



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 28 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 20th January, 2016)

GEOFFREY KIPKIRUI CHERUIYOT & OTHERS PETITIONERS

VERSUS

TOPLIS & HARDING INTERNATIONAL LIMITED.....RESPONDENT

RULING

1. There are two applications before the Court, one is dated 24th March, 2015, and the other is dated 28th April, 2015. The first application was filed on the same day by the firm of Philip Muoka & Company Advocates under Articles 22, 23(3) (c), 258 of the Constitution seeking the following Orders:
 1. *Spent*
 2. *That an interim conservatory order be issued to restrain the Respondent, by itself or through its agents or representative, or any persons claiming through it, from divesting itself of any portion of its stock, share capital assets, funds, interest or operations held in its name or on its behalf or proceeding with any transaction or action intended to achieve the aforesaid, pending the hearing and determination of this Application interpartes.*
 3. *That an interim conservatory order be issued to restrain the Respondent, by itself or through its agents or representative, or any persons claiming through it, from divesting itself of any portion of its stock, share capital assets, funds, interest or operations held in its name or on its behalf or proceeding with any transaction or action intended to achieve the aforesaid, pending the hearing and determination of the petition herein.*
 4. *That in the alternative, the Respondent be hereby ordered to pay the petitioners the best comparable exit/transition package in line with the industry standard in the insurance sector including:*
 - i. *3 months notice pay at Kshs. 1,538,400/=*
 - ii. *Service pay of 3 months for every year worked at approximately Kshs. 9,230,400/=*
 - iii. *Outstanding leave balances at approximately Kshs. 1,538,400/=*
 - iv. *Expected ordinary bonus for the 2014/2015 financial year at Kshs. 3,076,800/=*
 - v. *Industry standard transition bonus of 3 months pay at Kshs. 4,615,200/= ALTERNATIVELY, upto 12 months pay for constructive dismissal using unfair process a Kshs. 18,460,800/=.*
5. ***THAT IN THE FURTHER ALTERNATIVE the Respondent be ordered to provide security***

sufficient to satisfy the Petitioners/Applicants' claim in this suit in the sum of Kshs. 33,844,800/= or such other sum or in such other manner as may be approved within 10 days of the Order herein or such other period as the Court may order to be held in an interest earning account.

6. *That a Receiver/Manager be appointed over the Respondent's business with power to take immediate possession of its assets and to collect and protect the Company's properties and accounts until the suit is heard and determined or until further orders of this Honourable Court;*
 7. *That the Honourable Court be pleased to fix the amount to be paid as remuneration for the service of the Receiver/Manager.*
 8. *That Mr. David Russel, the Respondent's Managing Director, do deposit his passport, visa and other travel documents in Court pending the hearing and determination of this petition.*
 9. *That the Respondent be hereby ordered to provide in writing to the Petitioners all relevant information about restructuring of its business including the nature of the restructuring proposed, information about the expected effects of the change on the employees and any other matters that are expected to affect the employees;*
 10. *That the Court do give any other or further orders that will favour the course of justice;*
 11. *That the Petitioners' costs be provided for.*
2. The Application is supported by the annexed affidavit of Geoffrey Kipkirui Cheruiyot and is founded on following grounds and provisions of the law:
 - a. *That the constitutional rights of the Petitioners have been gravely compromised and violated through the unconstitutional acts of the Respondent;*
 - b. *That the actions of the Respondent have violated and/or threatened to violate the Constitution of Kenya 2010;*
 - c. *That the Respondent has purported to restructure its business without consulting with its employees who are key stakeholders therein, occasioning grave prejudice to the Petitioners;*
 - d. *That the Respondent's two shareholders and Directors are already out of the Country and away from the Honourable Court's jurisdiction. The Managing Director, one David Spencer Russell, is also scheduled to leave the Country any time now;*
 - e. *That neither the shareholders, nor the Managing Director are citizens of Kenya and it may thus be well nigh impossible for the Court to exercise its authority over any of them should David Spencer Russell be allowed to depart the Country.*
 - f. *That the Company is of uncertain financial status and it is therefore imperative that security for the Claim herein be provided pending the litigation;*
 - g. *That this Honourable Court has unfettered powers and jurisdiction to make the Orders sought;*
 - h. *That it is mete and just, for the purposes of justice and equity and the overarching purpose of constitutional integrity, to make the orders sought.*
 3. When the Application came up *ex parte* on 24.3.2015, this Court gave Orders in terms of prayers 1 and 2 of the said Application and directed the Applicants to serve the Respondents for *inter partes* hearing on 20.4.2015.
 4. The Parties elected to proceed by way of submissions.

