



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.216 OF 2018

KSC INTERNATIONAL LIMITED (IN RECEIVERSHIP).....PLAINTIFF

- VERSUS -

MWANJOLE CHAKA

ANDREW ATETWE T/A

KILIMANJARO AUCTIONEERS.....DEFENDANTS/APPLICANTS

RULING

1. Before me are four applications being as follows:-

- a) Notice of motion dated 30th May 2018 filed by the firm of M/s Walker Kontos Advocates for the Plaintiff/Applicant.
- b) Notice of motion dated 8th June 2018 by M/s Walker Kontos Advocates for the interested party.
- c) Notice of motion dated 18th June 2018 by M/s Chebukaka & Associates for the Defendants/Applicants.
- d) Notice of motion dated 4th July 2018 by Kaplan & Straton Advocates for the proposed intended party.

2. At the hearing the court directed that all the above mentioned applications be heard together and counsel do put in written submissions. The firm of M/s Walker Kontos Advocates put in their submissions in support of their applications dated 8th June 2018, for the interested party to be enjoined as interested party; and submissions in support of the plaintiff's application dated 30th January 2018 seeking orders of injunctions and submissions in opposition of the defendants application dated 18th June 2018 seeking transfer of the suit to the High Court at Voi. The same firm of Advocates filed further submissions dated 1st October 2018 on the same issues. The defendants' counsel filed his submissions dated 2nd October 2018 in support of their application and opposing the applications by the other parties.

3. I have very carefully perused the applications, the Replying affidavit and grounds of opposition in respect of each respective application and I propose to deal with each application on its own save the two related applications for rejoinder of the Applicants as interested parties. I will deal with the issues arising in respect of each application on its own.

A) Notice of motion dated 30th May 2018 filed by the firm of M/s Walker Kontos Advocates for the Plaintiff/Applicant.

4. The Notice of motion dated 30th May 2018 is brought pursuant to section 1A & 1B, 3A, of Civil Procedure Act, Order 40 (2) and (3) of Civil Procedure Rules, and all enabling provisions of the law seeking the following orders:-

- 1) The application be certified as urgent and service of the application be dispensed with and the application be heard *ex-parte* in the first instance.
- 2) Pending the *inter-partes* hearing and determination of this application, the Defendants/Respondents be restrained whether by their employees, servants or agents or any of them or otherwise howsoever from removing and selling any of the assets of the Plaintiff/Applicant.

3) Pending the *inter-partes* hearing and determination the main suit, the Defendants/Respondents be restrained whether by their employees, servants or agents or any of them or otherwise howsoever from removing and selling any of the assets of the Plaintiff/Applicant.

4) Any further orders that may be made in the interest of justice.

5) The costs of this application be provided for.

5. The Defendants/Applicants are opposed to the application and in doing so, have filed a Replying affidavit dated 18th June 2018. It is contended that the application is unmerited and fails to meet the threshold for granting injunction orders.

6. The matter is related to Hccc No. 446 of 2015 in which an order is in force for preservation of all the assets belonging to the plaintiff company, which include the proclaimed assets. The Defendants/Applicants, claim for rent arrears, whether merited or not, is unsecured claim and therefore the defendants/applicants cannot be allowed to unilaterally seize and sell assets of the company under receivership without following the laid down procedure under section 95 and 311 of the Companies Act 486 (*now repealed*), which still continues to apply in this receivership of the plaintiff company the defendants being not a priority creditor, are therefore estopped from claiming preferential payment nor can they be justified in seeking proclamation.

7. I have considered the submissions by the defendants and do not find that they have satisfied the conditions set out for granting orders of injunctions as set out in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) E.A 358**. The defendants have not demonstrated that they have a prima facie case with probability of success; nor that if the orders of injunction are not granted they would suffer irreparable loss that won't be adequately compensated by way of damages and that balance of convenience tilts in their favour.

8. In view of the forgoing and in the interest of doing justice and for the benefit of the secured and unsecured creditors of the Plaintiff/Applicant; I will grant the orders in this application restraining the Plaintiffs/Respondents from removing and selling the proclaimed assets till the suit is heard and determined.

B) Notice of motion dated 8th June 2018 by M/s Walker Kontos Advocates for the interested party

And

Notice of motion dated 4th July 2018 by Kaplan & Stratton Advocates for the proposed intended party.

9. The application dated 8th June 2018 is brought pursuant to provisions of order 1 Rule 10(2) of the Civil Procedure Rules and all other enabling provisions of the laws, seeking the following orders:-

a) Bank of Africa Kenya Limited be enjoined in this sit as an interested party.

b) The costs of this application be provided for.

