. I note that, the Plaintiff responded to the first issue by submitting that, he is a director, shareholder and contributory of; Lakestar Insurance Company Limited (In Liquidation), and qualifies as a "**contributory**" as defined under **section 214 of the repealed Act**. Therefore, he does not require leave of the court to sue the 2nd Defendant., as an Interim liquidator

40. Further, pursuant to the provisions of; **section 241(3)** any creditor, shareholder or contributory may apply to the court and challenge the exercise or proposed exercise of any of the liquidator's powers.

Plaintiff avers that he has sued the 2nd Defendant in his capacity as a "Contributory". That, **section 214 of; the Companies Act** (repealed), define a "Contributory" means "*every person liable to contribute to the assets of a company in the event of its being wound up, and for the purposes of all proceedings for determining and all proceedings prior to the final determination of the persons who are to be deemed contributories, include any person alleged to be a contributor*".

41. He argued that, he has not sought for any relief against the company at all, to warrant a requirement of leave of the court pursuant to the provisions of; Section 228 of the repealed Companies Act. In addition, creditors and contributories are the only category allowed under the provisions of; section 241(3) of the repealed Companies Act, to challenge the exercise of powers by the liquidator without leave as they have an interest in the estate of the company.

42. Finally the Plaintiff argued that, Section 241(3) of the repealed Companies Act, does not stipulate the time limit within which a creditor and/or contributory may apply to the court for leave is untenable.

43. However, the 1st Defendant submitted that, the Plaintiff has no independent and separate right either in his name or right, to commence and sustain an action to recover an asset of the company or challenge the Interim Liquidator's action.

44. That, the Plaintiff's submissions have no foundation in law and in fact, contradicts a long line of authority in this and other Commonwealth jurisdictions in which provisions of; section 241(3) of the Companies Act (repealed) and others in *pari materia* with that section are considered.

45. That, even if section 241(3) of the said Act, empowers a contributory to bring any action against a liquidator of a company, such power is clearly limited to commencing such suit only with the leave of court and in the company's name. The 1st Defendant relied on the case of; **Abric Project Management Sdn Bhd vs. Palmshine Plaza Sdn Bhd & Another (1999)**, where a contributory seeking to impeach the Liquidator of the company for incompetence, fraud, collusion and concealment of facts to the detriment of the creditors and contributories failed, inter alia; for want of leave to commence the action.

46. That, in the case of; Fargro Ltd v. Godfrey & Others (1986) 3 ALL ER 279, 281, it was held that, a minority shareholder's action will not lie if a company is in liquidation. The appropriate procedure in such a situation is for the Liquidator, to bring the action on behalf of the company or, if he refuses to do so, a contributory may apply to the court for an order authorizing him to bring the action in the company's name or compelling the Liquidator to do so on such terms as to indemnify as the court considers appropriate.

47. That the court in the above decision quoted, with approval, the holding of Cotton LJ in; Cape Breton Co v. Fenn (1881) 17ChD 198 at 208, which held inter alia that, creditors and contributories-

“have a right in special cases to ask the court for leave to do that which the liquidator is advised not to do, or which, (and in practical terms this is usually the reason) because he has no funds, he does not do, viz, take proceedings in the name of the company, but in my opinion the power of the court to give leave to use the name of the company stops there, and is confined to those who are parties to the liquidation.”

48. The 1st Defendant also relied on the case of; Welcome Properties Ltd. v. Jackson Kamau Kenya & Others (2001) eKLR, John Gachoki Ndenge v. Kiambu Dandora Farmers Co. Ltd & Another (2008) Eklr, Dadani v. Manji [2004] 1 KLR 95 at 110(1) and Joseph Kaara vs. Thabiti Finance Co. Ltd Civil Application No. 120 of 1998, citing Joseph Kaara vs. Thabiti Finance Co. Ltd Civil Application No. 120 of 1998, where the court clarified that, a derivative action may only be commenced or continued with the express and specific leave of the court upon application by the Plaintiff, failing which the case cannot proceed and the proceedings are a nullity.

49. Finally, the 1st Defendant submitted that, they have never acquiesced to any failure or omission by the Plaintiff to seek or obtain leave and the actions of the 2nd Defendant, *qua* liquidator, cannot, as they could not, be challenged in these proceedings and therefore, the suit against the 1st Defendant is equally invalid.

50. In the same vein, the 2nd Defendant submitted that, the Plaintiff has failed to seek leave to institute the proceedings contrary to section 228 of the Companies Act (repealed), which provides that, once a winding up order has been made or an interim Liquidator appointed, no action or proceedings shall proceed or be commenced against the Company, except by leave of the court and subject to such terms as the court may impose.

