REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 68 OF 2015

SURYA HOLDINGS LIMITED.....1ST PLAINTIFF

RHEA HOLDINGS LIMITED.....2ND PLAINTIFF

YESHODA INVESTMENTS LIMITED.....3RD PLAINTIFF

KARUTURI LIMITED.....4TH PLAINTIFF

KARUTURI OVERSEAS LIMITED.....5TH PLAINTIFF

VERSUS

ICICI BANK….....1ST DEFENDANT

KOLLURI VENKATA SUBBARAYA KAMASATRY.....2ND DEFENDANT

RULING

1. Surya Holdings Limited (Surya or the 1st Plaintiff), Rhea Holdings Limited (Rhea or the 2nd Plaintiff), Yeshoda Investments Limited (Yeshoda or the 3rd Plaintiff) and Karuturi Overseas Limited (Karuturi overseas or the 5th Plaintiff) have relaunched an attempt to injunct ICICI Bank (the 1st Defendant) and its Receiver Manager Kolluri Venkata Subbaraya Kamasatry (the Receiver and Manager), from advertising and selling its business, assets and certain parcels.

2. That relaunch is taken up in an application in which 6 proposed Plaintiffs seeks to be enjoined to these proceedings as Plaintiffs so as to continue these proceedings on behalf of Karuturi Limited (the 4th Plaintiff) in a derivative capacity. This composite application is contained in the Notice of Motion dated 24th October 2017 for the following prayers:-

> 1. Spent
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> 2. THAT pending the hearing and determination of this application inter partes an injunction do issue restraining the Defendants, by themselves, servants, auctioneers, receivers, agents, or advocates or any of them or otherwise from advertising and selling the 1st, 2nd, 3rd and 5th Plaintiffs' business, assets and pieces or parcels of land known as:-

a. Land Reference Number 12248/19, in the name of Surya Holdings Limited.

b. Land Reference Number 12248/20, in the name of Surya Holdings Limited.

c. Land Reference Number 12248/21, in the name of Surya Holdings Limited.

d. Land Reference Number 12248/38, in the name of Surya Holdings Limited.

e. Land Reference Number 25261/61, in the name of Surya Holdings Limited.

f. Land Reference Number 25262/62, in the name of Surya Holdings Limited.

g. Land Reference Number 11669/2, in the name of Surya Holdings Limited and

h. Land Reference Number 10854/60, in the name of Rhea Holdings Limited

3. THAT leave be granted to the proposed 6th to the 12th Plaintiffs to join this suit as Co-Plaintiffs, and that the Plaint be amended accordingly.

4. THAT Leave be granted to the 6th to the 12th Plaintiffs to join this suit as Co-Plaintiffs, and that the Plaint be amended accordingly.

5. THAT the Application and Suit herein be set down for speedy hearing, on consecutive dates, for determination of the issues on merit as directed by the Court of Appeal Judgement dated 30th June 2017.

6. THAT pending the speedy hearing and determination of the suit herein on merit, as directed by the Court of Appeal Judgement dated 30th June 2017, an injunction doe issue restraining the Defendants, by themselves, servants, auctioneers, receivers agents, or advocates or any of them or otherwise from advertising and selling the 1st, 2nd, 3rd and 5th Plaintiffs' business, assets and pieces or parcels of land known as:-

i. Land Reference Number 12248/19, in the name of Surya Holdings Limited.

j. Land Reference Number 12248/20, in the name of Surya Holdings Limited.

k. Land Reference Number 12248/21, in the name of Surya Holdings Limited.

l. Land Reference Number 12248/38, in the name of Surya Holdings Limited.

m. Land Reference Number 25261/61, in the name of Surya Holdings Limited.

n. Land Reference Number 25262/62, in the name of Surya Holdings Limited.

o. Land Reference Number 11669/2, in the name of Surya Holdings Limited and

p. Land Reference Number 10854/60, in the name of Rhea Holdings Limited

7. THAT the Plaintiffs and their agents be permitted to conduct an independent valuation of their businesses and assets.

8. THAT the costs of this application be provided.

3. The Application is made in the context of a claim by the Plaintiffs against the Defendant whose genesis can be traced to an agreement by the Bank to grant certain facilities to Karuturi Overseas. In the Plaint

filed herein on 17th February 2015, the Plaintiffs aver that the Bank had offered to grant Karuturi Overseas Bank Financial accommodation with a total limit of USD 40,000,000/=. That accommodation which comprised of two term loans and a working capital demand loan were to be secured, inter alia, by a Debenture created by the 1st, 2nd, 3rd and 4th Plaintiffs and various Corporate and Personal Quarantees.

