



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 147 OF 2018

MICHAEL KADOWE KARISA.....APPLICANT

VERSUS

AFRICAN SAFARI CLUB (IN LIQUIDATION THROUGH ITS

LIQUIDATOR, OFFICIAL RECEIVER).....RESPONDENTS

AND

UAP PROVINCIAL INSURANCE CO. LTD.....INTERESTED PARTY

RULING

1. By a Notice of Motion dated 8th May 2018 and later amended on the 18th June 2018, the applicant seeks that he be granted leave to continue with Mombasa CMCC No. 3574 of 2013, from where it had reached and that the liquidator be joined to the proceedings to facilitate such continuity.
2. The application was grounded on the provisions of Section 432(2), in the main, together with the provisions on the overriding objectives of the court, the inherent powers of the court and article 159 of the constitution. The grounds upon which the application is brought are that there is pending suit No. CMCC 3574/2013 against African Safari Club Ltd in which judgment was delivered on 1/4/2016 in the sum of Kshs.6,805,500/= plus costs and interests. At the time the matter proceeded and judgment entered, both counsel were not aware of the fact that the defendant/respondent, had been placed under liquidation pursuant to order issued in High Court Winding Up Cause No. 1 of 2005 and that the Official Receiver appointed the provisional liquidator. It is contended that on account of the appointment of the liquidator overall the affairs and assets of the defendant/respondent, all proceedings undertaken prior to leave being granted were nothing but a nullity.
3. For that reason, the application prays and pleads that leave be granted to it to proceed with the matter because there having been an insurance cover provided by the interested party who even appointed an advocate to defend the claim, the fact of winding up should not render the litigation academic since any resultant judgment can be settled by the interested party.
4. Those fact were repeated and reiterated in the affidavit of support sworn by Michael Karisa Kadowe which exhibited the pleadings at trial, the judgment as well as the winding up order.
5. To the application no opposition by way of Replying Affidavit or grounds of opposition were filed but Mr. Mogaka advocate attended and offered submissions at the hearing with the leave of the court.

Submissions by the parties

6. Mr. Gikandi for the applicant gave the history of the case sought to be continued by the leave of the court upto the delivery of judgment and stressed the point that all that while both him and Mr. Mogaka for the Respondent, were unaware that the defendant had been liquidated. Counsel however deviated from the words and expressed prayers of the application by asking that the winding up order be lifted. That is an order that cannot be made out of submissions from the bar and without a substantive prayer. In fact even if there was to be such a prayer in these proceedings, I would still decline to grant same because the winding up order can only be lifted in the file in which the order was given.
7. On the application, the counsel cited to court Section 432(2) Insolvency Act which gives the court a discretion to grant leave for a party to proceed with a suit against a company placed under liquidation. The decisions in *Lukas Maitha vs Flint East Africa Ltd [2017] eKLR* *PortReitz Co. Ltd* and *PMN vs Kenyatta National Hospital* were all quoted from the application of Insolvency Act to liquidation and on when to extend time and restore the name of a liquidated company into the register of companies for purposes of meeting legal obligations.

8. The counsel for the Respondent having failed to file any opposition to the application indicated to court that they had no opposition to the leave being granted but objected to the provisional liquidator being joined to the proceedings. He however correctly pointed out, and I have observed above that there is no prayer to lift the Winding Up Order hence the same cannot be granted here.

9. In response to Mr. Mogakas' submissions Mr. Gikandi informed the court that the parties have been before Ogola J, with a Judicial Review application to prohibit the execution of the decree and for the suit to start de novo but the same was dismissed. He also pointed out the fact that parties have been before Hon. Rabera, SRM with a declaratory suit but the same was dismissed on the basis that the proceedings since 19th June 2014 and the resultant judgment were a nullity. On these facts be pleaded that the application be allowed.

Analysis of the fact, the law and determination of the matter

10. The necessity of the Applicant approaching this court is the fact that it has a decree procured in violation of the law on insolvency, which it cannot enforce against the judgment debtor, because it is under liquidation nor can it be enforced against the insurer because the proceedings were undertaken without a mandatory leave of the court and the lower court has declared the same a nullity.