51. The 2nd Defendant relied on the case of; **Sololo Outlets Limited & Others vs. National Social Security Fund, Board of Trustees & Others (HCC No. 914 of 1994)**, where the court held that, failure to obtain such leave makes the suit invalid. Further reliance was placed on the case of; **Welcome Properties Limited vs. Jackson Kamau Karuga & 2 Others (Misc App No. 70 of 2001)**, where it was held that, failure to obtain leave renders proceedings instituted a nullity.

52. I have considered the rival arguments on the issue and I note that, first and foremost, basically “*Locus standi*” is defined in; Black's Law Dictionary, 9th Edition page 1026 as “the right to bring an action or to be heard in a given forum”. It implies the legal capacity of a person which enables him or her to invoke the jurisdiction of the court in order to be granted a remedy.

53. In the cases of; Housing Finance Company of Kenya Ltd v. Embakasi Youth Development Project [2004] KLR, the court observed that, only a juristic person, endowed with legal personality, can have *locus standi* before the court, and can be the subject of rights and liabilities.

54. It is not in dispute herein that the Plaintiff did not seek for leave to institute this suit and/or sue the 2nd Defendant, as an Interim Liquidator. It suffices to note that, in a compulsory liquidation, and/or liquidation commencing with a winding-up order, claims and actions against the Company in liquidation, are limited by virtue of a statutory provisions under section 228 of the Companies Act (repealed), the moment the court makes the winding-up order. The stay means that, no action or proceedings can be brought, or continued with, against the Company without the leave of the court.

55. The provisions of that sections expressly states as follows: -

“When a winding-up order has been made or an interim liquidator has been appointed under section 235, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose”.

56. The Plaintiff’s argument is that he has not sued the Company and/or sought any relief against it for these provisions to apply. In what capacity then, is the 2nd Defendant sued. To answer this question, there is need to appreciate the role of a Liquidator in the winding up process.

57. A liquidator is essentially the independent person or entity who takes charge of the wound up Company. One of the primary roles of the Liquidator is, to take control of all of the Company’s assets, sell off the assets and then distribute the proceeds. When the Liquidator takes over the Company, the Company continues to exist as a legal entity. But the directors’ powers of managing the Company ceases, and the Liquidator takes control of the driving seat of the company.

58. So if the liquidator carries on the business of the Company or were to sell off the Company’s assets, it is still the Company carrying out such tasks but the Liquidator piloting these actions. The Company will cease to exist, when the winding up comes to an end and the Company is dissolution.

59. In that regard, Madan, Kneller, JJA and Chesoni Ag. JA held, in the Court of Appeal case of; Lochab Brothers vs. Kenya Furfural Co. limited [1983] KLR, that: -

“A receiver cannot sue in his own name as receiver since he has no property vested in him and so acquires no right of action by his appointment. Nor can the court give leave to sue as receiver. The receiver’s duty is to take care of and receive the property which is put under his charge and he is not at liberty and is not entitled to bring an action in his own name.”

60. Similarly, in the case of; Moss Steamship Company Ltd. vs. Whinney, (1912) 254, Lord Atkinson held that: -

“This appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, any more than the taking possession of the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist; but it entirely supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession, or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance.”

61. To revert back to the subject issue, it does appear that, from the plain reading of section 228, of the repealed Act, leave of the court is required to proceed with or commence a suit against the Company liquidation. However, as stated above, the Liquidator of a Company in liquidation, is a mere driver thereof. It therefore implies that, he cannot be sued in his personal capacity for the actions of the Company and neither can he sue in his personal capacity on behalf of the Company.

62. The question to address is; how then, can a person aggrieved with the action of the Liquidator seek for a remedy against the Liquidator and if that party wish to sue the Liquidator is leave required. Apparently there were no express provisions in the Companies Act (repealed) and/or Companies (Winding up) Rules that made provision for the leave of the court before suing a liquidator.

63. However, there are provisions in the Companies Act (repealed) concerning the legal liabilities of Liquidators. In this regard the provisions of; provisions of 241 (3) of the Companies Act (repealed), states that: -

(3) *The exercise by a liquidator in a winding up by the court of the powers conferred by this section shall be subject to the control of the court, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers*

64. In the same vein, the provision of; section 242 (5) of the Companies Act (repealed) states that: -

“If any person is aggrieved by any act or decision of the liquidator, that person may apply to the court, and the court may confirm, reverse or modify the act or decision complained of, and make such order in the premises as it thinks just. 243

65. Similarly, the provisions of; section 246 of the Act, empowers and gives the Official Receiver control over the Liquidator and states that: -

(1) *The official receiver shall take cognizance of the conduct of liquidators of companies which are being wound up by the court, and, if a liquidator does not faithfully perform his duties and duly observe all the requirements imposed on him by statute, rules or otherwise with respect to the performance of his duties or if any complaint is made to the official receiver by any creditor or contributory in regard thereto, the official receiver shall inquire into the matter and take such action thereon as he may think expedient.*

(2) *The official receiver may at any time require any liquidator of a company which is being wound up by the court to answer any inquiry in relation to any winding up in which he is engaged, and may, if the official receiver thinks fit, apply to the court to examine him or any other person on oath concerning the winding up”.*

66. Finally the provisions of; Section 324 of the Companies Act (repealed).

“(1) If in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver, or of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the court thinks just.