4. The securities which were also held by CFC Stanbic Bank Limited were to be shared on a *pari passu* basis with the Bank under a securities sharing Agreement entered between the two lenders.

5. A complaint by the Plaintiffs, as set out in the Plaint, is that the Bank willfully defaulted in its contractual duty and obligation and only advanced part of the facilities. That notwithstanding, it is the case of Karuturi Overseas, that it fulfilled its part of the bargain by repaying instalments towards the partialy disbursed facilities. The Plaintiffs are aggrieved that on a date, which is not given in the Plaint (but would be 5th June, 2014), the Bank appointed the 2nd Defendant as a Receiver over the assets of the 1st, 2nd, 3rd and 4th Plaintiffs. It is said that the appointment is irregular, premature, in bad faith and oppressive. The reasons are particularized in the Plaint but need not be set out for purposes of dealing with the business of the day. In addition, the Receiver and Manager is said to be mismanaging the Business of Karuturi and in breach of his fiduciary duties.

6. Further, the Plaintiffs aver that the Receiver and Manager had advertised the properties of 1st to 4th Plaintiffs for sale. The Plaintiffs took the view that no such right had accrued and there would also be other reasons which made the Defendants' conduct *malafides* and fraudulent. These include that the Bank had not registered any legal charge or mortgage over the properties. Secondly, CFC Stanbic Bank Ltd had been restrained from selling the suit properties in HCC No.78 of 2014 Surya Holdings Limited & 2 Others vs. CFC Stanbic Bank Ltd (**hereafter Stanbic Suit**) and that the advertisement of the properties for sale was a contemptuous breach of the said Order.

7. Ultimately the Plaintiffs sought the following orders:-

a. A declaration that the 1st Defendant is in breach of its contractual obligations contained in the various facilities documents and that they cannot rely on the same contracts being the Facility Letters, Debentures, Letters of Guarantee and Indemnities.

b. A declaration that the appointment of the 2nd Respondent herein, Mr. Kolluri Venkata Subbaraya Kamsastry as receiver of the 1st, 2nd, 3rd and 4th Plaintiff was unlawful, illegal and vid ab initio.

c. A permanent injunction do issue restraining the 1st Defendant/Respondent either by itself or through Mr. Kolluri Venkata Subbaraya Kamassatry the 2nd Defendant being its Receiver/Manager or such other Receiver/Manager that it may purport to appoint or any of them, servants, auctioneers, agents, or advocates or any of them or otherwise from advertising or offering for sale, or purporting to sell, or in any other way alienating the 1st, 2nd, 3rd and 4th Plaintiffs' movable properties including but not limited to ALL THOSE PROPERTIES KNOWN AS Land Reference Numbers 12248/19, 12248/20, 12248/21, 12248/38, 25261 and 25262 in the name of Surya Holding Limited, the 1st Plaintiff herein and Land Reference Number 10854/60 (Title No. I.R 87312), in the name of Rhea Holdings Ltd, the 2nd Plaintiff herein or otherwise howsoever dealing with the suit properties.

d. A permanent order of injunction do issue against the 1st Defendant, being its Receiver/Manager or such other Receiver/Manager that the 1st Defendant may purport to appoint restraining him and/or them from discharging, executing and/or effecting any powers or such powers under the Deed of Appointment dated 9th June 2014, or such other appointing instrument or in any other way interfering with the operations, management, running and affairs of the 1st, 2nd,3rd and 4th Plaintiffs/Applicants.

e. A mandatory injunction do issue to compel the 1st Defendant and its appointed Receiver, the 2nd Defendant herein or any other Receiver or manager or agent appointed by it, to leave the premises of the 1st, 2nd, 3rd and 4th Plaintiffs.

f. Cost of this suit.

g. Any other relief that the Honourable Court may deem just and convenient.

