



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION AT MILIMANI LAW COURTS

CIVIL CAUSE NO. 363 OF 2008

JOHN KIPKEMBOI KILEL.....PLAINTIFF

Versus

WILFRED RIITHO NJERU

INTERIM LIQUIDATOR OF LAKESTAR INSURANCE

COMPANY LIMITED (IN LIQUIDATION).....DEFENDANT

RULING

Order to restrain advocates from acting

[1] The Application before me is a straight forward one; it is asking the court to restrain the firm of **RACHIER & AMOLLO ADVOCATES** from acting for the defendant herein. Alternatively, the Applicant asks the court to strike out the said firm of advocates from the record of these proceedings. It seeks yet other orders of accounts and deposit of money received by the said firm of advocates, and more specifically that the said firm of advocates do render a correct and accurate account of all the monies received on behalf of the defendant; from realization of the assets of the company; and fees paid to them by the company between 27.6.2003 and 14.2.2012.

The applicant submitted:

[2] That the Respondent was appointed Interim Liquidator of Lakestar Insurance Company Limited (In Liquidation) by an order made on 27th June 2003. The appointment took effect from the 30th June 2003. The Respondent never constituted a committee of inspection under Section 248(1) of The Companies Act. In the absence of the Committee of Inspection, the Honourable Court is empowered under the Provisions of Section 250 of The Companies Act to sanction all duties which are supposed to be performed by the Committee of Inspection upon an application being lodged by the liquidator for direction or permission in respect of matters authorized to be performed by the Committee of Inspection.

[3] The Respondent violated all the mandatory Provisions of the Companies Act. For instance, the defendant did not file security as required by Section 237(a) of the Companies Act as read together with Rules 47 and 48 of The Companies (Winding up) Rules. As such, the defendant was incapable of acting as a Liquidator and could not appoint the firm of **RACHIER & AMOLLO ADVOCATES** to assist him in the performance of his duties. Their appointment was, therefore, null and void. Even assuming he had capacity to so appoint the said advocates, he ought to have applied for the court's sanction under section 241(1) (c) of the Companies Act before the appointment could take effect. That notwithstanding, the said

advocates ought to have known that the said section 241(1) (c) is mandatory and had not been complied with. In the circumstances, the money they received as fees should be accounted for and returned. They should not benefit from an illegality. The Applicant relied on the case of **SIMBA AIRLINES LTD v HERITAGE BANK LTD [2002] 1 E.A 302** and **TRADE BANK LTD v L.Z. ENGINEERING CONSTRUCTION LTD [2000] 1 E.A 266** to support his said position.

The respondent on the other hand argued:

[4] That the instant application is asking for two orders that the firm of **RACHIER & AMOLLO ADVOCATES**; 1) be barred from continuing to appear for the defendant in this matter; and 2) does account for all the monies received from the defendant as legal fees or otherwise and subsequently refund the same. The application is grounded upon section 241 (3) of the Companies Act and the affidavit sworn by the plaintiff. The major grounds are simply premised on the alleged failure by the liquidator to seek the sanction of the court before appointing the said advocates. The Respondent raises a preliminary objection. The Respondent started by citing the relevant law of the Applicant's Locus, i.e. Section 241(3) which states:

The exercise by a liquidator in a winding up by the court of the powers conferred by this section shall be subject to the control of the court, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers.

[5] The Plaintiff has brought this application purporting to be a contributory and riding on the privilege given by the statute to the contributories or creditors to make such applications. We submit that the plaintiff is not only a contributory but also a debtor, his indebtedness relating to sums he owes the company otherwise than in his capacity as an alleged contributory. The defendant's predecessor, in HCC No. 1016 of 2002, obtained judgment against the plaintiff in the sum of Kshs. 47,645,015/- which the plaintiff has to date not satisfied. Therefore, other than protecting his shareholding in the company, the plaintiff has another interest to protect and he should not be allowed to hide under section 241(3) of the Companies Act. Since this matter was filed, the plaintiff has done everything possible to frustrate the process of liquidation. The plaintiff has done this by filing applications after applications. The plaintiff ensured that the plaintiff was removed from office and now has turned on the plaintiff's advocates. The main aim of the plaintiff in all this is to frustrate the execution against him for monies he owes the Company.

[6] The alleged noncompliance with Section 241(1) (c) of the Companies Act in appointing the firm of Rachier & Amollo Advocates to assist him in liquidation is a farce. The said section provides:-

The liquidator in a winding up by the court shall have power, with the sanction either of the court or of the committee of inspection –

(c) to appoint an advocate to assist him in the performance of his duties;

It was complied with and the sanction of the court was obtained by an order of court which was given by the Hon. Mutungi on 15.8.2003, See Annexure "JOJ2". The applicant is therefore just looking for reasons to impede liquidation herein. Upon appointment of the advocates following the sanction of the court, the advocates have continued to represent and/or assist the liquidator in his duties whenever necessary. The said advocates have handled numerous matters on behalf of the liquidator both contentious and non-contentious, and executed the client's instructions at all times. The liquidator did not raise any complaint against the advocates for any non-execution of instructions. The plaintiff's allegation of noncompliance with the law is not only unfounded but also maliciously farfetched.

[7] The application also seeks to compel an advocate of a party to a suit to disclose matters discussed with the client under a retainer which is tantamount to breach of section 134 of the Evidence Act. The section provides:-

Privilege of advocates

1. ***No advocate shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:***

Provided that nothing in this section shall protect from disclosure –

- a. ***any communication made in furtherance of any illegal purpose;***
 - b. ***any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.***
2. ***The protection given by subsection (1) of this section shall continue after the employment of the advocate has ceased.***

All the matters discussed between the advocates and the defendant, under the advocate-client relationship, including all the fees paid are privileged and the advocate cannot be compelled to disclose at the behest of the client's adversary.

