



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)

Miscellaneous Civil Application 294 of 2010

IN THE MATTER OF: TRUST BANK LIMITED (IL)

IN THE MATTER OF: THE COMPANIES ACT, CAP 486 LAWS OF KENYA

THE DEPOSIT PROTECTION FUND BOARD

AS LIQUIDATOR OF TRUST BANK LIMITED

(in Liquidation)APPLICANT

v

AJAY SHAH.....1ST RESPONDENT

PRAFUL SHAH.....2ND RESPONDENT

R U L I N G

1. The Applicant commenced the proceedings herein by way of Notice of Motion dated **23rd March 2010** and filed in Court on even date. The Motion is expressed to be brought under **Sections 323 and 324** of the **Companies Act** and **Rule 60** of the **Companies (High Court) Rules**. The Application seeks for the following orders:-

a) A declaration that the Respondents Ajay Shah and Praful Shah who acted as Executive Directors of Trust Bank Limited (in liquidation) were knowingly parties to the carrying on of business of Trust Bank Ltd (in liquidation) with intent to defraud creditors of the Company and for a fraudulent purpose.

b) A declaration that the Respondents Ajay Shah and Praful Shah who acted as Executive Directors of Trust Bank Limited (in liquidation) were guilty of misfeasance and breach of trust in relation to the said company.

c) A declaration that the Respondents Ajay Shah and Praful Shah who acted as Executive Directors and employees of Trust Bank Limited (in liquidation) in breach of their fiduciary duties to Trust Bank Limited allowed and/or caused Trust Capital Services Limited, in which they had a personal interest, to overdraw its accounts without proper security and thereby caused the Bank to loose over Kshs. 241,442,376.80cts as at 16th September 1998.

d) An order that the Respondents Ajay Shah and Praful Shah jointly and severally are liable to make good and pay the Applicant, Deposit Protection Fund Board as Liquidator of Trust Bank Limited (in Liquidation) the sum of Kshs. 1,549,591,424.41 cts being the amount due in the account of Trust Capital Services Limited as at 28th February 2010 together with interest thereon at prevailing Bank rates from 1st March 2010 to the date of payment in full.

2. The Application is based on the grounds stated therein and is supported by the affidavit of **DANIEL MUGUIMA** sworn on **23rd March 2010** and a further affidavit sworn by the same person on **18th May 2010**.

3. It is averred on behalf of the Applicant that in the course of winding up the Company, it was established that the business of the Bank was carried out with intent to defraud the creditors and for other fraudulent purposes and that the Respondents as former directors were knowingly parties to the said frauds. The liquidator further established that the Respondents were guilty of misfeasance or breach of trust in relation to the company.

4. According to the liquidator, Trust Bank Ltd (in Liquidation) lost the sum of **Kshs. 241,442,376.80 cts** as at **16th September 1998** in the account of Trust Capital Services Limited through the said actions. It is the Applicant's case that the Respondents are jointly and severally accountable and liable to Trust Bank Ltd (I.L) for all the losses incurred as a consequence of fraud.

5. In the supporting affidavit dated **23rd March 2010** it is deposed that, the liquidator established that one of the accounts through which the Bank lost colossal sums of money was in the name of an entity known as Trust Capital Services Limited. The Applicant annexed a copy of the Memorandum of Association of the said entity together with the Certificate of Incorporation as evidence that the company was incorporated on 10th November 1993 and the subscribers to the Memorandum of Association were the Respondents herein. The said entity operated three accounts in Trust Bank Limited (I.L) namely; A/c No. 00059811-0001, 0058653-0001 and 25862-01. An account opening form was annexed to the Application as evidence that the Respondents were authorized signatories for Account No. 25862-01 of Trust Capital Services Ltd.

6. The liquidator further established that there was no application to the Bank by Trust Capital Services Ltd for any loan or overdraft facility. That notwithstanding, it is the Applicants report that there was massive withdrawal of funds from the Bank in the aforesaid three accounts, and in the absence of a loan or overdraft application by Trust Capital Services Ltd, the Applicant alleges that the said sum of Kshs. 241,442,376. 80cts had been stolen from the bank through the above accounts.

7. The Application is opposed vide the Replying Affidavits of the 1st and 2nd Respondent both sworn on **12th May 2010**. The first Respondent deposes that the allegations made in the supporting affidavit sworn on behalf of the Applicant are hearsay as the sources of the information are not disclosed. He also deposes that some of the documents annexed to the application are fabricated to enhance the Applicant's case.