8. As one of the issues that prompted the filing of the suit was the imminent sale of the charged properties, the Plaintiffs moved Court for Protective Orders through a Motion dated 17th February 2015 for injunction. The venture by the Plaintiffs succeeded and on 14th July 2015, the Court issued the following orders:-

"6. An Injunction restraining the 1st Defendant either by itself or through Mr.Kolluri Venkata Subbaraya Kamassatry, the 2nd Defendant, being its Receiver and Manager or such other Receiver and Manager that it may purport to appoint or any of them, servants, auctioneers, agents or advocates or any of them or otherwise form advertising or offering for sale, or purporting to sell, or in any other way alienating the 1st, 2nd, 3rd and 4th Plaintiffs movable and immovable properties including but not limited to ALL THOSE PROPERTIES KNOWN AS Land Reference Number 10854/60 (Title NO. I.R 87312), in the name of Rhea Holdings Ltd, the 2nd Plaintiff/Applicant herein, Land Reference Numbers 122248/19, 12248/20, 12248/21, 12248/38, 25261 and 25262 in the name of Surya Holdings Limited the 1st Plaintiff herein or otherwise form howsoever dealing with the suit properties pending the hearing and determination of this suit.

7. An Injunction restraining the 1st Defendant either by itself or through Mr. Kolluri Venkata Subbaraya Kamasastry, the 2nd Defendant, being its Receiver and Manager or such other Receiver and Manager that it may purport to appoint or any of them, servants, auctioneers, agents, or advocates or any of them or otherwise from advertising or offering for sale, or purporting to sell, or in any other way alienating the 1st, 2nd, 3rd and 4th Plaintiffs' assets under or secured by the Debenture dated 24th October 2011 pending the hearing and determination of this suit.

8. An Injunction restraining Mr. Kolluri Venkata Subbaraya Kamasastry the 2nd Defendant being the 1st Defendant's Receiver and Manager or such other Receiver and Manager that the 1st Defendant may purport to appoint from discharging, executing and/or effecting any powers or such powers under the Deed of Appointment dated 9th June, 2014 or such other appointing Instrument or in any other way interfering with the operations, management, running and affairs of the 1st, 2nd, 3rd and 4th Plaintiffs pending the hearing of this case. This order is not removal of the Receiver and Manager. It only stops him from exercising any of his powers".

9. The Plaintiffs enjoyed that Protection until not too long ago, on 30th June, 2017 when the Court of Appeal reversed the decision of the learned Judge.

10. Savoring its victory at the Court of Appeal, the Bank and its Receiver and Manager has offered the business and assets of Karuturi Ltd (in Receivership) together with all assets of the 1st, 2nd and 3rd Plaintiffs for sale. That advertisement was published in the issue of 12th October 2017 of the Daily Nation. It is that sale and future attempts that the Motion before Court seeks to stop.

11. The grounds in support of the Motion are set out as follows on the face of the Motion:-

a. The Defendants have scuttled attempts by the Plaintiffs' Directors and Shareholders to conduct an independent valuation that was aimed at obtaining funds to settle. They have also declined to provide the valuation that they are utilizing for the unlawful attempts at selling.

b. The 1st Defendant has no registered charge as provided for under S.79 of the Land Act, as would enable the Defendants to sell the 1st and 2nd Plaintiffs' immovable property.

c. The 1st Defendant has not acquired any right to dispose of the said property, as the debenture relied upon, to the extent that it purports to form the basis of their right to dispose of the suit properties, is null and void, on account of no Agricultures Land Control Board consent having been applied for, and or granted by the relevant Divisional Land Control Board in which the subject properties are situated.

d. The 2nd Defendant's advertisement purports to sell the ".. business and assets of Karuturi Limited (in Receivership) …; which surreptitiously includes the suit properties herein.

