REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISC. APPLICATION NO. 456 OF 2018

INSOLVENCY ACT 2015

RE: IN THE MATTER OF KEMUSALT PACKERS PRODUCTION LIMITED IN RECEIVERSHIP

KALISA K. MOSES.....1ST APPLICANT

KEMUSALT PACKERS LIMITED.....2ND APPLICANT

AND

PETER KAHI.....1ST RESPONDENT

ANTHONY MUTHUSI.....2ND RESPONDENT

RULING

Brief facts

1. Through the application dated 11th December 2018 brought under Sections 522,563,568,593,594 and 604 of the Insolvency act, and Regulation 10 of the Insolvency Regulations, 2016 the applicant seeks the following orders

> ***1) spent***
>
> ***2) That a mandatory injunction be issued retraining the respondents from purporting to act as receivers, administrators, and or managers of KEMUSALT Packers Production Ltd (herein called "the debtors") pending the hearing and determination of this suit***
>
> ***3) That a prohibitory injunction be issued restraining the respondents from trespassing onto the debtors business and/or interfering with any and all properties of the debtor pending the hearing and determination of this suit.***
>
> ***4) That this honourable court be pleased to remove the respondents from being administrators of the debtor***
>
> ***5) That this honourable court be pleased to direct the respondents to give a true and fair account to this court of all monies they have received and/or handled as administrators from 7th September 2017 to date and disclose all fees that they have received during that period of time.***
>
> ***6) That costs of this application be provided for.***

2. When the matter came up for mention on 20th December 2018 the applicant's counsel informed this court (differently constituted) that the applicant did not wish to pursue prayers no. 2 and 3 of the application after which the said prayers were marked as withdrawn and this ruling will therefore be in respect to the remaining prayers in the application.

3. The application is supported by the affidavit of the 1st applicant's director one **Kalisa K. Moses** who avers that he advanced a soft loan of US dollars 22,500 and Kshs. 600,000 to the 2nd applicant which loan had not been repaid by the time of the 2nd applicant went into receivership. He further avers that the respondents were appointed as the receivers on the 6th September 2016 but have not made any application for the extension of their tenure which expired by effluxion of time at the expiry of one year pursuant to the provisions of

sections 593 and 594 of the Insolvency Act. The applicant also faults the respondents for allegedly entering into a license agreement with the debtors for a period of 10 years without regard to the fact that their license lasts for 10 years. The applicant also claims that the 2nd applicant's machinery has become dilapidated due to neglect and mismanagement by the respondents and therefore urges this court to exercise its powers under section 604 of the Insolvency Act and remove the administrator.

4. Through a further affidavit dated 1st February 2019, the 1st applicant states that he has filed this application in his capacity as the 2nd Applicant's creditor and that he was, as at the time of filing this case, unaware of the existence of any previously filed suits. He further states that Mombasa High Court Misc. Application No. 266 of 2018 was consolidated with Malindi ELC No. 90 of 2018 and adds that the two suits do not therefore exist independently.

5. The respondents opposed the application through the 2nd respondent's replying affidavit filed on 14th January 2019 wherein he avers that the respondents were appointed as receivers and not administrators of the 2nd applicant on 6th September 2016 and that on 8th November 2016 orders were issued by Chitembwe J. to the effect that neither of the respondents could discharge their duties as receivers of the 2nd applicant but that the said orders were reversed by Angote J. thereby allowing them to resume their duties as the 2nd applicant's receivers. He further states that he made several attempts to regain possession of the 2nd applicant salt plant but it he was barred from accessing the premises and that they only regained its full control later when they discovered that some machines were missing from the premises.

6. He further states that the operations of the 2nd applicant could not continue as there was no money in their bank account and that the replacement of the machines would cost a lot of money. He avers that it is for that reason that they decided to give Kensalt Limited a license over the 2nd applicant salt plant. He termed the application an abuse of the court process as it seeks to canvass similar issues as those that are already pending determination before the High court in Malindi and Mombasa.

7. The respondents filed a further replying affidavit dated 21st March 2018 wherein the same deponent avers that they were appointed as receivers under the provisions of the debenture dated 18th October 1999 issued in favour of Dubai Bank Kenya Limited which debenture predated the Insolvency Act that came into effect/operation on 18th January 2016. For this reason he states that their term does not come to an end at the expiry of twelve months as they were not appointed as administrators under the Insolvency Act.

8. The respondents also filed Grounds of Opposition in response to the application in which they listed the following grounds:

1. That the application has been improperly filed without authority of the 2nd applicant.

2. That the 2nd applicant does not any Directors in office and is improperly constituted.

3. That the neither the 1st applicant nor the 2nd applicant have any cause of action either as against the respondents herein and/or as against Kemusalt Packers Production Limited (In Receivership).

4. That this application is an abuse of process and seeks to have this court make a determination of matters which:

a) Are currently before Honourable Mr. Justice Korir (the Presiding Judge of the Malindi High Court) in HCCC 28 of 2016 (Malindi) and were, raised vide an application filed on 20th July 2018; and

b) Which were before Honourable Justice P.J. Otieno (Mombasa High Court) vide an application dated 22nd October 2018 filed in High Court Miscellaneous Application 266 of 2018(and which said matter has now been transferred before Honourable Mr. Justice Korir sitting in Malindi High Court and which is set to come up on 21st January 2019.

5. That the respondents herein are not administrators but are Receivers duly appointed by Dubai Bank Kenya Limited (In liquidation) in accordance with the provisions of Section 690(4) of the Insolvency Act 2015.