8. It is the 2nd Respondent's deposition that the deponent of the supporting affidavit sworn on behalf of the Plaintiff has failed to disclose the sources of his information as respects some of his averments in the said affidavit. According to the Respondent, the contents of some of the paragraphs constitute hearsays, are unsubstantiated, unfounded and unreliable. The 2nd Respondent further deposes that there is no viable relationship between Accounts 25862-01 and 00059811-0001 and that it has not been shown in any way that he is connected to Account No. 00059811-0026.

9. Before the Applicant's Notice of Motion came up for hearing, the 1st Respondent filed a Preliminary Objection dated **18th June 2010** on grounds that the Court had no jurisdiction because the Applicant filed its suit without leave of Court. The Court directed that the Preliminary Objection be considered as a response to the Applicant's Notice of Motion dated **23rd March 2010**.

10. On **8th October 2012**, this matter came up for cross-examination of the deponent in respect of the affidavits dated **23rd March 2010** and **18th May 2010** sworn on behalf of the Applicant. Before the cross-examination, counsel for the Applicant submitted that he was prepared to abandon **exhibit number 5** attached to the affidavit dated **23rd March 2010** as it was not the basis of the Applicant's case.

11. On cross-examination by Mr. Billing, Advocate for the 1st Respondent, the deponent testified that the claim in the current suit was for the losses incurred by the Bank because of funds lost to Trust Capital Services Limited. He stated that the Applicant had not sued Trust Capital Services Limited. The deponent withdrew paragraphs 27, 28, 29, 30 and 31 of his supporting affidavit as they related to HCCC No. 1243 of 2001 and confirmed that the Applicant was no longer relying on the same. He further withdrew paragraphs 10, 11, 15, 16, 17, 18 and 19 of his further affidavit as they related to the aforesaid case.

12. He further testified that from 2008 to 2010, he carried out investigations as a Liquidator. He referred to Exhibit “DM3” and “DM4” which were statements for Trust Capital Services Limited, among other exhibits. He also referred to the Scheme of Arrangement attached to his affidavit and testified that the current suit was not based on the same as it had expired on 31st December 2003.

13. The deponent was further cross-examined by Mr. Gitonga, Advocate for the 2nd Respondent on 10th October 2012. He testified that the Applicant was claiming approximately Kshs. 1.5 billion from the Respondents. He further testified that he did not have the originals of some of the documents annexed to his affidavits as the same were with the Respondents. It was the deponent’s testimony that the matter presently before court could be traced into the Scheme of Arrangement. It was further the deponent’s testimony that he had no evidence that any of the Respondents had signed for the moneys being claimed by the Applicant.

14. The parties herein filed their submissions with regard to the Notice of Motion dated 23rd March 2010 as well as the Preliminary Objection dated 18th June 2010 which I have considered. I have also considered the authorities filed and cited by the respective parties.

A. ON THE PRELIMINARY OBJECTION

15. The 1st Respondent filed the Preliminary Objection dated **18th June 2010**, to wit that this Court has no jurisdiction because the Applicant filed the suit without leave of the Court. It is the 1st Respondent’s case that the Applicant should have obtained leave of the Court as required under **Section 241 (1) (a)** of the Companies Act. It was also submitted for the 1st Respondent that the Applicant was required to obtain leave of the court to appoint an Advocate subject to **Section 241 (1) (c)** of the Companies Act.

16. The 2nd Respondent associated himself with the submissions of the 1st Respondent.

17. In response to the 1st Respondent's Preliminary Objection, it is submitted for the Applicant that the same is wholly misconceived and does not lie. It is submitted that the 1st Respondent's perception that the present application is an action by Trust Bank Limited (in Liquidation) and that it is filed by the Liquidator in exercise of its power under **section 241 of the Companies Act** is entirely false and misconceived.

18. Counsel for the Applicant submitted that the present application was a proceeding commenced by the liquidator in his own right in the nature of a misfeasance summons. He referred to the case of **re W. Powell & Sons [1896] 1 CH.D 681** for the distinction between misfeasance summons and an action by the company. He further submitted that the application was brought under Sections **323** and **324** of the Companies Act and as such the provisions of **Section 241 (1) (a) & (c)** of the said Act did not apply. It was Counsel's submission that **Section 241** was not the only section that regulated court proceedings by a Company in liquidation. It was also his submission that the restrictions in **Section 241** did not apply to the commencement of misfeasance proceedings under **Section 323** and **324** of the Act for the reason that such proceedings were brought not by the Company in liquidation but by a creditor or a liquidator on behalf of creditors.