e. To the extent that the stated intention purports to sell the "…business and assets of Karuturi Limited (in Receivership) …; Karuturi Limited the 4th Plaintiff herein is currently under Liquidation.

f. The 2nd Defendant's actions are in bad faith since, even if the injunctions were lifted, sale of the entire business and assets of tall the companies valued at USD 90,951,631.00 as at 21st June 2012 to settle a disputed claim of USD 21,124,551 (where the 5th as borrower states that from the partially disbursed amount, only USD 9.84 million remains unpaid) is in contravention of the law and spirit contained in the Insolvency Act.

g. At a Karuturi Limited's Creditor's meeting held on 21st July 2016, the 1st Defendant voted to the tune of U|SD 16,634,551, so as to enable them have a weighed vote at the Creditor's meeting on account they had their say on the appointment of the 4th Plaintiff's Liquidator. In keeping with the ruling made by the Honorable Justice Fred Ochieng on 11th July 2016 orders that the repealed Companies Act Cap 486 of the Laws of Kenya applies , the 1st Defendant's vote is subject to Rules 128 and 129 of the Companies (Winding Up Rules; and are thereby bound by their concession made.

h. The immovable securities the Defendants wish to foreclose upon are held by CFC Stanbic Bank Limited, who hold legal charges over the said properties and are the subject of an injunction issued by the Honorable Court in HCC N.78 oft 2014, Surya Holdings Limited & others vs. CFC Stanbic Bank.

i. The applicants herein have notified the CFC Stanbic Limited of the said intended sale by the Defendants herein, but the said Chargees seem unfazed, by reason of which the Applicants herein believe that this purported sale is an attempt to circumvent the said injunction.

The supporting affidavit of Sai Ramakrishna Karuturi who is the Chairman and Managing Director of the 1st, 2nd, 3rd and 5th Plaintiffs populates those grounds by providing some evidence said to be in support thereof.

12. In opposing the Notice of Motion, it is not surprising that the Bank and Receiver and Manager raised the argument that the Application is res judicata the Application of 17th February 2015, the outcome thereof and the determination of Civil Appeal No. 284 of 2015 arising therefrom. The other grounds in opposition that were taken up in the Notice of Preliminary Objection dated 30th October 2017 and the Replying Affidavit of the 2nd Defendant sworn on 30th October 2017 are that the Application contravenes the Provisions of Section 228 of the Repealed Companies Act which requires Leave of Court prior to proceeding with a matter involving a Company over which a winding up order has been made. Secondly, that the Applicants have not complied with the mandatory provisions with respect to initiating Derivative suits nor met the threshold for Derivative suits. The Bank and its Receiver and Manager also criticize the Plaintiffs for failing to disclose to Court that they have sought an Order of injunction before the Court of Appeal pending an intended Appeal to the Supreme Court

13. The two preliminary objections raised are in respect to the plea of Res judicata and the alleged infraction of Section 228 of the Repealed Companies Act. Let me consider them in that order.

14. The Defendants assert that the following issues which are raised in the current Application are caught up by the Doctrine of Res judicata.

a. Allegations that the Bank has not registered a Charge over the 1st and 2nd Plaintiffs property as is required by Section 79 of the Land Act.

b. That the debenture relied upon by the Bank is null and void because of lack of a Land Control Board Consent.

c. The Bank is seeking to dispose of the entire Business and Assets of the Plaintiffs whose value far outways the Debt due to the Bank.

d. The Bank is caught up with reference to Karuturi limited by voting at a Creditors meeting.

e. CFC Stanbic Bank holds a security over the Assets and there is subsisting an injunction against the Bank in Nairobi HCC No.78 of 2014.

f. Whether consolidation of the 5th Plaintiff's Account was agreed upon by the parties.

g. Whether the Bank failed to honour its contractual obligation.

15. That the plea for res judicata applies to applications as it does to suits is undoubted. That plea, whose policy consideration is primarily that it is against public policy for a matter which has been litigated and resolved by a competent tribunal to be relitigated is codified in Section 7 of the Civil Procedure Act which reads:-

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court".