5. The Petitioners/Applicants have framed six issues for determination as follows:
 - a. *Whether the Directors can ‘abandon ship’;*
 - b. *Whether the Respondent has become insolvent;*
 - c. *What the law provides on insolvency of an employer;*
 - d. *Whether the circumstances of this case justify the appointment of a receiver;*
 - e. *Whether the employees had a right to information from their employer;*
 - f. *Whether the Applicants have the conditions for grant of injunction;*
6. As to the 1st issue, the Plaintiff submits that the Directors have abandoned the Company and states that there are instances where the law foresees a vacancy in the directorship which may be by resignation, death or termination of an appointment which in the event it happens may be catastrophic for the Company.
7. The Petitioners submit that the Respondent already faces liabilities of more than Kshs. 150 Million and as a result of abandonment by the Directors there is no management to pay these liabilities.
8. As to whether the Respondent is insolvent, the Petitioners have cited provisions of the law that deal with insolvency of an employer in particular Section 67 of the Employment Act. The Petitioners state that there has already been a proposal by one Mr. David Russell to the Principal Directors to wind up the Company and Mr. David Russell has himself resigned from the Company. As it stands, according to the Petitioners, the Principal Directors have gone missing while the Managing Director has resigned. They therefore submit that the Directorship of the Company does not meet the statutory requirement and as such the veil of incorporation should be lifted and the Directors held personally liable.
9. The Petitioners further submit that they have a right to receive information about their relationship with the employer. They cite Article 35 of the Constitution 2010. The Petitioners also hold the view that the entitlements of employees arising from the employment contract have to be protected.
10. They further rely on Article 2(5) of the Constitution which ratifies international treaties and conventions which include the International Labor Organization Termination of Employment Convention 1982, which requires employers provide employees on the verge of unemployment with reasonable notice of such termination or compensation for lack of notice thereof. The same convention also requires strong and direct participation by workers in employment termination, particularly in restructuring, downsizing or terminations due to employer insolvency.
11. In addition to the above cited convention, the Petitioners rely on the Protection of Workers’ Claims (Employer’s Insolvency) Convention was enacted in 1992 as a revision of the Protection of Wages Convention 1949. The Convention requires the payment of Claims arising out of employment before non-privileged Creditors can be paid.
12. On the issue of appointment of receiver, the Petitioners hold the opinion that in the case at hand there is no management it is not possible to obtain information necessary in settling employee liabilities. The Petitioners have submitted lengthily on the issue of Jurisdiction and submit that the Court has inherent Jurisdiction to appoint a receiver if the circumstances of the case so warrant as was held in the case of **Nasir Ibrahim Ali & 2 Others Vs Kamlesh Mansukhalal Damji & Another.**
13. The Petitioners seek for the grant of Orders as prayed in their Application.
14. The Respondent did not file any submissions, but one Mr. Russel whom the Petitioners allege is a Director of the Company has filed submissions in relation to the Application dated 24.03.2015 and state that the Orders sought are untenable since the Petitioners have not tendered proof that the Respondent has ceased operations or that it is restructuring. Further the Orders against Mr.

David Russel are untenable as on the Petitioners' own admission the said Mr. Russel resigned as a director of the Respondent.

15. Mr. David Russell also submits that the Court lacks jurisdiction because according to Section 211 of the Companies Act Cap 486, jurisdiction lies with the Commercial and Admiralty Division of the High Court acting on a Winding up Petition due to the elaborate procedure involved which is not provided for under Employment law. That even if the Court had jurisdiction the Petitioners would first have to show that they are Creditors whose claim has crystalized or that they are shareholders of the Respondent and the Petitioners are none of the above.

16. The Respondent prays that the Application be dismissed with costs.

17. The Petitioners have also filed another Application dated 17.04.2015 seeking for one Mr. David Russel to be cited for contempt of the Orders of the Court issued on 24.03.2015. The Respondent submits that the said Orders were not directed at Mr. David Russell in person but to the Managing Director of the Respondent. Mr. David Russell submits that he is neither a Principal Officer nor the Managing Director of the Respondent and he is as such not in contempt of any Court Order.

18. Furthermore, Mr. David Russell submits that the fears of the Petitioner that the Respondent has ceased operations or is restructuring require a board resolution which in this case has not been exhibited. Mr. David Russel also submits that the even if the Court finds that the Orders of 24.03.2015 were directed at him, there is no evidence on record that he disobeyed the said Orders.

