



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
WINDING UP CAUSE NO. 42 OF 1993
IN THE MATTER OF NZAA KUU CEMENT COMPANY LTD
AND
IN THE MATTER OF THE COMPANIES ACT
CAP 486 OF THE LAWS OF KENYA
O. M. DA COSTA LUIS (the liquidator
for NZAA KUU CEMENT CO. LTD. APPLICANT
VERSUS
CHRISTOPHER M. MUSAU RESPONDENT

R U L I N G

Introduction:

1. Before the Court is an application dated 3rd April, 2013 brought pursuant to the provisions of **Sections 323, 324 and 325** of the Companies Act and **Rule 60** of the *Companies (High Court) Rules*. In the application, the Applicant seeks for a declaration for the Respondent in this matter be held personally responsible for all or any of the debts or other liabilities of Nzaa Kuu Cement Company Ltd. (hereinafter “the Company”) incurred before the liquidation process. The basis upon which the application is predicated is elucidated in the grounds set out in the application: that the Respondent has failed to co-operate with or assist the liquidator and has failed to disclose crucial information or account for the liabilities attributed to the Company and that the Respondent, in operating the Company, did so with an intent to defraud creditors and by false pretences induced various persons to give credit to the Company. It is also the Applicant’s contention that the Respondent illegally retained and diverted payments and property due to the Company, thereby knowingly and deliberately caused the Company to become insolvent.
2. The application is supported by the Affidavit of **Orlando Mario Da-Costa Luis** sworn on 3rd April, 2013. The Applicant contends that the Respondent, during an examination ordered by the Court on 26th February, 2004, failed to explain or give an account of the various liabilities incurred by the Company. It is the Applicant’s further contention that the Respondent formed and incorporated several other companies which served as conduits and laundering units for defrauding and diverting money from the Company for his own benefit. The Applicant at

- paragraph 18 (a) – (q) reiterates the matters which the Respondent could not explain or account for during the examination which was determined on 17th November, 2009. It is therefore, the Applicant's contention, that the Respondent be compelled to be personally culpable for the liabilities incurred by the Company and to repay and indemnify the creditors for his misfeasance.
3. In response to the application, **Mr. Christopher Musau**, the Respondent herein and a shareholder and former Director of the Company, denied the allegation by his Affidavit sworn on 26th April, 2013. In denying the allegations by the Applicant, the Respondent contends that the Applicant has not provided sufficient evidence or acted in a transparent manner, and therefore omitted and failed to prove any misfeasance on his part. Further, the Respondent alleges that the insolvency of the Company was caused by the going into liquidation of Trade Bank Ltd, in which it had an account to its credit of Kshs. 18,000,000/- and it would be therefore, callous and inconceivable for the Applicant to impute on the Company improper motives and personal liability upon the Respondent for the Company's insolvency. It is the Respondent's contention that the Applicant is apprehensive of his mishandling of the Company assets/money by virtue of his duties and obligations as the Liquidator and has not tendered any evidence that the Respondent willfully and intentionally mismanaged the Company, leading to its closure.

The Applicant's Case:

4. The Applicant's case is predicated upon the grounds that the Respondent's misfeasance or acts or omissions lead to the insolvency of the company. The Applicant contends that the Respondent carried on the business with an intent to defraud the creditors as per **Section 323 (1) (a)** of the *Companies Act* (hereinafter "the Act") and that the directors breached the Company's trust and mandated fiduciary duties and misapplied and retained the money and/or property of the company as per **Section 324 (1)** of the Act. At paragraphs 13, 14, 15 and 6 of the Supporting Affidavit of the Applicant, it is averred that the Respondent carried on the business with intent to defraud, and by false pretenses, induced various persons to give credit and failed to account for or explain the numerous liabilities incurred by the Company. At paragraph 17(a)-(q), the Applicant details what he considered the inexplicable matters that arose to which the Respondent, during the examination of 26th February, 2004 - 17th November, 2009, failed to give an explanation to or account for. The deponent maintained that there were irreconcilable differences and discrepancies, and it would be in the interest of justice for the Respondent to be held personally responsible for all the debts and liabilities of the Company.
5. In the Further Supporting Affidavit sworn by the Applicant on 31st May, 2013, the Applicant contends that the Respondent has continually failed to give an account of assets purportedly sold to off-set claims and moneys obtained from alleged sale of company assets. These were not provided for in any sale agreement or schedule of assets sold. The Respondent has failed to account for the consignment of cement to the Company and its sister companies, of over Kshs. 73,048,536/- which the Respondent claimed had been settled but which the creditors still claim is unsettled and the non-disclosure of the beneficiary of the alleged Kshs. 80,000,000/- worth of cement sold by the Respondent to his other companies during the liquidation period. It is the Applicant's contention that the Respondent has repeatedly and falsely alleged that its insolvency was due to the liquidation of Trade Bank Ltd, with which it had an account holding over Kshs. 18,000,000/-.
6. Having been accused by the Respondent in his Replying Affidavit of under selling the Company's property **L.R No. 12715/319**, which the Respondent alleged was valued at over Kshs. 50,000,000/- (Fifty Million), the Applicant produced Valuation reports marked "**OMDCL 13**" and "**OMDCL 14**" dated 19th May, 1997 and 5th April, 2002 from Messrs. Lloyd Masika Ltd and Tysons Ltd respectively. The valuation of the Company's said property therein stated were Kshs. 1,500,000/- and Kshs. 2,200,000/-. The sale agreement was concluded on 1st March, 2006 in which Messrs. Syokimau Eight Co. Ltd purchased the property for Kshs. 3,100,000/-.

The Respondent's Case:

7. It is the Respondent's contention that the Applicant has failed to show fraudulent trading and that

there was deliberate or otherwise carrying on of the business with intent to defraud creditors. The claims by the Applicant that the Respondent owes Kshs. 109,443,723/- did not take into account the substantial amounts that have been paid, which was deliberated upon during the Committee of Inspection meeting held on 16th June, 2000. At paragraph 80, the Respondent refers to paragraph 3(b) of the minutes of the aforementioned meeting in which E.A Portland Cement had been paid Kshs. 15,000,000/- and Bamburi Cement Ltd had recovered Kshs. 44,000,000/- from Trident Insurance Co. Ltd. Further at paragraph 64, the Respondent reiterated that the suppliers were paid by the guarantors in full, a fact that the Applicant had failed to update and/or capture in the admitted payments.

8. The Respondent further states that once the Applicant took over the Company as the Liquidator, all Company records and documents were in his custody, even though there is no record or inventory, (as reiterated in paragraph 89), of the documents taken over by the Liquidator. It is the Respondent's assertion that 1993 was a long time ago and any documents missing, which could not be produced, should not impute that the Respondent was unwilling or un-co-operative and that in any event, it is the Applicant who has not cleared the liquidation process and has not updated the records to reflect the true position of the Company's accounts as they stand presently.
9. The Respondent, at paragraph 28 and 29 of the Replying Affidavit, reiterates that the Company's insolvency was occasioned by the going into liquidation of Trade Bank Ltd in which it lost an amount of Kshs. 18,000,000/-. This loss, as it is alleged, was beyond the control of the Company, a fact which the Applicant acknowledged. Hence it would be reprehensible for the Applicant to therefore impute improper motives on the Company to conduct its business with intent to defraud. At paragraph 30, the Respondent contends that the Applicant has failed to appreciate the obvious consequences of such a loss as abovementioned, and had not in any way shown or explained how the Company would have survived the liquidation of its banker and had, instead, concentrated on perceived wrong trading of the Company, with an intent to show misfeasance on the part of its directors.

The Law:

10. The Applicant's application is brought under the provisions of **Sections 323, 324 and 325** of the Act. **Section 323 (1) (a)** of the Act reads:

“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”.

