



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**MISC. CIVIL APPLICATION NO. 426 OF 2016**  
**CHARLES MBATHA SUING AS THE LIQUIDATOR OF**  
**STEEL SACCO SOCIETY LIMITED (IN LIQUIDATION) ..... APPLICANT**  
**VERSUS**  
**KENYA UNITED STEEL COMPANY (2006) LTD..... RESPONDENT**  
**RULING**

1. The applicant through an application dated 19<sup>th</sup> May, 2016 brought under sections 64(1) and 228 of the Companies Act, Cap 486, under schedule 1 part (1) of the Co-operative Societies Act and Order 51 rule 1 of the Civil Procedure Rules seeks the following orders:-

- i. That leave be granted to the applicant to commence proceedings against Kenya United Steel Company (2006) Limited; and
- ii. That the costs of this application be provided for.

2. The application is supported by the affidavit of Charles Mbatha sworn on 19<sup>th</sup> May, 2016 and the grounds in support of the said application. The respondent filed its grounds of opposition on 4<sup>th</sup> July, 2016 and a replying affidavit on 14<sup>th</sup> day of December, 2016. Counsel for the applicant thereafter filed his written submissions on 27<sup>th</sup> March, 2017 while Counsel for the respondent filed his on 10<sup>th</sup> May, 2017.

3. Mr. Jumbale, Learned Counsel for the applicant in highlighting his submissions stated that Steel Sacco Society Limited (Steel Sacco) was placed under liquidation with the liquidator being one Charles Mbatha. He further stated that in the process of liquidation it was realized that money was deducted from members of the Steel Sacco was supposed to be remitted to the said Sacco by the respondent but instead of so doing, it retained the money. He relied on the annexure marked CM4 attached to the applicant's affidavit. He argued that it revealed clear non-remittance of the money. He also referred to the letter dated 10<sup>th</sup> June, 2005 attached to the said affidavit which shows that deductions were not being remitted to the Steel Sacco. Counsel sought leave to file a substantive claim.

4. It was submitted that the respondent has tried to avoid responsibility by selling the company to other parties but in this case, the applicant has cited the entity which the Steel Sacco was dealing with. He added that a search from the Registrar of Companies dated 11<sup>th</sup> July, 2013 disclosed the identity of the Directors of Kenya United Steel Company. In another letter addressed to Kituo cha Sheria dated 11<sup>th</sup>

July, 2013, it showed that Kenya United Steel Company (2006) Limited does not appear in the database at the Registrar of Companies.

5. Mr. Jumbale made reference to a letter dated 16<sup>th</sup> April, 2014 wherein an inquiry was made to the Registrar of Companies for a search for Steel Rolling Mill (SRM) Limited where a response was received to the effect that the company was under a Receiver Manager from 15<sup>th</sup> August, 1989. Counsel submitted that the said company which was under receivership had no capacity to transact and enter into the agreement for sale of land that was entered into on 1<sup>st</sup> December, 2005. He stated that since they had no capacity to transact, the agreement was a sham.

6. In making reference to the annexures attached to the respondent's replying affidavit, Counsel for the applicant stated that a certificate of change of name of the Company from United Steel Company Ltd to Kenya United Steel Company (2006) Ltd. was attached. He further stated that the respondent is in a fix as its operations are ongoing but the Registrar of Companies states that the company is not in their database as per the letter dated 11<sup>th</sup> July, 2013. It was also submitted that the respondent had not availed a certificate of incorporation of SRM Limited but had attached a certificate of change of name to its replying affidavit. He prayed for the application to be allowed.

7. Mr. Bosire, Learned Counsel for the respondent opposed the application and stated that with regard to the letter dated 11<sup>th</sup> July, 2013, the applicant failed to pursue the issue of the registration number of Kenya United Steel Company (2006) Limited yet registration numbers distinguish one company from another. He submitted that the letter dated 19<sup>th</sup> June, 2013 gave the registration number for the said company as 6962. He stated that the same number is replicated in clause 1 of the agreement between Kenya United Steel Company (Ltd) and SRM where the latter gives its registration No. as 110522. Counsel further submitted that Kenya Commercial Bank sold the property of SRM to Kenya United Steel Company Limited. Counsel referred to clause 13.2 at page 11 of the said agreement where the buyer on the request of the purchaser agreed to the use of its name, Kenya United Steel Company Ltd. Counsel further stated that at clause 13.1 of the said agreement, the buyer was to pass on a list of its employees for absorption into the purchasing company, if necessary. Mr. Bosire argued that no liability was passed onto the buyer.

