REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

MISC CIVIL SUIT NO. 296 OF 2014

GITHARA & ASSOCIATES ADVOCATES ..... APPLICANT

Versus

DIMKEN (K) LIMITED ..…….……. RESPONDENT

RULING

Leave to file suit

[1] The Applicant has sought for leave to commence proceedings against the Respondent Company which is being wound up. The Application is dated 12th June, 2014. The Applicant submitted it had been retained by the Respondent Company to act for it in four matters before an order for winding-up was made by the Court. But before it had paid the legal fees, the company was ordered to be wound. The official receiver in her Replying Affidavit does not object that an advocate client relationship exists between the two and that the Respondent Company owes the applicant monies for services rendered to it by him.

[2] The only quarrels the Official Receiver has fastened on the application are: 1) that the Applicant has taken four years to commence proceedings for recovery of costs, and so it has been indolent on its quest. Therefore, it cannot claim for costs at this time; 2) that the company is not the correct party and the claim should be directed to Official Receiver instead. According to the Official Receiver, the Applicant is wrong for suing the company as the Respondent. The Applicant responded to the submissions by the Official Receiver and argued that the Company did not lose its legal status after the order of winding-up issued on 21st October, 2010 because the order did not dissolve the company. The Applicant relied on **Dr. Ashok Sharma, *Company Law and Secretarial Practice***, who states that;

> ***'….. the corporate (legal) status and powers of the company continues even after passing winding up order. But on dissolution the corporate status of the company comes to an end….'***

And that,

> ***' ….. Before dissolution and after the order of winding up, the legal status continues and it can be sued in the court of law…..'***

THE DETERMINATION

Status of company before dissolution

[3] The law, the way I understand it, is that a company does not lose its corporate character on an order of winding. It retains its legal personality until dissolution. The ultimate dissolution is the death certificate of the legal person. That notwithstanding, a winding-up imposes some form of incapacity on the company such that the Board of Directors is ousted and the liquidator acts for the company. And, henceforth, proper description of any official dealing with the company is by the style of "the official receiver and liquidator", of the particular company in respect of which he is appointed and not by his individual name. I am therefore, unable to accede to the argument by the Official Receiver that the Application for leave should have been made in the individual name of the official receiver.

[4] Accordingly, I reckon "the official receiver and liquidator", of the Respondent shall defend any proceedings against the Company on behalf and in the name of the Respondent Company. I am guided by Section 241(1) which provides that,

> ***'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 to bring or defend any action or other legal proceeding in the name and on behalf of the company.'***

[5] But leave should be given first before proceedings are filed against a company where an order for winding-up the company has been made. See Section 228 of the Companies Act which provides that:

> ***"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.'***

[6] The reason why leave has to be sought is to enable a structured and uninterrupted administration of the assets of the Company being liquidated for the benefit of the creditors. See the case of **Neptune Credit Management V Invesco Insurance & Others (2012) eKLR**. Again, I do not accede to the argument by the official receiver that the application for leave is incompetent, improperly before court and an abuse of court. The application is competent and proper.

[9] One other important thing is should address; the submission by the Official Receiver that no liquidator was appointed in the main winding up cause for the company and so the Applicant will not be able to recover its costs against the company. It is true that in the judgment in the winding up cause, a liquidator was not appointed. The Official Receiver may have to move the Court for a formal appointment of herself or any other person in accordance with Section 234 and 236 of the Companies Act. But, at the moment, the law is that, under Section 236 (a) of the Companies Act the Official Receiver by virtue of his office becomes the provisional liquidator and is the right person to deal with this application. The absence of a formal appointment of a liquidator by the court, does not affect the official Receiver as a sufficient party to act on behalf of the company and receive all court processes. The Official Company has been served with and has responded to this application. This application, therefore, is necessary if the Applicant is to tax its costs against the Company and obtain the Certificate of taxation by the taxing master to act as a proof of debt by company to the applicant. The said vesting of costs is procured through the process of taxation, and such being a proceeding initiated as provided under the Advocates Act, thus, Section 228 of the Companies Act comes into play. See the case of **Bisai & Another Vs Kenya Commercial Bank ltd & others (2002) 2 EA** as referred to in the case of **Ruth Wanjiku Kagiri v Reliance Bank Limited (in liquidation) & 2 others (2012) eKLR** Mwera J opined that,

> ***'… to commence any action or proceedings against a company in liquidation, the plaintiffs are obliged, and mandatorily so by law, Companies Act, to obtain leave from***

the court since a company in liquidation is under the supervision of the court and whatever the liquidator does or any other party wishes to bring along as an action or proceeding against the company, must have the sanction of the court first. The learned judge further held that the leave ought to be sought before bringing an action or proceeding and not after…."

[8] The upshot is that I grant leave to the Applicant to file a cause for the taxation of the bill of costs herein against Respondent within 30 days. But, the intended proceedings should be properly intituled in accordance with the Companies Act. I should also state, and I did this earlier, that the Official Receiver as provisional liquidator should move the court as appropriate on the formal appointment of liquidator and progress the liquidation of the Defendant Company. Each party shall bear own cost of the application.

Dated, signed and delivered in court at Nairobi this 27th day of October, 2014

F. GIKONYO

JUDGE