6. That this application is bad in law.

7. That this application is unmeritorious and ought to be dismissed with costs.

Analysis and Determination.

9. I have considered the application filed herein, the respondents' response together with the submissions filed herein and highlighted during the hearing. I find that the main issue for determination is whether the respondents are administrators by virtue of section 523 of the Insolvency Act and if so whether the applicants are entitled to the orders sought in this application. Before delving into determining the above issue, this court is minded to consider the issue raised in the respondents' replying affidavit and Grounds of Opposition regarding the existence of similar suits before both the Malindi Court and Mombasa High Court over the same subject matter. In other words, the respondents have raised the doctrine of *res sub judice.*

10. In the further replying affidavit dated 21st March 2019, the respondents provided a list of the applications before the other courts in which similar orders to oust them as receivers have been sought. The applications are listed as follows:-

a. Notice of Motion dated 20th July 2018 filed in HCCC 28 of 2016 (Malindi)

b. Notice of Motion filed on 22nd October 2018 in the High Court Miscellaneous 266 of 2018 (Mombasa)

c. Notice of motion filed on 14th December 2018 in High Court Miscellaneous 456 of 2018 (Nairobi)

d. Notice of motion filed on 4th February 2019 in Environment and Land Court Case 90 of 2018 (Malindi)

11. This court notes that the respondents attached a bundle of documents containing all the applications filed by different creditors in different courts as annexure "AM2". The existence of the said applications was not disputed by the applicants herein who in response to the long list of pending applications contended that they were not aware of any other cases and that they were not party to any of the said cases.

12. The question which then arises is whether in light of the undisputed fact that there are similar, previous applications over the issue of the removal of the respondents as the 2nd respondent's receivers, this court can still go ahead and determine the instant application. **Section 6** of the **Civil Procedure Act** provides for the doctrine of *res sub judice* as hereunder:

> ***No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. [Emphasis mine].***

13. When dealing with the doctrine of sub judice in the case of ***Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR*** the court held that:

> ***"…Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed…"***

14. The rationale for this principle was restated in ***Kampala High Court Civil Suit No. 450 Of 1993 - Nyanza Garage vs. Attorney General*** wherein the Court held that:

> ***"In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits."***

15. Similarly in **Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR** the court observed that:

> ***"It is settled law that a litigant has no right to pursue paripasu two processes which will have the same effect in two courts either at the same time or at different times with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks."***

16. It is not in dispute that the main issue raised in the instant application is the ouster of the respondents from their position as the 2nd applicant's receivers. I find that this is the exact same issue that is the subject of similar applications pending before other courts. The applicants have argued that they were not aware of the existence of the other similar applications as at the time of filing the instant application and that they are not parties to the said cases. I find this argument to be contrary to the facts contained in the pleadings filed in the said related cases which show that the 2nd applicant is cited as the applicant in all the related cases. In **Kemusalt Packers Production Limited vs Peter Kahi & Anthony Muthusi Mombasa Misc. Civil Suit No. 266 of 2018**, Justice P.J. Otieno on 3rd December 2018 pronounced himself on the issue of the existence of an earlier suit filed before Malindi Court as follows:

> ***"I have heard the benefit of reading the pleadings and decisions handed out in the Malindi suit and I am convinced that even though there are prayers that attack the appointment of the Respondents to manage the affairs of the Applicant here, that attack is largely on the basis that there was no right to appoint them unlike here where the contention seen to be that the appointment was irregular or just null and has come to an end by the operation of law. However as structured, crafted and filed this application could conveniently and properly be pleaded in the Malindi matter so that prospects of two different courts rendering themselves on one matter of appointment and continued stay in office by the Respondents may be dealt with by one court rather than two. That is what I understand to be the dictate of Section 6 of the Civil Procedure Act which prohibits a court from proceeding with a suit in which the dispute is a matter directly or substantially in issue of a previously instituted suit."***

17. My finding therefore is that the applicants in this application cannot be heard to say that they were not aware of the existence of the earlier cases considering that the 2nd applicant herein was the applicant in the Mombasa case.

18. Be that as it may and even assuming, for a moment and for argument purposes, that the applicants did not know about the other pending applications, I note that the respondents were careful to take the earliest opportunity, when they first appeared in court on 20th December 2018, to inform the court and the applicants of the existence of the other similar suits. My take is that the applicants would not have suffered any prejudice if they, in turn, seized the earliest opportunity to refer their dispute/claim to the court that is already handling the dispute so as

to avoid running into the risk of being caught up by in the *sub judice* rule.

19. From the jurisprudence developed in respect to the *sub judice* doctrine, it is clear that courts have taken the position that they will not entertain multiplicity of suits over the same subject matter. Needless to say, multiplicity of suits may give rise to the undesirable result of different courts making different decisions over the same subject matter thereby causing not only confusion between the parties, but also embarrassment to the court. My humble view is that in order to avoid multiplicity of suits, justice permits to have the judicial officer who heard the first related matter proceed with this application as well. This means that my finding over the issue of sub judice does not discharge the applicant's right to be heard. I am guided by the decision in the case of ***Mbaki & Others V. Macharia & Another*** ***(2005) 2 EA 206,*** wherein it was held:

> ***"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."***

20. In conclusion and having found that the instant application and suit is sub judice, I find that the applicants are at liberty to refer this matter to Malindi Court for hearing and determination. I make no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 31st day of July 2019.

W. A. OKWANY

JUDGE

In the presence of

No appearance for the parties.

Court Assistant - Fred