- Section 324 (1)** of the Act reads:

“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”.

In my view, the Applicant therefore, has to establish and prove to the Court:

- (a) That the directors carried out the business with an intent to defraud the creditors of the company or the creditors of any other person or for fraudulent purposes; and
- (b) That the director 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 Applicant took over the operations of the Company as its Liquidator on 20th December, 1994. The Company had gone into voluntary winding-up on 21st October, 1993 after the Respondent filed his Petition therefore. At that date, the outstanding debt was Kshs. 109,443,723/- which both the Applicant and Respondent have acknowledged, the latter albeit stating that the amount has significantly reduced over time. With regards to (a) above, the Applicant's contention was that the Respondent had established various other companies, including but not limited to Musau Hardware Ltd, Maanzoni Hardware Ltd, Nairobi Hides & Skins Co. Ltd, Musau Enterprises Ltd and Nova Chemicals (NCL) Ltd. He alleged that these companies were used as conduits and laundering units for defrauding and diverting money from the company. He also alleged that the said companies were supplied with cement, as per paragraph 15 of his Further Affidavit, after which were then conveniently wound up or lay dormant. However, the Applicant has not shown before Court just how these companies were used as conduits for carrying on business with intent to defraud or for fraudulent purposes has not been clearly established.

11. The Applicant also alleges that the Respondent sold off the assets of the company and diverted the proceeds for his own benefit. The assets in question were furniture and a motor vehicle all valued at Kshs. 1,200,000/- which the Applicant reiterated, were not included in the Statement of Affairs dated 31st December, 1993 even though they were included in the Petition dated 21st October, 1993. This was at paragraph 17(g) of the Supporting Affidavit. The Respondent, in response to that allegation, set out at paragraphs 70-73 of his Affidavit that the assets were sold off to off-set un-paid wages amounting to Kshs. 364,806/-. The price value placed upon the assets was predicated, according to the Respondent, on the date of purchase, and had subsequently depreciated over the four years in which the company was in operation, by the time of sale. What was received from the sale, if the Respondent's allegation is to be believed, was not Kshs. 1,200,000/- but a significantly lower amount which he never revealed before Court. Further, the Applicant, in his Further Affidavit at paragraphs 23-25, states that the Respondent has not supplied any evidence of corresponding salaries and statutory dues paid from the purported sale proceeds or the discrepancy between the 2 figures of Kshs. 835,194/-. At paragraph 26, the Applicant reiterates that these actions have been detrimental to the company. Did the director by these actions, wrongfully detain or misapply money or property of the company according to (b) as aforementioned?
12. According to Odunga, J in **The Deposit Protection Fund Board** (supra) upon which authority the Applicant heavily relied as being on all fours with this case, the directors' obligations under **Section 323 and 324** of the Act arise where the business of the company has been carried out with intent to defraud creditors and where the assets of the company have been misplaced or the directors are in breach of trust or misfeasance in relation to the company. The learned judge followed and adopted the ruling in **Re Exchange Banking Co. Flitcroft's Case [1882] XXI Ch. D 519** which set out the liquidators duties to creditors of a company. At page 535, it stated:

“The liquidator represents the company, and is bound to discharge towards all the creditors all the dues 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”.

13. Lewison J in **Re Hawkes Hill Publishing Co. Ltd (In Liquidation) Ward v Perks & Another**

(2007) EWHC 3073 Ch on the prospect of avoiding insolvent liquidation stated that:

“However, there is a crucial stage in the analysis that is missing. Accepting as I do that the directors ought to have known that the company was insolvent, it still leaves open the question: did they know (or they ought to have concluded) that there was no reasonable prospect that the company would avoid an insolvent liquidation? The answer to this question does not depend on a snapshot of the company's financial position at any given time; it depends on rational expectations of what the future might hold. But directors are not clairvoyant and the fact that they fail to see what eventually comes to pass does not mean that they are guilty of wrongful trading...so far as their actual knowledge is concerned, I am satisfied that they did not know or conclude that there was reasonable prospect that the company could avoid going into insolvent liquidation”.