16. That provision of the law has the following Explanation:-

Explanation. —(1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation 4 is particularly relevant to the matter at hand and must be kept in view.

17. When the 1st to 5th Defendants at the outset of these proceedings, filed the Application on 17th February 2015 for Injunction it cited various reasons for making the request. One of the reasons was that the Charge created by the Debenture herein is an informal charge as defined by Section 79 of the Land Act and that the attempted sale could only proceed upon sanction by the Honourable Court. That argument is again raised in the Notice of Motion before Court.

18. Common as well to the two applications is the complaint by the Plaintiffs that the Defendants are seeking to sell the entire business and assets of the Plaintiffs whose value far outways the outstanding Debt. Also taken up in the current application is that the conduct of the Defendants to foreclose the removable securities which are held by CFC Stanbic Limited is in disobedience of the order of injunction issued by Court in HCC No.78 of 2014.

19. Without a doubt the 3 issues pointed to above were raised in the application that came up before this Court and were the subject of the Courts determination of 14th July 2015. I have noted earlier that Ruling was set aside by the Court of Appeal together with the injunctive orders issued thereunder on 30th June 2017. It requires no effort therefore to see that the 3 issues raised again either directly or disguised in different arguments are res judicata.

20. The Court had observed that explanation No. 4 of Section 7 is of some relevance to the plea taken up by the Defendants. The question to be answered is whether any of the issues raised in this subsequent application might or ought to have been a ground of Defence or attack in the former application. This Court sees one issue. A discourse that the current application proposes is whether or not the Debenture held up by the Bank is null and void for lack of consent by the relevant Divisional Land Control Board. The Debenture is dated 24th October 2011 and was registered on 21st November 2011. If there is merit in the argument by the Plaintiff then the consent ought to have been obtained prior to the registration of the Debenture. The lapse would therefore have been apparent as early as 21st November 2011 when registration occurred. This is an argument that was available to the 1st – 5th Plaintiffs right from the outset. This was in fact rightly conceded to by Mr. Wandabwa for the Applicant. And no reason has been proffered as to why it was not taken up at the first opportunity for injunction. The rationale for explanation No. 4 of Section 7 of the Civil Procedure Act is that a party should not be permitted to litigate in installments. It would be grossly unfair for a party to take up an application on some grounds and to hide some other arsenal that is available to it only to unleash it at a later stage. An application ought to be made upon all grounds at the disposal of an Applicant. Res judicata applies to every issue which properly belongs to a previous application and which might have been taken up at the time. A party will not be excused even if the matter was omitted through negligence, inattention or accident.

21. Mr. Wandabwa nevertheless argues that the application of Section 7 is not cast in stone. His argument is that by freshly advertising the securities for sale, the Defendants are committing both an illegality and a crime because of the initial infraction of the mandatory provisions of the Land Control Act. The Court is asked to overlook the doctrine of Res Judicata so as to prevent this impending illegality. This is an attractive argument when one considers the provisions of Section 22 of the Land Control act which criminalizes Acts done in furtherance of void transactions, it provides:-

> "Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6 of this Act, and any person—
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> (a) pays or receives any money; or
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> (b) enters into or remains in possession of any land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months,

or to both such fine and imprisonment".

22. The flavor of that argument is however lost when it is considered that this very argument was available to the Plaintiffs on 17th February 2015 when they sought their first injunction. One of the issues that had distressed the Plaintiffs then is that the Receivers had, in an advertisement in the Daily Nation Newspapers of 26th January 2016, offered for sale the business and assets of Karuturi Ltd together with the lands registered under the ownership of the 1st, 2nd and 3rd Defendants. It could be argued then that the intended sale was an act in furtherance of a void transaction. This was an issue that properly belonged to the first application and it would be oppressive and intolerable to the Respondents for the Plaintiffs to be permitted to raise this issue so as to defeat each attempt to sell the properties when it was not taken up at the earliest occasion it presented itself. This argument, like the other three discussed earlier, are caught up with the Doctrine of Res Judicata.

