



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 302 OF 2017

THE RETIREMENT BENEFITS AUTHORITY.....APPLICANT

-VERSUS-

MUMIAS SUGAR COMPANY LIMITED.....1ST RESPONDENT

MUMIAS SUGAR COMPANY STAFF PROVIDENT FUND....2ND RESPONDENT

ROBERTS INSURANCE BROKERS LIMITED.....3RD RESPONDENT

RULING

Before the court for determination is the application dated the 19th day of October, 2018 seeking to set aside the orders made on 3rd November, 2017 and to reinstate the decision of the applicant dated the 28th June 2017 placing the 2nd Respondent under interim administration.

The application is supported by the annexed affidavit sworn by Nzomo Mutuku on the 10th October 2018 and is premised on the grounds as set out on the body of the same. Among such grounds are that, since the orders of 3rd November 2017 were made, the 1st Respondent has made no efforts whatsoever to remit the monthly installments to the 2nd Respondent in order to clear the unremitted arrears. The other ground is that the 1st Respondent misguided the court that it will comply with the Remedial Plan Agreement to remit the monthly installments but has failed to do so and has continued to benefit from the said orders to the detriment of its trustees.

That, at the time of entering the compliance Remedial Plan Agreement on 9th October, 2015, the 1st Respondent and the Trustees recognized that there were un-remitted contributions by the 1st Respondent amounting to Kshs.97,061,102.31/- as at 31st July, 2015. That under Clause 7 of the aforesaid Remedial Plan Agreement, the 1st Respondent undertook to make monthly payments of Kshs.3,085,086.12/- so as to fully pay up the unremitted contributions on or before the 30th June, 2018 and to satisfy any conditions as may be set by the Retirements Benefits Authority (the Applicant herein) and the Respondent agreed to be bound by the terms of the Agreement.

Upon entering the Compliance Remedial Plan, the applicant conducted periodic monitoring of the plan and a bundle of emails have been annexed evidencing the periodic monitoring dating between 1st July 2015 -30th September, 2016 which shows that as at 28th June, 2017, the total outstanding amount of the unremitted contribution totaled to over Kshs.80,000,000/-. That, as a result of the poor funding status of the 2nd Respondent and concerns about its ability to continue as a going concern, on 28th June 2017 the Applicant appointed the 3rd Respondent as an interim Administrator for a period of 3 months subject to extension, if necessary, for purposes of liquidating the 2nd Respondent prompting it to file an Appeal against the said decision.

That the Applicant moved this court by way of a Notice of Motion dated 20th July 2017 seeking for an order to stay execution pending the hearing and determination of the Appeal which orders were granted by this court on 3rd November, 2018 and which the Applicant now seeks to set aside.

The court has considered the application, the supporting affidavit and the oral submissions made in court by counsel for the applicant in support of the application. The Application proceeded exparte as the Respondent neither filed a response nor attended court during the hearing and therefore this court did not get to hear their side of the story.

On 3rd November 2017, this court made a ruling in favour of the Respondent in which it stayed execution of the decision of the 1st Applicant to place the 2nd Respondent under interim administration pending the hearing and determination of a pending Appeal. The court also issued an order of injunction against the 2nd Respondent restraining it from in anyway interfering with the assets of the 2nd Respondent.

The decision to place the 2nd Respondent under interim administration was informed by its failure to remit contributions together with accruing interest amounting to over 80 million as well as its failure to adhere to a remedial plan agreement entered between it and the applicant and since the 2nd Respondent had made a commitment to remit the monthly installments, the court allowed its application.

In paragraph 16 of the supporting affidavit, it has been deponed that 1st Respondent has failed, refused and/or neglected to remit the statutory payments that are in arrears in accordance with its own remedial plan which arrears now stand at Kshs.117,411.247/- which, it is deponed, is an indication of funding problems and its imperative that the Applicant protect the interest of the members.

From the facts deponed to, in the supporting affidavit it is clear that the 1st Respondent has been unable to meet its financial obligations to the 2nd Respondent despite the indulgence given to it and in the premises, the application herein is merited and the same is allowed as prayed. The orders made by this Honourable court on the 3rd day of November 2017 are hereby set aside and the decision of the applicant dated 28th June 2017 placing the 2nd Respondent under interim administration is hereby reinstated. The costs of the application are awarded to the applicant.

It is so ordered.

Dated, signed and delivered at NAIROBI this 31st day of January, 2019.

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent