



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
WINDING UP CAUSE NO. 5 OF 2013
IN THE MATTER OF JETLINK EXPRESS LIMITED (IN LIQUIDATION)
AND
IN THE MATTER OF THE COMPANIES ACT, CAP 486 (REPEALED)
AND IN THE MATTER OF THE INSOLVENCY ACT, 2015
RULING

1. By the judgment dated 27th July 2016 Jetlink Express Limited (the Company) was wound up. The Court did not in that judgment determine the costs of the winding up. This is what Justice Farah Amin stated in that judgment.

“62. On the question of costs there is an application before the Court to consider an alternative costs order. The Court accedes to that request. The Court will hear arguments on the issue of costs once the parties have had an opportunity to digest this judgment.”

2. What the learned judge referred to as an application was not an application, per se, but it was submissions that were made by creditors requesting that the Court to order the winding up costs be paid by the Directors of the Company. On 5th September 2016 the learned judge made this order:

“Order

1. The Directors of the Debtor Company Captain Elkana Aluvale & Capt. G. Patel are joined as parties to the proceedings in order to enable them to respond to the show cause raised on costs by Mexican CRJ.

2. The Creditor Mexican CRJ to serve upon Directors a copy of

1) The judgment. 2) The Application for their submissions (sic) within 14 days.

3. The Directors are hereby granted 14 days from the date of service to enter an appearance.

4. The Directors to file response and written submissions within 28 days of service.”

3. Parties to this winding up filed their submissions on costs and this ruling is to determine who pays the costs.

4. Mexican CRJ, a Creditor, submitted that not only should the Company be ordered to pay costs but an order be made that those costs be paid in priority from the Company assets. Further it submitted that if the Company is unable to pay the costs the costs should be paid personally by the Directors of the Company.

5. Those submissions were supported by Finejet Limited, the petitioner, and by the Kenya Civil Aviation Authority the other creditor. The request of payment of costs by the Company's Directors personally is grounded on submissions that it was the Directors who instructed an Advocate to represent the Company during the winding up proceedings. The Directors actively controlled and managed the conduct of the proceedings on behalf to the Company. The Directors convened several creditors meetings and directed those meeting, which meetings were intended to arrive at creditor's arrangement, with a view to settle the debts. The Company, through its Directors sought many adjournments which were conceded to by the creditors on the basis that negotiations would proceed with a view to having a restructuring plan but instead that the Company was misleading and/or misdirecting the Court. Creditors are of the view that that Directors of the Company abused the Court process by frequently adjourning the matter before Court. Mexican CRJ in its submission stated the following which captures what other creditors submitted:

“The actions of the Directors of the Company contributed to the unreasonable time taken to conclude the matter leading to the inordinate Court's time, resources and costs needlessly spent.”

6. The case of **SYMPHONY GROUP PLC VS HODGSON (1993) 4 ALL ER 143**, was cited but not provided, and was reproduced in the submissions as follows:

1) An order for the payment of costs by a non-party will always be exceptional. The judge should treat any application for such an order with considerable caution.

2) It will be even more exceptional for an order for the payment of costs to be made against a non-party, where the applicant has a cause of action against the non-party and could have joined him as a party to the original proceedings;

3) Even if the applicant can provide a good reason for not joining the non-party against whom he has a valid cause of action, he should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him.

7. The reasons attributed to the creditor's request that costs be paid by the Directors personally was because, as stated before, the Directors requested and obtained many adjournments which prolonged the conclusion of the matter, the Directors at one time admitted the Company's debt only later at the hearing of the petition for winding up it submitted that the Company did not owe any debts, and that the Directors of the Company patently misconducted themselves and were blatantly unreasonable over the course of the hearing of the petition.

ANALYSIS

8. In all common jurisdiction there is one principle on costs that is adhered to, that is costs follows the event. There is no doubt that the creditors in this petition are entitled to costs because the event here was the success of their plea, that is the winding up of the Company.

9. The other principle on award of costs is that costs are always at the discretion of the Court. This principle was well discussed by Justice John M. Mativo in the case **CECILIA KARURU NGAYU V BARCLAYS BANK OF KENYA & ANOTHER [2016] eKLR** thus:

“I find useful guidance in the following passage from the **Halsbury's Laws of England**;

The Court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the Court, a party has no right to costs unless and until the Court awards them to him, and the Court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”(Emphasis added).

in the *Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others*,^[8] where the Court citing two leading decisions on the subject held *inter alia* that:-

*“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion.But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the **exercise of good grounds for doing so.**”*

10. The more complex question, in this matter is, who should bear the costs. The creditors are essentially asking this Court to pierce the corporate veil of the Company and find the Company's Directors personally liable to pay the costs. I wish to cite a Canadian case in the

regard, namely **R-V-1137749 ONTARIO LTD. (OPERATING AS PRO-TACK ELECTRIC 2018 ONCJ502)**: viz

51. Certain realities are indisputable. A corporation has its own legal existence, separate and apart from its shareholders, its officers and its Directors. Unless the law, either statutory or common-law, provides otherwise, if a corporation does a wrongful act, it is the corporation that must be punished, even if it cannot be subjected to the same range of punishments that a human actor might be subjected to.

To pierce the corporate veil is to disregard the separate legal personality of a corporation, a fundamental principle of corporate law recognized in Salomon v. Salomon & Co., [1897] A.C. 22, [1895-9] All E.R. Rep. 33. Only exceptional cases -- cases where applying the Salomon principle would be "flagrantly" unjust -- warrant going behind the Company and imposing personal liability.

11. There is no disputing that the Company has its own legal existence which is separate and apart from shareholders, as stated in the above case. The creditors have submitted that the Directors were the cause of frequent adjournment of the petition. That it is them who prolonged the conclusion of the petition. It would however seem that the very same creditors were amenable to those adjournments which it seems were intended to resolve the matter of indebtedness of the Company. This is clearly stated in the submissions of The Kenya Civil Aviation Authority thus:

"In the course of the proceedings, however, the authority (Kenya Civil Aviation Authority) indicated to the Honourable Court that it was ready to engage the Company in such a restructuring programme as would see the Company back to business..."

The authority participated in the negotiations bore no fruit compelling the parties to proceed to fulling hearing."

12. The granting of adjournment is always at the Court's discretion and it would seem to me that when the Company through its Directors requested for adjournment the Court on hearing the reason for the adjournment granted the adjournment at its discretion. I am unable to find that the Company's Directors so flagrantly directed the case to justify the lifting of the corporate veil or to order the Directors to bear the costs of the petition personally. I find that there is no proof of flagrant misconduct on the Director's part. I am afraid I am unable to find, on the submissions made before me and consideration of the proceedings and the Court's judgment, that the creditors have met the high test of piercing the corporate veil. I find that the Directors, in engaging the creditors, which necessitated the adjournment of this matter, were purely advancing the interests of the Company in attempt to have the matter settled out of Court. I can find no other reason.

13. In exercise of my undoubted discretion, therefore, I decline to order that Directors, Captain Kiran Patel and Elkana Aluvale, to personally be liable to pay the costs of this petition.

14. In conclusion I order that the costs of the creditors in this petition be paid from the assets of Jetlink Express Ltd realized by the official receiver.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 28th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **28th** day of **April, 2020**.

MARY KASANGO

JUDGE