(2) The provisions of this section shall have effect notwithstanding that the offence is one for which the offender may be criminally liable.”

66. In addition to these provisions, the common law has addressed this issue as to whether leave is required to sue a liquidator. In regard, the Australian position is well settled that, leave of court is required in order to commence proceedings against a liquidator (Armitage v Gainsborough Properties Pty Ltd and another (2011) VSC 419 (Armitag), 34 at page (42), Baxter v Hamilton (2005) TASC 64 (Baxter) 32, Mamone and another v Pantzer (2001) NSWSC 26 (Mamone), and Re Siromath Pty Ltd (No 3) [1991] 25 NSWLR 25 (Siromath)).

67. The Australian position does not appear to be based on any provision in the relevant Australian Legislation, but the rationale for requiring leave is two-fold; first, the courts have an interest in protecting its own officers from facing spurious or vexatious litigation; (see Siromath, and Armitage (supra) and secondly, the courts have an interest in protecting the integrity of the winding-up process so that, the process is conducted quickly and efficiently for the benefit of all interested persons (Sydlow Pty Ltd (in liq) v TG Kotselas Pty Ltd (1996) 144 ALR 15935 at 165 (Sydlow)).

68. The Malaysian courts, like their Australian counterparts, require leave to be obtained in order to bring proceedings against a Liquidator (Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [2010] 1 MLJ 547, Abric Project Management Sdn Bhd v Palmshine Plaza Sdn Bhd and another (2007) 3 MLJ 571 (36), Chin Cheen Foh v Ong Tee Chew (2003) 3 MLJ 57, Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow (1995) 3 MLJ 20(37)). Leave is required because a court-appointed Liquidator is an officer of the court.

69. The Malaysian position is not based on any express provision in the relevant legislation in Malaysia. However, the Malaysian Court of Appeal in; Chi Liung Holdings referred to; a provision in the Malaysian legislation (section 236(3) of the Companies Act 1965 (Act 125 of 1965) (Mal)) in support of its reasoning that, the Liquidator is an officer of the court. The relevant provision reads:-

“(3) The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers”.

70. However, the Canadian Bankruptcy and Insolvency Act RSC 1985 (c B-3) (s215 BIA) expressly provides that, leave of court is required in order to sue the Canadian equivalent of a Liquidator. (a trustee, of the BIA, Loose leaf Ed, 2009). Thus, except by leave of the court, no action lies against the; Superintendent, an Official Receiver, an Interim Receiver or a Trustee with respect to any report made under, or any action taken pursuant to, the Act.

71. The Singapore Companies Act, has an identical provision (see section 272(3) of the CA) which states that, the exercise by the Liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

72. The rationale as aforesaid for these provisions, sections 262(3), 299(2) and 227C(c) of the Companies Act, is axiomatic: it is to prevent the company from being further burdened by expenses incurred in defending unnecessary litigation.

73. The main focus of; a company and its liquidators once winding up has commenced should be to prevent the fragmentation of its assets and to ensure that the interests of its creditors are protected to the fullest extent. In other words, returns to legitimate creditors should be maximised; the process of collecting assets and returning them to legitimate creditors should be attended to with all practicable speed. Unnecessary costs should not be incurred; liquidators should act in the collective interests of all legitimate stakeholders and not with a view to enhancing their own self-interests or fees.

74. Based on the aforesaid, I find that the Plaintiff’s submissions that, leave can be obtained at any time untenable as there was no leave applied for in this matter. I therefore find and hold that the Plaintiff required the leave of the court to institute the suit against the 2nd Defendant and failure to obtain leave renders the suit against him null and void. On that finding alone the suit against the 2nd Defendant is incompetent and struck out accordingly.

75. The question is where does that leave the claim against the 1st Defendant? I shall deal with other issues raised, firstly that, the 2nd Defendant did non-compliance with provisions of; section 237 of Companies Act (repealed). These provisions provide that;

“Where, in the winding up of a company by the court, a person other than the official receiver is appointed liquidator, that person

a) shall not be capable of acting as liquidator until he has notified his appointment to the registrar and given security in the prescribed manner to the satisfaction of the official receiver;

b) shall give the official receiver such information and such access to and facilities for inspecting the books and documents

of the company and generally such aid as may be requisite for enabling that officer to perform his duties under this Act.