23. That said a party is entitled to bring a second application for injunction if new facts or circumstances arise. The application before Court would reveal the following new set of facts or circumstances:-

a. That the Bank is attempting realization of the securities without undertaking recent valuations.

b. A winding up order against Karuturi Limited (the 4th Plaintiff) was made on 30th March 2016.

c. There was a meeting of Creditors of Karuturi Limited held on 21st July 2016 in which it is alleged that the Bank voted and thereby made certain concessions to which it is bound.

Arguments around these facts or alleged facts are not res judicata.

24. That does it for the first Preliminary objection.

25. It is common ground (see paragraph 6(e) of the Affidavit in support of Sai Ramakrishna Karuturi sworn on 24th October 2017) that on 30th March 2016 the Court made an order winding up Karuturi Limited. The winding up Petition was filed in the year 2013 when the Repealed Companies Act (chapter 486) was still in force. Part IV of the Insolvency Act which provides for liquidation of Companies commenced on 18th January 2016 and so the winding up order was made when the new statute had become operative. A stance taken by the Bank and its Receiver and Manager is that the Application before Court is a cropper because the Applicants have not sought the leave of this Court to proceed with a matter which involves a Company over which a Winding up order has been made. Section 228 of The Repealed Companies Act is cited and reads:-

"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".

26. As a prefatory to considering this argument this Court must locate the statute applicable to the affairs of Karuturi Limited. For orderly passage from the Repealed statute to the Insolvency Act, Section 734 of the latter statute make transition provisions in respect to winding up and Insolvency of Companies. This Section reads as follows:-

(1) In this section—

"the commencement" means the coming into operation of Parts VI to X;

"past event" means any of the following that has occurred before the commencement:

(a) the passing by the company of a special resolution resolving that the company be wound up;

(b) the making of an application to the Court for a winding up order in respect of the company;

(c) the appointment of a liquidator or provisional liquidator in respect of the company;

(d) a failure by the company to deliver the statutory report to the Registrar or to hold the statutory meeting required under the repealed Companies Act;

(e) failure by the company to commence its business within a year from its incorporation or, if the company has suspended carrying on business, the elapse of a whole year since the business was suspended;

(f) a reduction of the number of members of the company, in the case of a private company, below two, or, in the case of any other company, below seven;

(g) the inability of the company to pay its debts;

(h) in the case of a company incorporated outside Kenya and carrying on business in Kenya —the commencement of winding-up proceedings in respect of it in the country or territory of its incorporation or in any other country or territory in which it carries on or formerly carried on business;

(i) the appointment of a receiver in respect of the company by the holders of the company's debentures;

(j) the appointment of a receiver and manager in respect of the property of the company.

(2) Despite the repeal of the Companies Act, or of Parts VI to IX of that Act, those Parts, and any other provisions of that Act necessary for their operation, continue to apply, to the exclusion of this Act, to any past event and to any step or proceeding preceding, following, or relating to that past event, even if it is a step or proceeding that is taken after the commencement.

(3) Subsection (2) has effect subject to any transitional regulations in force under section 736 that relate to the insolvency of companies and other bodies corporate".

27. Part iv of the Insolvency Act which contains substantive provisions on liquidation of Companies came into operation on 18th January 2016. No doubt therefore, and by dint of subsection (1) (b) of the Transitional provisions, the presentation of a Petition to Court for the Winding up of Karuturi on 7th August 2013 was a past event. It follows, on the reading of subsection 2, that the provisions of the Companies Act V parts or Vi to IX of that Act, and any other provisions of the repealed Act necessary for their operation will continue to apply (to the exclusion of the Insolvency Act) to any step or proceeding following the past event, even if it is a step or proceedings that is taken after the commencement.

28. This is the same finding that was made by Ochieng J. in the winding up cause itself (No.12 of 2013 IN THE MATTER OF THE WINDING UP OF KARUTURI LIMITED).

29. The Law providing for the consequences of a Winding Up order was found in part VI of the Repealed statute. It is in this part that the provisions of Section 228 are found.

30. As an ingenious way of finding their way out of the difficulty that section 228 would have placed on their way, the Applicants argued that the provisions of Section 228 would be inapplicable because (the Plaintiffs) they do not seek to continue any suit on behalf of a company or liquidation. That they are proceeding with their own suit.

