



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Petition 58 of 2010

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 77, 82 AND 84 OF THE OLD CONSTITUTION AND ARTICLES 19, 20, 21, 22, 23, 25, 27, 40, 48 AND 50 OF THE CONSTITUTION OF KENYA (2010), RULE 19 OF THE SIXTH SCHEDULE [THE TRANSITIONAL AND CONSEQUENTIAL PROVISIONS OF THE CONSTITUTION OF KENYA (2010)]

AND

IN THE MATTER OF ALLEGED DENIAL OF PROTECTION OF LAW AND ACCESS TO THE COURT IN CONTRAVENTION OF ARTICLES 47 AND 48 OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF ALLEGED ABUSE OF COURT PROCESS AND FAILURE BY THE HIGH COURT AND ATTORNEY GENERAL TO COMPLETE PENDING LITIGATION FOR TWENTY SIX (26) YEARS

AND

IN THE MATTER OF USURPATION OF THE PROPERTY RIGHTS OF THE PETITIONERS BY THE STATE LAW OFFICE CONTRARY TO ARTICLE 40 (3) OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF THE COMPANIES ACT, THE CENTRAL BANK OF KENYA ACT AND THE BANKING ACT

BETWEEN

RURAL URBAN CREDIT FINANCE LIMITED.....1ST PETITIONER

JOHN N. MWENJA NGUMBA (*Suing as the Administrator*

of the Estate of the late ANDREW KIMANI NGUMBA).....2ND PETITIONER

KARUGOR GATAMAH.....3RD PETITIONER

BETH N. MUIGAI.....4TH PETITIONER

NG'ANG'A GICHARU.....5TH PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE OFFICIAL RECEIVER AND INTERIM

LIQUIDATOR of the Petitioner.....2ND RESPONDENT

THE MINISTER FOR FINANCE.....3RD RESPONDENT

J U D G M E N T

Introduction

1. The Petition (*hereinafter referred to as "the Company"*) dated 30th September 2010 is premised on the following facts;

2. That the 1st Petitioner was incorporated on 22nd October 1981 as a limited liability company and the 2nd – 5th Petitioners were its former Shareholders and Directors with the 2nd Petitioner representing the estate of Andrew Kimani Ngumba (deceased). The company obtained a licence to carry on the business of a financial institution under the Banking Act and it commenced its business on 22nd October 1981.

3. On 16th November 1984, the Central Bank of Kenya commenced a statutory inspection of the 1st Petitioner and before that inspection was completed, it was placed under interim liquidation. Thereafter, H.C. Winding Up Cause No.31 of 1984 was filed and 2nd Respondent was appointed as Interim Liquidator and has had the conduct of the affairs of the 1st Petitioner since then. At paragraph 12 of the Petition, the 1st Petitioner had claims as follows;

"Upon his appointment on the 3rd day of December 1984, the official liquidator moved into the first Petitioners premises and inter alia engaged in the following functions;

(a) Updating the Petitioner's customers,

(b) Receiving loans repayments from institutions, customers and sundry debtors,

(c) Releasing road licenses for motor vehicles pledged as security and/or jointly owned by the first Petitioner and its customers.

(d) Calling and holding meetings with the Petitioner's Board of Directors, Advocates and major creditors,

(e) Paying salaries and other administrative expenses

(f) Upkeep and management of the Petitioner's assets including rent collections,

(g) Paying off depositors."

4. Further, that the 2nd Respondent has made huge payments from the funds collected by its officers but has never given audited financial reports of his transactions vis-à-vis the 1st Petitioner and his actions are **"oppressive, capricious, arbitrary and unconstitutional"** and the liquidation ought to have been terminated by effluxion of time under **Section 4 of the Limitation of Actions Act**. Further that the following Orders should be granted in favour of the Petitioners.

"(a) A declaration that the Petitioners constitutional and fundamental right as per Articles 19, 20, 21, 22, 23, 25, 27, 40, 48 and 50 of the Constitution of Kenya 2010 has been violated and in particular the Petitioners right to secure protection of the Law, the right to privacy of property and peaceful employment of property.

(b) A declaration that the petitioners are entitled to immediate peaceful enjoyment of L.R. No.209/2401 and protection against deprivation and Arbitrary entry of property.

(c) A declaration that the delay of the twenty six (26) years by the Courts, the Attorney General and the official liquidator to finalise Winding Up Cause No.31/1984 is a contravention of the Petitioners constitutional right under Article 47, 48, and 50 of the Constitution of Kenya – 2010 and a contravention of the petitioners rights to a speedy trial.