10. It is based on the grounds that the intended interested party is a secured creditor of **KSC International Limited** (*in receivership*), and one of the Banks that appointed the current Receivers and Managers of **KSC International Limited**; that the proclaimed assets, which are part of the subject matter of the suit, are contained in crystallized securities held by various debenture holders over the Plaintiff's Company with one of the holders being Bank of Africa Kenya Limited; that the Plaintiff's application adversely affects the rights of the interested party as well as the ongoing litigation in Hccc No. 446 of 2015, where the High Court had issued an order of preservation of all assets belonging to the Applicant; which include those proclaimed by the 2nd Respondent; that the interested party has a right to be heard in this matter.

The application is further supported by affidavit of Ben Mwaura Head of Recoveries of the Applicant Company.

11. On the other hand the application dated 4th July 2018 is brought pursuant to order 1 Rule 10(2) of the Civil Procedure Rules, seeking the following orders:-

a) That I & M Bank Limited be joined in this suit as an interested party.

b) That the costs of this application be provided for.

12. The application is premised on the grounds on the face of the application inter-alia:- that the intended interested party is a secured Creditor of **KSC International Limited** (*In receivership*), the Plaintiff in this matter; there is pending in this court a suit between **KSC International Limited** (*In Receivership*) and its directors and guarantors and the secured lenders and the receivers being Hccc No. 446 of 2015; that any orders made in the present suit will affect the Interested Party; that it is in the interests of justice that the Interested Party be heard before any orders are made.

13. The application is further supported by an affidavit of Andrew Muchina; legal counsel of the Applicant Company.

14. In the instant case, the Defendants/Respondents have not filed any objection to the Applicant's applications to be enjoined as interested parties in this matter, however in their submissions they have averred that the interested parties can only be enjoined to this suit if this court is of the view that the parties have a stake in the proceedings and will be affected by the decision of the court (see **Communications**

Commission of Kenya and 4 others Vs. Royal Media Services Limited & 7 others Petition No. 14 of 2014 eKLR).

15. The Applicants are praying to be enjoined on various grounds as stated on the face of the applications in respective and that the proclaimed assets are contained in crystallized securities held by various debenture holders over the plaintiff company being Bank of Africa Kenya Ltd, KCB Bank Kenya Limited and I & M Bank Limited, which banks have by various notices appointed Harveen Gadhoke and Samuel Oketch Ochieng as receiver managers of the plaintiff company. I have noted the defendants acts complains of and that the suit directly and indirectly affect the rights of the Applicant Banks herein.

16. I am alive to the fact, that there is Hccc No. 446 of 2015 where one of the Applicant Bank and the plaintiff herein are parties; which matter is part heard and in which orders have been issued for presentation of all the assets belonging to the plaintiff company herein; which assets include the proclaimed assets. I find the Applicants has a stake in the proceedings and will be affected by the decision of the court and in the interest of substantive justice the applicants requires to be enjoined in this suit to articulate their interest and enable complete settlement of all questions involved in the proceedings.

17. The Supreme Court has had an occasion to pronounce itself on who an interested party is. In **Communications Commission of Kenya and 4 others Vs Royal Media Services Limited & 7 others, Petition No. 14 of 2014 [2014] eKLR** it was held that:-

"In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this Court's decision in the Mumo Matemo case where the Court (at paragraphs 14 and 18) held:

(An) interested part is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.

Similarly in the case of **Meme Vs Republic [2004] 1 EA 124**, the High Court observed that a party could be enjoined in a matter for the reasons that:

- i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;**
- ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;**
- iii) Joinder to prevent a likely course of proliferated litigation.**

We ask ourselves the following questions: a) what is the intended party's stake and relevance in the proceedings" And b) will the intended interested party suffer any prejudice if denied joinder."

18. Having stated the much I have in this application, and having considered the matters raised, I find in the interest of justice that the two applications are meritorious and the Applicants ought to be enjoined as interested parties to protect their interests.

C. Notice of motion dated 18th June 2018 by M/s Chebukaka & Associates for the Defendants/Applicants.

19. The application is brought pursuant to section 1, 1B, 3, 3A, 12 & 63 of the Civil Procedure Act, Order 51 of Civil Procedure Rules and all enabling provisions of the law. The Applicants seek the following orders:-

- 1) That, the Honourable Court be pleased to transfer Nairobi High Court Civil Suit No. 216 of 2018 pending at the Commercial & Tax Division at Nairobi and all proceedings pending therein to the High Court at Voi for trial and disposal.
- 2) That the costs of this application be provided for.