31. But what does a keen look at the Application reveal? The Application is brought by the 1st, 2nd, 3rd

and 5th Plaintiffs and the proposed Plaintiffs. The proposed Plaintiffs wish to continue the suit on behalf of the 1st and 2nd Plaintiffs in derivative capacity (see paragraph 14 of the affidavit of Sai Ramakrishna Karuturi). Karuturi limited is not one of the Applicants. However, it remains as a Plaintiff, the 4th Plaintiff herein. As long as the 4th Plaintiff remains in these proceedings, the proceedings are automatically stayed unless the Leave sought by Section 228 is granted. No such leave has been sought or granted in respect to these proceedings.

32. The provisions of section 228 are not to be taken lightly and this Court has had occasion to consider the rationale of the provisions requiring the approval of Court to continue or commence proceedings against a Company placed under Winding up. In Winding Up cause No. 12 of 2013 IN THE MATTER OF KARUTURI LIMITED the Court observed:-

> "7. The grant of leave is not a matter of course but discretionary. Each application will be considered on its own circumstances and facts. It is suggested that some of the matters relevant to grant of leave are:-
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> > "…..the amount and seriousness of the claims; the degree and complexity of the legal and factual issues involved; the stage to which the proceedings, if commenced, have progressed; the risk that the same issued would be relitigated if the claims were to be the subject of a proof of debt; whether the claim has arguable merit; whether proceedings are already in motion at the time of liquidation; were to be the subject of proof of debt; whether the claim has arguable merit; whether proceedings are already in motion at the time of liquidation; whether the proceedings will result in prejudice to creditors; whether the claim is in the nature of a test case for the interest of a large class of potential claimants; whether the grant of leave will unleash an avalanche of litigation; whether the cost of the hearing will be disproportionate to the Company's resources; delay and whether pre-trial procedures such as discovery and interrogatories are likely to be required or beneficial"(https://briferrer.com.au)
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> See also the observation of the Court of Appeal in Kirtesh Premchand Shah vs. Trust Bank Limited [2007] eKLR, where it stated,
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> > "Without indulging in any comprehensive discourse on the subject, we think the rationale for the provisions of the section was to ensure that the Court, the acknowledged neutral arbiter of disputes, takes control of the disabled commercial entities and ensures justice and fairness to all creditors, whether secured or unsecured, and the contributories. That is why the liquidator must answer to the Court for all his activities as he owes a statutory duty to the creditors and the contributories".

33. Yet there may be an argument that the Leave granted to the Bank by the Winding Up Court on 16th February 2017 to proceed with Nairobi Civil Appeal No. 285 of 2015 that emanated herefrom is sufficient and further Leave is unnecessary. That argument is however without force because for purposes of Leave under the provisions of Section 228, a suit and an Appeal from the suit are treated as separate proceedings. The sanction of the Winding up/insolvency Court is sought and granted on "the basis of facts and circumstances existing when the matter is laid before the Court and the Court exercises its discretion in those particular facts" (see Kirtesh Premchand Shah *supra)*. The facts and circumstances existing now may be different from those that existed when Leave to pursue the Appeal was granted on 16th February 2017.

34. This Court reaches a decision that leave was necessary. And it has to be said that this Court would have still reached the same outcome even if the applicable law was the current Insolvency Act. Section 432(1) of the new Statute has similar provisions to Section 228 of the Retired Statute:-

> "432(1) when a liquidation order has been made or a provisional Liquidator has been appointed, Legal proceedings against the Company may be began or continued only with the approval of the Court and subject to such conditions as the Court may consider appropriate".

35. This is an outcome that the Applicants had contemplated and so asked the Court to excuse the lapse in view of the urgency in which they came to Court to forestall a sale. This Court has set out the rationale for the rule which is the premise for the Court insisting on its observance. Where there is urgency, then an Applicant may present a composite application with the first prayer being one for Leave. A total non-observance of the Rule will not be tolerated. It is an issue of substantive and not procedural law.