19. In my view, the Applicant need not hide behind section 323 and 324 of the Companies Act to claim jurisdiction when jurisdiction to commence this suit without the leave of the Court is expressly given by the Statute. **Section 35 (1)** of the Banking Act Cap 480 states:-

35(1) "If an institution becomes insolvent, the Central Bank may appoint the Board established under section 36 to be a liquidator of the institution..."

20. The Board referred to under Section 35 (1) of the above Act is the Deposit Protection Fund Board (the Applicant herein). While such an appointment under Section 35(1) would have the same effect as the appointment of a liquidator by the Court under the provisions of part VI of the Companies Act, and therefore subject such appointees to seek leave of Court before instituting or proceeding with a suit in line with section 241 of the Companies Act, the Deposit Protection Fund Board is expressly exempted from the operation of section 241 of the Companies Act by Section 36 of the Banking Act. Section 36 (2) of the Banking Act states:

36(2) "The Board shall have perpetual succession and a common seal and shall in its corporate name or in the name of an institution under liquidation be capable of –

(a) suing and being sued, without sanction of the court or a Committee of Inspection..."

21. The provisions of section 36 of the Banking Act therefore have the effect of disposing off the Preliminary Objection in favour of the Applicant. The liquidator in this matter does not have to seek the leave or approval of the Court to commence or to continue with these proceedings on behalf of the Company in liquidation. I therefore dismiss with costs to the Applicant the Preliminary Objection dated 18th June 2010.

B. ON THE NOTICE OF MOTION

22. At the time of instituting HCCC No. 1243/01, the Applicant was aware of all matters concerning the Respondents, Trust Bank Limited (I.L) and Trust Capital Services Ltd. The Respondents have appealed against the judgment in HCCC No. 1243/01. On cross-examination, the deponent of the affidavits sworn on behalf of the Applicant testified that as of 2002 the Liquidator was aware of the accounts in dispute and could have sued the Respondents then. In light of that testimony, this Court would easily conclude that the Application herein is time barred since it should have been filed by 2008. However, it was also the deponent's testimony that he was the liquidation agent from 2008 to 2010 when he did his investigations and established fraud. In that case, the current application cannot be said to be time barred. This is so because a cause of action in fraud allegations accrues from the time when the fraud is discovered.

23. With regard to prayers a, b and c of the application, I have noted that the Applicant merely seeks these declaratory prayers due to the conduct of the Respondents. Without going into the contents of HCCC No. 1243 of 2001 it is clear that these were also some of the prayers sought in the aforesaid case in which Lady Justice Lesiit delivered a Judgment which is now under appeal. On the matter at hand, and on the evidence provided by the parties, I am satisfied that the Respondents herein were Executive Directors of Trust Bank Limited and that they were also shareholders of Trust Capital Services Limited which operated account no. 25862-01 with Trust Bank.

24. Trust Bank Limited was placed under statutory management by the Central Bank on 18th September 1998. In 1999 there was an attempt to revive the operations of the Bank under a Scheme of Arrangement dated 26th May 1999. The two respondents were party to the said scheme of arrangement. They provided information that was used in the drawing of the scheme of arrangement and also signed the said scheme of arrangement and acknowledged the accuracy of the information contained therein, their liability to the Bank and their commitment to pay their liability. The two Respondents also acknowledged that Trust Capital Services Limited owed Kshs. 246, 400,000/- to the Bank as at 26th May 1999. The said sum of Kshs. 246.4 million was withdrawn from the Bank on account No. 00059811-0001. This account was not officially opened in the Bank books and while account No. 25682-001 had no account opening document to support it, there were no company resolution from Trust Capital Services Limited to open the account nor was there a mandate to open the account and the Bank does not have authorized signatories to the account.

25. What is clear to me however, is that at all times relevant to this action, the Respondents stood in a

Trust Relationship to the customers of Trust Bank Limited and they were obligated at all times to discharge their duties diligently, transparently and non-fraudulently. Evidence shows that money was withdrawn from the Bank through Trust Capital Services Limited and without the sanction of the Bank in an account which did not officially exist in the bank's books. The Bank did not hold any security for the repayment of the same.

26. A reference to annexure DM 3 by the Plaintiff's liquidator shows that as at 9th September 1998, the said account was overdrawn in the sum of Kshs. 34,057,293.30/= and on 16th September 1998 the same account was overdrawn in the sum of Kshs. 241,442,376.80/=. It is evident from the above facts that in a space of 7 days between 9th and 16th September 1998 there was a massive withdrawal of funds from Trust Bank Limited (in liquidation) using the said account to the tune of Kshs. 207, 385,083.50/=. Two days later after the said withdrawal, Trust Bank Limited (now in liquidation) was placed under Statutory Management. There was obviously a run on the Bank and the Respondents were the Executive Directors then who knew or ought to have known of this fact.