76. In the same vein, Rules 47(6)(a) and 48 of the Companies (Winding up) Rules, states that, if a liquidator other than the official receiver is appointed, the official receiver shall, as soon as the liquidator has given security, cause notice of the appointment to be published in the Gazette. That, the security shall be given to the official receiver in such manner as the court may from time to time direct.

77. I have considered these provisions and agree with the Plaintiff's submissions that they are couched in a mandatory manner. It is a fact that as per the evidence of a letter dated 3rd May, 2010, the 2nd Defendant did not comply with these provisions.

78. The question that arises is; what is the legal consequences of non-compliance. The 1st Defendant argued that non-compliance of these provisions cannot render the actions of the 2nd Defendant null and void and cannot vitiate the contract of sale herein. The 1st Defendant relied on section 238 (5) of the Companies Act (repealed). The said provisions state that;

“(5) Subject to the provisions of section 326, the acts of a liquidator shall be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification”.

79. I concur with the submissions of the 1st Defendant that, the non-compliance aforesaid will not invalidate the sale herein. The third party dealing with the Interim Liquidator is not empowered in law to supervise the performance of his work as such, and will in ordinary course of business assume that, the appointment is valid and deal with the Liquidator in good faith as a bona fide purchaser. Even then that claim lies against the 2nd Defendant and I have ruled the suit against him is incompetent.

80. The other issue raised was in relation to the conduct of the sale of the property, as regard the advertisement thereof. There is evidence the property was advertised for public auction on 19th July, 2004. I have considered the content of the advertisement aired and I find the information as well as the description of the suit property is adequate to guide any intended purchaser.

81. I also note that the 2nd Defendant testified that, the bids were addressed to the firm of; Rachier and Amolo Advocates and company and later he formed a Tender Committee that appraised the bids. He did not do it alone. He conceded that the Commissioner of Insurance attended the process but there is no evidence that he compromised the process. There is further evidence that a meeting of bidders was held on 27th April, 2005.

82. Further, there is evidence the 2nd Defendant indeed notified the two highest bidders that, they had tied in their bids, at Kshs 55,000,000. He did not write to the 1st Defendant only. It is on record that eventually other bidder; Jet Black Kenya's final bid was, Kshs 58, 200,000. As per the letter dated 29th June, 2005, the property was sold for Kshs 59,000, 000, higher price than that bid.

83. The 1st Defendant's bid was enhanced from the initial Kshs 50,000,000, as evidenced by a letter dated 19th April 2005. There is evidence that, the 1st Defendant delayed in paying the 10% of the purchase price upon notification of the sale, and/or within ninety (90) days period as evidenced by the letter dated 5th August 2005, and a letter dated 7th March 2006, forwarding the cheque in the sum of; Kshs 40,590,976 about eight months after the sale, thus, putting its financial viability in issue but still the 1st Defendant paid more than the competitor Jet Black Kenya. The stamp duty was paid based on the figure of Kshs 59,000,000 as per the duty declaration assessment slip dated 13th September, 2005.

84. The question is; was the property sold at an undervalue or below market price? It suffices to note that, the valuation report by Acumen Valuation Limited was obtained by the Statutory Manager before the 2nd Defendant was appointed. The value therein is Kshs, 72, 180,745 inclusive of loose assets and Kshs, 63,000,000 for the suit property alone, and the property was sold at Kshs, 59,000,000. The other valuations by Gimco Co Limited dated 22nd December 2014, giving a value of Kshs 156, 700,000 was prepared after the events in the year 2005, and so is the report dated 13th April 2015. The book value of Kshs 146, 830, 724 is not supported by the evidence of the maker.

85. I find that based on the evidence adduced in total, the sale was conducted fairly well and the price obtained was reasonable taking into account that; Jet Black Kenya offered a similar amount as offered by the 1st Defendant. The evidence of disqualification of Keysian Auctione has been advanced and has not been rebutted. Of course in the normal circumstance the 2nd Defendant should have valued the property before the sale, than to rely on the valuation of 4th July 2003.

86. I also find that the allegation of fraud has not been proved by evidence and finally, the Plaintiff has not proved that he has the *locus standi* to sue and recover an asset registered in the name of the company, in that case I find that the suit is non-starter.

87. The upshot is that, I find that the plaintiff has not proved its case on the required standard of probabilities and/or the suit is incompetent as stated herein and for want of *locus standi* and it is struck out as against the Defendant or dismissed as against the 1st Defendant. Costs are awarded to the defendants.

88. It is so ordered.

Dated, delivered and signed on this 30th April, 2020 on line

GRACE L NZIOKA

JUDGE

In the presence of:

Moraa Nyakundi for the Plaintiff

Ms Onyango for Dr. F. Ojiambo SC for the 1st Defendant

Mr. Munyua for the 2nd Defendant.