36. Clearly then the Notice of Motion dated 24th October, 2017 has run into an unsurmountable difficulties. It would therefore be needless to consider its merits.

37. This would have been a good place to stop but it would be opportune for this Court to discuss, without going into merits, one limb of the Motion before it. The 6th to the 12th Plaintiffs seek Leave of the Court to continue these proceedings on behalf of the 1st and 2nd Plaintiff Companies who are in Receivership. The request for permission invites this Court to consider the circumstances when a Court should allow a Derivative action by a Member or Director of a Company in Receivership. That question is not novel in Kenya (see for example Amin Akberali Manji & 2 others vs. Altaf Abdulrasul Dadani & another [2015] eKLR). Let me add my voice to that discussion with the following observations.

38. At heart of the right of a Director or Member to bring a Derivative Action in a Company under Receivership is the concept that merely placing a Company under receivership does not divest a Director or member of a Company of the right to bring or intervene in actions on behalf of the Company. But just as with ordinary Derivative Actions it must be in appropriate circumstances and with the sanction of Court. Whilst the repealed Companies Act (chapter 486) never provided for the procedure for seeking that Leave, the procedure then adopted was that of English Common Law (see Amin Akberali Manji & 2 others Supra).

39. The current statute, the Companies Act (Act No. 17 of 2015) dedicates its Part XI (Sections 238 – 242) to Derivative actions. Section 238(1) gives the meaning of a Derivative claim and provides:

> In this Part, "derivative claim" means proceedings by a member of a company—
>
> (1) (a) in respect of a cause of action vested in the company; and
>
> (b) seeking relief on behalf of the company". (*My emphasis)*

Although Part XI does not make reference to Derivative actions in Companies in receivership, the procedure to be used in seeking Leave would have to be the procedure set out in Part XI.

40. The provisions of Part XI of the Companies Act sets out the types of Action that can constitute a Derivative claim and instances when a Derivative claim can be commenced or maintained. Classically, security documents which appoint a Receiver confer the Receiver with broad powers over the Company's Assets and Affairs. Often, many but not all the powers that inhere in a Director prior to a receivership are surrendered to a Receiver (of course subject to terms of the instrument of appointment that vary from case to case). Because of the similarity of some of the Powers of a Receiver with that of a Director, the provisions of part XI would be a useful guide as to when a member or Director should be permitted to commence or continue with a Derivative claim of a Company in Receivership.

41. Borrowing from the provisions of Section 238(3) of The Act, a Derivative claim of a Company in Receivership would typically be in respect to a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by the Receiver. It has however been suggested that it can extend to where a Director or Member wishes to litigate the validity of a security under which the appointment has been made (Avalon Motors Ltd (in Receivership) vs. Bernand Leigh Gadsdent Anor (1998) S.J.26CS.C), and perhaps the appointment itself.

42. In considering whether or not to grant permission to commence or continue a claim as a Derivative Action of a Company in Receivership, the Court will have to be satisfied that:-

i. Generally, the action sought to be commenced or continued will not prejudice the proper administration of the Receivership.

ii. It is probable that the Company will not institute the proceedings after a request has been made to the Receiver. The refusal may be actual or probable.

iii. The Director or Member is acting in good faith. The action must be for the good of the Company and not a vehicle to achieve some collateral objective that would be inimical to proper administration of the Receivership.

iv. The Action is in the best interest of the Company. So that, for instance, where a claim gives rise to a cause of action that a member or Director could pursue in his/her own right rather than on behalf of the Company then permission should be refused.

v. The claim must involve serious questions as opposed to frivolous matters that will unnecessarily distract the proper administration of the Receivership.

43. But for the reasons stated earlier, the Notice of Motion dated 24th October 2017 is hereby struck out with costs.

Dated, Signed and Delivered in Court at Nairobi this 15th day of February 2018.

F. TUIYOTT

JUDGE

PRESENT;

Owino for 1st, 2nd, 3rd, 5th Plaintiffs

Owino for 6th – 12th proposed plaintiffs

Nyaribo for 1st & 2nd Respondents

Dennis - Court Clerk