27. The two Respondents obviously owe an explanation to the depositors of Trust Bank Limited (now in liquidation). It is difficult not to reach the conclusion that the account was used by the Respondents who knew that the Bank was about to collapse as a way of siphoning money out of the Bank.

28. The Respondents have not convincingly denied the factual allegations in this application. Actually, they admit most of them. At page 92 of the exhibit "R-1" by the second Respondent the following facts come out clear:-

a) That Trust Capital Services Limited owed a sum of Kshs. 246.4 million to Trust Bank Limited (in liquidation) as at 26th May 1999.

b) There was no security held by Trust Bank Ltd (in Liquidation) in respect of the said indebtedness.

c) Trust Capital Services Ltd was a related party of the existing directors of the Bank who signed appendix 11(d) contained at page 92.

d) The three Directors included the Respondent herein and one Nitin Chandaria.

e) At the said page, the said Directors admitted the debt and agreed to use their best endeavors to assist the Bank in the full recovery of the debt.

29. There is no evidence to date that a single coin has been repaid by the Respondents. This brings into question their loyalty and trust to the depositors of the Bank.

30. The application is brought under section 323 (1) (a) and 324 (1) of the Companies Act. Section 323 (1) (a) states as follows:-

323 (1) (a) "If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court, on the application of the official receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct."

While Section 324 (1) states as follows:-

324 (1) "If in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver, or of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the court thinks just."

31. The Director's responsibility or liability under Section 323 arises where the business of the company has been carried out with intent to defraud creditors. On the other hand the Director's liability under Section 324 arises where the assets of the company have been misplaced by the Directors or where the Director is guilty of breach trust or misfeasance in relation to the company.

32. The judgment in the case of **Flitcroft's case [1882] XXI Ch. D. 519** sets out the legal position regarding the liquidator's duties towards the creditors of the company. At page 535 the judgment states as follows;

“The liquidator represents the company, and is bound to discharge towards all the creditors all the duties which the company owes them. It is therefore his duty when such a breach of trust as this is discovered to get a return of the assets improperly expended that they may be applied in payment of debts. The act of the directors is impeached as a breach of trust, not on the ground of tort or misfeasance. There are persons who may be liable under section 165, without having been guilty of breach of trust; but where the person charged under that section is a trustee, the act which brings him within the section is a breach of trust. That being so, no Statute of Limitations nor any bar by analogy to the Statute can be relied on. The question of set-off is disposed of by our decision of yesterday in Pelly's case. Everything that could be urged for the Appellants has been well put, but their case fails.”

33. The Respondents responses to the application are substantially based on technical grounds, mainly attacking the affidavits in support of the application, but not in any way responding to the issues of trust and liability to depositors and their undertaking to repay the said loan. In my view the issues raised in the application are very serious and also raise public concern. The issues raised concern a period where banks just used to go under and depositors losing their lifelong savings without a soul on earth caring. The Respondents had a responsibility to the depositors. Upon their failure to act responsibly, they became liable. They were directors of the company which was carrying on banking business and by that reason became custodians or trustees of the depositors' funds. Those funds were withdrawn through a non-existent account or without a proper channel sanctioned by the bank. That not being enough, the Respondents misrepresented to the creditors and to the Court in the Scheme of Arrangement that the said withdrawals of funds was made pursuant to a valid loan transaction between Trust Capital Services Ltd and the bank in order to conceal the true fact that the funds had been withdrawn from the bank without a loan application from the alleged customer and through an account which was not officially opened in the bank's books.

34. Notwithstanding that their acts offended section 11 of the Banking Act, the Respondents are keen to persuade this Court to dismiss the application on purely technical grounds without substantively dealing with the facts and the law addressing the mundane issues raised. I refuse.

35. The Respondents must answer to sections 323 (1) (a) and section 324 (1) and since no satisfactory answer or explanation or **exculpatory** evidence has been given, the Notice of Motion application date 23rd March 2010 succeeds in its entirety with costs to the applicant.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 30TH DAY OF MAY 2013

E. K. O. OGOLA

JUDGE

PRESENT:

Ohenge holding brief for the Applicant

Billing for the 1st Respondent

Gitonga for the 2nd Respondent

Teresia – Court Clerk