[8] On the appointment of a new liquidator to take over from the defendant, the new liquidator was ordered to audit the activities of the former liquidator, present a report to court and conclude the process of liquidation. The advocates cannot therefore be compelled to audit the works of the former liquidator and prepare a parallel report; which is the effect of the instant application. Further, all the legal fees paid by the defendant were paid for professional work actually done on the instructions of the defendant. If any fee was ever paid without the advocate executing his instructions, the liquidator, as the client, would be the proper party to question that and not the plaintiff, who is an adversary. The application, therefore, lacks merit and ought to be dismissed with costs to the defendant.

COURT'S RENDITION

[9] Although parties have engaged copious turns of expressions in support of their respective standpoints, I see only one issue for determination; that is:

(a) Whether the defendant had capacity to appoint the firm of RACHER & AMOLLO ADVOCATES as advocates to assist him as the Interim Liquidator.

[10] I fall back to the law and the facts of the case. The defendant was duly appointed as the Interim Liquidator by the court on 27.6.2003 in WINDING UP CAUSE NO 21 OF 2003. His appointment took effect on 30.6.2003. On 15.8.2003, the court sanctioned the appointment of the firm of **RACHIER & CO ADVOCATES** to be the duly appointed advocates to assist the Interim Liquidator pursuant to section 241(1) (c) of the Companies Act. The said firm of advocates later changed its name to **RACHIER & AMOLLO ADVOCATES** on 18.1.2005. By that act, the law was followed to the letter. The Applicant has not said anything about the said sanction issued by the court. Instead, I find to be quite a dramatic irony, the submission by the Applicant which stated as follows:

...assuming that the Defendant had capacity to appoint the said firm of advocates then he ought to have moved the Honourable court under the provisions of Section 241(1)(c) and seek the court's sanction before appointing the said firm of Advocates. He did not move the court and consequently the purported appointment is null and void.

[11] I do not know what to make of that submission or its purport; is it a paradox, or plain dishonesty or at best epitome of ignorance of facts. Whatever it is made for, I should only state that it opposes the obtaining state of things in this matter. And its effect, perhaps, is to administer a sudden shock or provoke

confusion in the matter. Let me not engage in further reflection of the truth of the paradox, except I should say the statement is erroneous and unsubstantiated; it is not even capable of being in support of the application before me.

[12] That notwithstanding, I can see the path the Applicant is following; that because the Defendant did not file security as required under section 237(a) of the Companies Act, then he was not capable of discharging the powers of a Liquidator including appointing the advocates herein. I take the view that exercise of the powers of the Liquidator in this matter is subject to the control of the court. The sanction under section 241(1) (c) of the Companies Act is one of the mechanism in the exercise of that control by the court. Therefore, where an application has been made under section 241(1) (c) of the Companies Act seeking the court's sanction to the appointment of advocates to assist the Liquidator in the performance of his duties, and the sanction is accordingly granted by the court, the appointment of the advocates may not be impeached on account of failures by the Liquidator to comply with the law. Such failures as the ones being cited by the Applicant are plausible grounds to remove the Liquidator but they are not grounds for removal of the advocates already and duly appointed. There is no doubt that the defendant had been duly appointed as the Liquidator by the court, and he had the power to appoint on court's sanction, advocates to assist him in the discharge of his duties. By way of extension of this argument, the advocates who have been appointed by previous liquidator could still be retained by the successor liquidator without violating the law.

[13] Before I make my final findings and order, I wish to re-state that, the Applicant is both a shareholder in and a debtor to the company. The law, especially section 241(3) of the Companies Act is tailored to offer protection to the company against those persons who may want to use the right of challenge to frustrate liquidation of a company. And therefore, a person like the Applicant who has two hats- a shareholder and a debtor- will have to meet the legal threshold, and may not utilize the right of challenge especially when he is also a debtor- of a huge and ascertained sum of money i.e. the sum of Kshs. 47,645,015/- arising from a decree in HCC No. 1016 of 2002. That is why the power of challenge under the section was placed at the behest of only creditors and contributors, and not debtors. And the law, in a situation as this, has placed the onus on the Applicant to prove that, as a debtor, his challenge is not aimed at frustrating the liquidation in order that the debt he owes is not realized. In the circumstances, motive is of material significance and the Applicant has not discharged that burden. On that basis, I hold that the Applicant has not shown *bona fides* on his use of the right to challenge under section 241(3) of the Companies Act. See cases of **SIMBA AIRLINES LTD v HERITAGE BANK LTD [2002] 1 E.A 302** and **TRADE BANK LTD v L.Z. ENGINEERING CONSTRUCTION LTD [2000] 1 E.A 266**

[14] In sum, I find and hold:

- a) That the Defendant had capacity to appoint the firm of **RACHIER & CO ADVOCATES** (later **RACHIER & AMOLLO ADVOCATES**) to assist the Liquidator in the performance of his duties.
- b) That the Defendant sought for and obtained the sanction of the court to the appointment of the firm of **RACHIER & CO ADVOCATES** (later **RACHIER & AMOLLO ADVOCATES**) to assist the Liquidator in the performance of his duties. The said advocates were duly appointed. Accordingly, the said advocates were duly appointed.
- c) That any account from the said advocates, on account of fees paid to or monies received otherwise by them, should be sought for by the Liquidator as the client and not by the plaintiff. Or by the court, as the law may demand for account, and where there is sufficient reason to so act.
- d) The upshot is that the application dated 10th July 2013 is dismissed with costs to the Respondent.

Dated, signed and delivered in open court at Nairobi this 28th day of March, 2014

F. GIKONYO

JUDGE