11. In reality, I see the facts in this matter to disclose and exhibit some legal quandary in that there is a judgment declared a nullity in a different file but yet to be set aside in the file in which it was made. There is also a decision of the high court which declined to order that the judgment be set aside and proceedings start de novo after compliance with the law on insolvency and declined to prohibit execution of the judgment of the lower court.

12. To this court, that is the state of affairs that do very little to help the court achieve its mandate. It is clear that parties have engaged the court in four files when indeed two files were utterly unnecessary if the counsel had just taken the fact of insolvency of the respondent, applied the same to the law and appreciated the impropriety of the proceedings both engaged in, simply approached the court which delivered the judgment, and in the same file, and set aside those proceedings and the consequent judgment. That is what Ogola J adverted to in his judgment in the JR No. 76 of 2016 when he said:-

“However, in this matter, there are already proceedings in the lower court in which the same issues can be skillfully canvassed”

13. It is clear to me that once the court issued the winding up order on the 19/6/2014, against the respondent, the then provisions of Section 288 of the Companies Act, now Section 432(2) of the Insolvency Act, came into operation and no proceedings could be validly undertaken against the respondent prior to obtaining the leave of the court. Now that it is conceded by the parties that such leave was never sought or obtained due to the fact that both counsel were unaware of the winding up order, the first order that this court has to make even though the same has not been sought, for ends of justice to be met, is a declaration that all proceedings taken in CMCC No. 3574 of 2013 from the date of the winding up order was made, were so taken contra statute and are therefore null and void and of no effect. They are for that reason set aside so that the proper administration of justice may be achieved. For that reason and for the neatness of court records in that file, it having come to my notice, I direct that the said file be placed before me for supervision purposes within 7 days from today.

14. Having set aside those proceedings, the status of that case is that the matter remains un-determined and ought to be moved forward towards determination. For the sake of moving the matter forward against the respondent, admittedly under liquidation, I invoke Section 432 (2), Insolvency Act, and grant to the Applicant Leave to proceed with the matter from the position it stood as at the 19/6/2014.

15. One may ask how this decision I am making today sits with that of my brother Ogola J, in **JR No. 76 of 2016**. I have taken time to read the decision by my brother and I have noted that at paragraphs 13 and 15, the application was defeated largely because the judgment could not be prohibited and set aside by a judicial review order without an order of certiorari having been sought.

16. In that judgment the judge rendered himself as follows:-

“On the first issue it is to be noted that the Judgment to be quashed was made on 1st April, 2016. The ex-parte Chamber Summons herein was filed on 27th October, 2016, 27 days after the six (6) months required. The issue then is whether this court can extend the time to allow the application to be within time. There is no application for extension of time. Even then it seems to me that time under Section 9(3) of the Law Reform Act cannot be extended. There is no provision for extension of time.

Quite clearly this court cannot extend the time vide the said Section.

It is to be noted that the Applicant could not give such annexure because the Applicant has not prayed for certiorari as a remedy. In the absence of a prayer for certiorari, the application is in vain because even if the order for mandamus and prohibition are given the Judgment will still stand since it is not quashed”.

17. All the judge said was that the court had not been properly moved and it was not proper for the court to issue the orders sought in the prevailing circumstances.

18. The foregoing reasons irresistibly point that I am inclined to grant leave to the applicant to proceed with the suit No. CMCC No. 3574/2013 from where it had reached as at the 19/6/2014 when the winding up order was made against the respondent.

18. On prayer 2 regarding joinder of the liquidator, I agree with the respondent's counsel that the proper forum to pursue that order is the trial court. I decline to grant such an order in this file.

19. But again is it really that necessary to join a liquidator to the suit? Can't the respondent just be properly describe in the suit papers to disclose its prevailing status? That would be for the counsel to decide. All I can say and I have said is that I decline to order that a party be joined into a suit not before me.

20. I order that the costs of these proceedings shall be in the matter it was purposed to serve CMCC 3574 and shall abide the outcome in that file.

Dated and delivered at Mombasa on this 28th day of January 2019.

P.J.O. OTIENO

JUDGE