20. The application is premised on the following grounds:-

- a) That, the 1st applicant who is the 1st defendant in the Nairobi High Court Civil Suit No.216 of 2018 at the Commercial & Tax Division resides and works for gain at Taru, Taita Taveta County.
- b) That, the 2nd applicant who is the 2nd defendant in the Nairobi High Court Civil Suit No.216 of 2018 at the Commercial & Tax Division resides and works for gain at Mombasa, Mombasa County.
- c) That, the advocate for the Defendants have their principle place of business at Mombasa.
- d) That, the suit property is situated at Taru, Taita Taveta County.
- e) That, the cause of action arose at Taru, Taita Taveta.
- f) That, it is a statutory requirement that every suit shall be instituted in a court within the local limits of whose jurisdiction each or any of the Defendants, at the time of commencement of the suit, actually and voluntarily resides or carry on business or personally

work for gain or where the cause of action arises and or where the subject matter situate.

g) That for the foregoing reasons, it is convenient and expedient for all parties that the suit filed at Nairobi should be heard and determined at Voi.

21. The application is supported by affidavit of Duncan Mukanda Chebukaka sworn on 18th June 2018 raising the same grounds as are in the face on the application.

22. The application is opposed by the plaintiff who has filed grounds of opposition dated 17th September 2018.

23. The Applicant urges that from reading of Order 47 Rule 4 of the Civil Procedure Rules together with section 15 of Civil Procedure Act, that the defendants are to be given priority in deciding the place of institution and/or trial of the suit, so that they can defend the suit without undue trouble.

24. In the case of **Kimani Waweru & 28 other Vs Law Society of Kenya & 12 others [2014] eKLR** the court expressed itself thus:

"So while the convenience of the parties and their witnesses is to be considered in accordance with Order 47 rule 6 of the Civil Procedure Rules first principles indicate that it is the convenience of the defendant that should be given paramount consideration to avoid undue hardship on his part in defending the suit."

25. The Defendants application is grounded on the fact that the 1st Defendant resides and works for gain at Taru, Taita Taveta County; that 2nd Defendant resides and works for gain at Mombasa County; that the suit property is situated at Taru, Taita Taveta County; and that the cause of action arose at Taru, Taita Taveta County.

26. The plaintiff in opposing the transfer of the suit has raised several grounds amongst them; is that there are numerous suits filed by creditors and other parties against the plaintiff company in Hccc No. 446/2015, Hccc No. 269 of 2015, Miscellaneous No. 141/2018 and Miscellaneous No. 160 of 2018 which are being heard before High Court in Nairobi.

27. The Hccc No. 446 of 2015 in which the defendants are not parties is pending defence hearing. The matter and dispute in Hccc No. 446/2015 relates to the subject matter in this application. The Hccc 446/2015 is being handled by this court and I am seized of the facts of the case. That by transferring this case to Voi as sought by the defendants who had filed the suit herein instead of filing it at Voi High Court in the first instance will cause confusion in that the same subject-matter will be pending for trial before two different courts at the same time. This will affect the parties right to a fair trial. That as parties in this application have interest in Hccc No. 446 of 2015, it would be in the best interest of all parties not to allow the defendants application for transfer of the suit to Voi for hearing and determination. In the instant matter there are several cases pending as pointed out and it is in the best interest of justice that all cases be heard in one.

28. The upshot is that having considered all the applications I proceed to make the following orders:-

1) Application dated 30th May 2018 is meritorious and I grant the following orders:-

a) Pending the hearing and determination of the main suit, the Defendants/Respondents be and are HEREBY restrained whether by their employees, servants or agents or any of them or otherwise howsoever from removing and selling any of the assets of the Plaintiff/Applicant herein.

b) Costs be in the cause.

2) Application dated 8th June 2018 is granted in the following terms:-

a) Bank of Africa Kenya be and is HEREBY enjoined in this suit as an interested party.

b) The plaintiff is granted leave to amend the plaint enjoining the interested party as first interested party within the next 14 days from the date of this ruling and serve all other parties in this suit.

c) Costs in the cause.

3) Application dated 18th June 2018 is not granted. I make the following orders:-

a) Application for transfer of Nairobi High Court Suit No. 216 of 2018 pending at Commercial & Tax Division at Nairobi and all proceedings pending thereon to the High Court at Voi for trial and disposal is rejected.

b) Costs be in the cause.

4) Application dated 4th July 2018 is granted in the following terms:-

a) I & M Bank Limited be and is HEREBY enjoined in the suit as interested party.

b) The plaintiff is granted leave to amend the plaint enjoining the interested party herein as the 2nd interested party within the next 14 days from the date of this ruling and serve all other parties in this suit.

c) Costs be in the cause.

Dated, signed and delivered at Nairobi this 29th day of November, 2018.

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J .A. MAKAU

JUDGE