(d) A declaration that the occupation of the First Petitioner's property L.R.No.209/2401 by the State for the last twenty six (26) years offends the Petitioner's constitutional rights under Article 27 of the Constitution of Kenya – 2010 and amounts to trespass and that the 1st Respondent has subjected the petitioners, its Directors and Shareholders to unjust Arbitrary and discriminatory treatment contrary to Article 27 of the Constitution of Kenya – 2010.

(e) A declaration that the Petitioners are entitled to [to the] account to the first Respondent then total collections and disbursement from operation of its assets for the last 26 years.

(f) A declaration that the order of the Court of 3/12/84 was made without jurisdiction and contravened the provisions of the Companies Act, Banking Act and Central Bank of Kenya Act and deliberately deprived the petitioners of their fundamental right to secure protection of the law and protection of their property and is null and void ab initio.

(g) A declaration that ex-parte appointment of an interim liquidator of the 1st Petitioner and the failure by the 1st Respondent to issue 1st Petitioner with a copy of the inspection report and an opportunity to be heard in its own defence contravened the 1st Petitioner's fundamental rights.

(h) A declaration that there is no valid Petition to wind up the 1st Petitioner within ambit of Section 221 of the Companies Act and the Winding Up Cause No.31/1984 is a sham designed, presented and prosecuted for ulterior purposes of denying the Petitioner the secure protection of the Law.

(i) A declaration that the powers vested by the Banking Act on the 2nd and 3rd Respondents were unlawfully used to deny the Petitioner(s) their constitutional rights and that the dominant purpose of the institution, prosecution and maintenance of W.U.P. Cause No.31 of 1984 was for a purpose other than that which it was properly designed to achieve.

(j) A declaration that the continued prosecution of Winding Up Cause No.31 of 1984 by the 1st Respondents' agent the official liquidator and the continued occupation of the petitioners offices and building by the said Respondent is a violation of the petitioners rights to enjoy their property without

let or hindrance as guaranteed by the Constitution and an order for the immediate removal of the 1st Respondent the interim liquidator and all their servants therefore.

(k) A declaration that the continued prosecution of Winding Up Cause No.31 of 1984 and the intended unlawful sale of L.R. No.209/2401 and of any other assets of the Petitioners is oppressive, unjustifiable and fraudulent and an affront to the Petitioners rights under Articles 22, 23, 27 and 40 of the Constitution of Kenya 2010 and an order that the same be stayed permanently.

(l) A declaration that the institution, prosecution and maintenance of Winding Up Cause No.31/1984 is unconstitutional, oppressive, vexatious and an abuse of the court process and an order quashing the same be made and the 1st Petitioner's ownership and control of itself, and its assets be returned to its directors and contributories in enforcement of their constitutional right under Article 40 of the Constitution of Kenya – 2010.”

5. Respondent's Response

Although I have seen responses to certain Applications filed after the petition, I am unable to see any specific response to the petition but from an Affidavit sworn on 30th November 2010 and from Submissions by the 2nd Respondent, the 2nd Respondent's position is that the Petition is lacking in merit for the following reasons;

6. Firstly, that the issues raised in the Petition are directly and substantially the same issues as are pending before this Court in H.C. Winding Up Cause No.31/1984, In the matter of Rural Urban Credit Finance Limited (Milimani Commercial Court) and that the Order made on 3rd December 1984 has neither been set aside, vacated nor varied. To make other Orders in separate proceedings may lead to conflicting decisions.

7. Further, that although the Petitioners have certain rights, those rights must be weighed against the rights of others and in the present case, the Petitioners being former Directors still owe creditors and debtors of the 1st Petitioner in excess of Kshs.2 Billion which sums are still outstanding.

That therefore the Petition ought to be struck off.

8. Opinion on Issues for Determination

I should start by looking H.C Winding Up Cause No.31/1984 and effect, if at all, it has on the present proceeding. From what has been presented to me, on 3rd December 1984, Simpsom, J. ordered as follows;

“The Court hereby appoints the official Receiver to be interim liquidator of the above-named company and the Court hereby limits and restricts the powers of the said Interim Liquidator to the following acts, that is to say, the getting in, protection and investment of the assets of the company and the ascertainment of liabilities.”

9. The Petition leading to the above Order had been filed by the Co-operative Bank of Kenya Limited which was claiming its deposit of Kshs.29 Million placed with the 1st Petitioner.