Thus, the two issues as postulated in (a) and (b) herein, are: (a) did the Respondent act with intent to defraud in carrying out the company's business or for fraudulent purpose and (b) did he in any way mishandle or retain company assets and money in breach of trust. Lewison, J further in his determination in dismissing the application in **Ward v Perks & Another** (supra) reiterated;

“Of course, it is easy with hindsight to conclude that mistakes were made. An insolvent liquidation will almost always result from one or more mistakes. But picking over the bones of a dead company in a courtroom is not always fair to those who struggled to keep going in the reasonable (but ultimately misplaced) hope that things would get better”.

In **Access Bank PLC v Akingbola & Others** [2012] EWHC 2148 (Comm), Burton, J in determining the issue as regards breach of duty or breach of trust against an officer of a company determined *inter alia*:

“I have studied the section, and have, so far as English authorities are concerned, considered in particular Barings plc v Coopers & Lybrand [2003] Lloyd's Rep IR 556 at 1128 - 1134. I cannot see that, in the light of the findings I have made, the Defendant can be said to have acted, either in relation to the first and second heads of claim, to which alone this issue is directed, "honestly and reasonably": certainly not so far as the Tropics Payments Claim is concerned, and as for his Strategy for the company to buy its own shares into the box, quite apart from being contrary to Nigerian law, it was simply wrong-headed, and was plainly a substantial contributing factor to the collapse of the Bank”.

14.A reading of the two aforementioned cases i.e. **Ward v Perks & Another** and **Access Bank PLC v Akingbola & Others** follows the gist of what the present case and instant application is before Court. The Applicant seeks for a declaration that the Respondent was responsible for all the debts and liabilities of the company and should therefore be personally liable for repayment of the said debts and liabilities. It follows that if the Respondent acted ***“honestly and reasonably”*** and ***“or knew or ought to have known”*** that the company would become insolvent, he should have acted diligently and in a manner such as to mitigate any losses that may have been incurred or accrued in the ordinary course of business. In his submissions, the Applicant maintained that the Respondent falsely attributes the Company's collapse to the liquidation of Trade Bank Ltd. The Applicant purported that this allegation cannot be true, but has not produced before Court any evidence to the contrary. The allegation that the Respondent could have pocketed Kshs. 8,500,000/- is unsupported and based on presumptions, not on tangible evidence. The Respondent admits that indeed there was a debt of Kshs. 71,453,538/- which the other Companies under his portfolio guaranteed in the ordinary course of business. The Applicant also, has failed to establish how these companies were conduits for laundering and diverting the money and assets of the Company. As reiterated by Burton, J in **Access Bank PLC v Akingbola & Others** (supra), the burden of proving these allegations lie with the Applicant and he has to establish that the actions

by the Respondent were a “*substantial factor*” that led to the subsequent collapse of the Company. In my opinion, the Applicant has not come anywhere near proving the allegations of wrong doing that he has alleged against the Respondents. Although such burden of proof in civil matters is based upon the balance of probabilities, it must not be forgotten that the Respondent herein was charged with criminal offences as regards his actions in relation to the Company. It appears from his Replying Affidavit that those charges were dropped as against him. What clearly comes over from the conflicting Affidavits of the Applicant and the Respondent is that they have scant respect for one another, almost to the extent of exchanging insults. In my view, this Application has been filed after inordinate delay which serves little purpose other than irritate. The allegations made therein, I find unproven.

As a consequence, the Application dated 3rd April, 2013 lacks merit and is hereby dismissed with costs.

DATED and DELIVERED at NAIROBI this 12th day of August, 2013.

J. B. HAVELOCK

JUDGE

Delivered by Hon. A.Mabeya, J. this 12th day of August, 2013.

JUDGE