8. Counsel stated that the certificate of change of name issued on 26<sup>th</sup> July, 2006 changed the name of SRM to Kenya United Steel Company (2006) Limited and that the registration certificate remains No. C.110522. He further said that the applicant has not disclosed the identities of the persons whose money was deducted. He made reference to various figures which differed in the letters dated 10<sup>th</sup> February, 2003, 28<sup>th</sup> August, 2003 and 8<sup>th</sup> September, 2008. Counsel indicated that the mandate given to Charles Mbatha, the liquidator elapsed on 27<sup>th</sup> November, 2015 and therefore he had no *locus standi* to file this suit.

9. In response to the foregoing submissions, Mr. Jumbale reiterated that the respondent had not attached a certificate of incorporation for SRM Limited but a certificate of change of name and that a search that was done did not reveal any information about Kenya United Steel Company (2006) Limited.

10. Counsel stated that the respondent had not disputed the amount being claimed in its replying affidavit hence it could not dispute the same from the bar.

11. On the issue raised by Counsel for the respondent of the lack of *locus standi* by the liquidator to file the present application, Mr. Jumbale stated that the applicant in his supporting affidavit filed on 20<sup>th</sup> May, 2016 did attach a copy of gazette Notice No. 2979 dated 28<sup>th</sup> November, 2015 which extended the mandate of the liquidator of Steel Sacco Society Limited (in liquidation (SC/2089) for a period not exceeding one year from the said date. It therefore follows that as at the time the applicant filed the present application on 20<sup>th</sup> May, 2016, he had the *locus standi* to do so.

## **ANALYSIS AND DETERMINATION**

The main issue for determination is if the applicant is entitled to leave to file a suit against the respondent.

12. Leave to institute a suit in this case is being sought as a result of Steel Sacco Society Limited being under liquidation. Section 64 of the Co-operative Societies Act provides that certain sections of the Companies Act specified in part I and part II of the Schedule to the Co-operative Societies Act shall apply *mutatis mutandis* in relation to the winding up of a Cooperative Society as they apply to a company registered under the Companies Act. One of the sections of the Companies Act listed in part I of the said schedule is section 228 of the Companies Act. It provides as follows:-

***“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 to such terms as the court may impose.”***

13. Counsel for the respondent when opposing the application argued that the respondent is not one and the same with the company that had employed the persons whose share contributions are said not to have been remitted to the respondent. In his view, due to lack of a contractual obligation on their part they could not be sued for recovery of the share contributions which should have been remitted to Steel Sacco Limited. The applicant’s Counsel submitted that it is Kenya United Steel Company Limited that should have remitted contributions and not Kenya United Steel Company (2006) Ltd.

134. At this point in time the duty of this court is not to look into the merits or demerits of a case that is yet to be filed as the counsel for the respondent would seem to suggest. Issues of whether the assets and liabilities of Kenya United Steel Company Limited were taken over by SRM Limited which later changed its name to Kenya United Steel Company (2006) Ltd., is a matter to be canvassed in the main suit if leave to institute one is granted.

15. The submissions from both Counsel and the affidavit relied upon leave me with no doubt that Kenya United Steel Company Limited (in liquidation) a Kenya United Steel Company (2006) Ltd. with a company SRM Limited and the respondent herein do share a relationship but the same can only be laid bare by giving the applicant an opportunity to commence action against the respondent. For the said reason, I grant the applicant leave to commence proceedings against the respondent within 60 days from today’s date. Costs of this application are granted to the applicant.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 25<sup>th</sup> day of September, 2017.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

No appearance for the plaintiff

No appearance for the defendant

Mr. Oliver Musundi - Court Assistant