19. The Petitioners have not submitted in respect of their Application of 17.04.2015.

20. Mr. Russell submits that the applications of 24.03.2015 and 17.04.2015 should both be dismissed with costs.

21. The gist of the application by the Applicant Claimants is to have what they consider to be their rightful exit dues preserved or paid to them pending the hearing and determination of this Petition. They seek this preservation of their interest by asking this Court to either ask the Respondents to provide security sufficient to satisfy the claim or pay off what is due to them all totaling to 18,460,800/= or in the alternative that this Court should appoint a Receiver/Manager to take over the Respondents businesses so as to take possession of the Respondents assets and to collect and protect the company properties and accounts until the suit is heard and determined.

22. Looking at these prayers sought, the Court refers to Order 41 which provides for appointment and removal of a Receiver and states that:

1. ***"1. (1) Where it appears to the court to be just and convenient, the court may by order:-***

- a. ***appoint a receiver of any property, whether before or after decree;***
- b. ***remove any person from the possession or custody of the property;***
- c. ***commit the same to the possession, custody or management of the receiver; and***
- d. ***confer upon the receiver all such powers as to bringing and defending suits and for the realization, management, protection, preservation, and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of such documents as the owner himself has, or such of those powers as the court thinks fit.***

(2) Nothing in this rule shall authorise the court to remove from the possession or custody of any person property whom any party to the suit has not a present right so to remove.

2. ***The court may, by general or special order, fix the amount to be paid as remuneration for the services of the receiver.***

3. **Every receiver so appointed shall:-**

- a. **furnish such security (if any) as the court thinks fit, duly to account for what he shall receive in respect of the property;**
- b. **submit his accounts at such periods and in such form as the court directs;**
- c. **pay the amount due from him as the court directs; and**
- d. **be responsible for any loss occasioned to the property by his willful default or gross negligence.**

4. **Where a receiver:-**

- a. **fails to submit his accounts at such periods and in such form as the court directs; or**
- b. **fails to pay the amount due from him as the court directs; or**
- c. **occasions loss to the property by his willful default or gross negligence, the court may direct his property to be attached, and may sell such property, and may apply the proceeds to make good any amount found to be due from him, or any loss occasioned by him, and shall pay the balance (if any) to the receiver.**

5. **The court may either on its own motion or on application by any interested party, remove a receiver appointed pursuant to this order on such terms as it thinks fit.**

23. This Court has jurisdiction to grant the orders sought despite the fact that the issues of Company Law are determined in the Commercial & Admiralty Division of the High Court. The Employment & Labour Relations Court has in the part been faced with suits where matters being canvassed are cross-cutting across the High Court's various divisions and the Employment & Labour Relations Court's our special wind and the Court has affirmed to handle the matter judiciously without having to apportion the same across Courts to enable access to justice.

24. In **George Maina Kamau v County Assembly of Muranga & 2 others (2015) eKLR**, Hon. J. Ongaya was faced with a suit demanding various remedies cutting across various Divisions of the High Court and was of the opinion that justice shall not be delayed but be administered without undue regard to procedural technicalities and the purpose and principle of the Constitution shall be protected and promoted. I do agree with my learned brother on this issue.

25. In regard to the current case, this Court must satisfy itself that:

1. ***The Petitioners have a prima facie case with a probability to success and that they have a good title to the Respondents property.***
2. ***Petitioners must show their interest on the property.***
3. ***The pleadings must ascertain/sufficiently disclose the assets of the company.***
4. ***The Petitioners need to show that these assets are in danger of being wasted/alienated so as to justify the appointment of a Receiver pending the suit.***

26. The above criteria was set out in **Rift Valley Agricultural Contractors Limited & Another vs. Maheshkumar Manibhai Patel (2000) eKLR**.

27. In seeking to have a Receiver appointed, the Petitioners have submitted that the Respondent is no longer able to meet its financial obligation and that the Respondent does not meet the statutory requirement on directorship. However, the Petitioners have not yet established the extent of their interest/amount of credit owed to warrant them standing out as creditors. This can only be done with certainty after hearing and disposing of the employment relationship issues herein.

28. It is my finding that it would be premature to order the appointment of a Receiver Manager at this

point without 1st deciding the extent of interest the Petitioners have in the Respondents property. It would also be difficult to determine the assets of the Respondent without going fully into issues of winding up elaborately provided for in the companies (Winding Up) Rules 1961.

29.The Petitioners can however move the Court as Creditors once their claim has crystalized after obtaining a judgment from this Court on the employment dispute.

30.I therefore find that as to orders sought by the Petitioners, I will grant prayer No. 5 that the Respondents be ordered to provide security sufficient to satisfy the Petitioners claim as may be approved by this Court within 30 days from today.

31.However, given the nature of the dispute, I direct that the main claim be set down for hearing on a priority basis as per the registry diary.

Dated and delivered in open Court this 20th day of January, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for the Claimant

No appearance for the Respondent