10. In a Ruling delivered on 7th December 1984, Simpson, J. dismissed an Application by the 1st Petitioner for dismissal of the Winding Up Petition and the discharge and setting aside of the orders for appointment of the Interim Liquidator. In doing so, he partly stated as follows;

“The repercussions of the appointment of an Interim Liquidator may well be considerable but it is not difficult to imagine the repercussions which might follow failure to make such an appointment.”

11. I have also read an Affidavit sworn on 29th August 1986 by one Bernice Gachegu, Senior Deputy Official Receiver where she deponed at paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 as follows;

“(3) That following an Order of this Court made in September 1986 the Official Receiver refunded to every depositor of the company whose individual deposit did not exceed the sum of Kshs.50,000/-, a total sum of Kshs.20,037,935.20

(4) That following further Orders of this Court made on 17th day of October 1988, the official Receiver paid to the depositors of the Company whose amounts did not exceed Kshs.3,900,000/-, a total of Kshs.69,894, 611.30/-.

(5) That on further Order by this Court made on the 2nd day of July 1990 the Official Receiver paid to the remaining creditors Kshs.6,000,000.00 each with the whole amount coming to Kshs.74,973,811.35.

(6) That there are now only eight creditors of this Company whose total outstanding balances amount to Kshs.248,821,557.20

(7) That the Official Receiver has worked out that if the remaining depositors are paid a total sum not exceeding Kshs.17 Million there will be a credit balance in the account of the company.

(8) That after making provisions for payment of staff salaries, insurance services, water, telephone, electricity and for other administrative expenses, payment for the sum not exceeding Kshs.17 million will be possible.

(9) That before the Official Receiver and interim Liquidator makes any payment to the depositors of the Company he needs the approval of this Court.

(10) That this Affidavit is made in support of such an Application for the approval to pay the stated sum of Kshs.17 Million.”

12. On 17th October 1988, Shaikh Amin, J. approved the repayment of Kshs.3.9 Million to certain depositors, pursuant to an Application by the 2nd Respondent.

13. I should note here that on 25th June 1984, the learned Judge (Sheikh Amin, J.) granted Orders that the Interim Liquidator, be granted ***“additional powers to sell moveable and immovable property of the company or in which the company has any interest without reference or consent of the Board of Directors of the company.”***

14. None of the Orders specified above have to my knowledge ever been set aside and they are lawful to that extent. A casual look at the Petition would show that it is those Orders that are sought to be challenged and this Court is being asked to declare the appointment of the Interim Liquidator as unconstitutional as are the powers that he enjoys. The complaints about the intended sale of L.R.No.209/2401 fall within the same complaint and the question that confronts this Court is whether it can legitimately purport to redress the complaints by the Petitioners when it is conceded that High Court Winding Up Cause No.31/1984 is still pending and unresolved? That Petition sought Orders that the 1st Petitioner be wound up. **Section 235** of the **Companies Act** grants the Court the discretion to appoint an Interim Liquidator *“before the making of a Winding Up Order”* and **Section 238(5)** provides that *“the acts of a Liquidator shall be valid notwithstanding any defects that may afterwards be discovered, in his appointment or qualification.”*

15. I have framed the above question because Mr. King’ara for the Petitioner has partly stated in his Submissions, that the issues to be determined are only two viz;

“(1) Whether the Petitioners constitutional rights were violated before the appointment of the Official Receiver as the Interim Liquidator of the 1st Petitioner.

(2) Whether the Petitioners constitutional rights continued to be breached after appointment of an Interim Liquidator from 3rd December 1984 to date.”

16. The two questions can only be answered in the context of the single question I have posed above and my answer would be that the Winding Up Court is the High Court which is this Court sitting in its original civil jurisdiction under **Article 165(3)(a)** of the **Constitution**. It follows that all the issues now raised can and should have been raised within that Cause and not by the filing of separate proceedings invoking the jurisdiction of the High Court under **Article 165(b)** and **(d)** of the **Constitution**. For avoidance of doubt, **Article 165** of the **Constitution** provides as follows;

“(1) There is established the High Court, which—

(a) shall consist of the number of judges prescribed by an Act of Parliament; and

(b) shall be organised and administered in the manner prescribed by an Act of Parliament.

(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

17. I wholly agree with the 2nd Respondent that the High Court can hear any Constitutional question because it is clothed with jurisdiction under **Article 165** above which should be read holistically. There is a misconception that the High Court Division on Constitutional and Human Rights Division in Nairobi is a separate Court that can overturn, ignore and shunt aside any Orders or proceedings before other Divisions of the High Court but that is not the Law. I also agree with the 2nd Respondent that **Rule 23** of the **Constitution of Kenya (Supervisory Jurisdiction)** and **(Protection of Fundamental Rights and Freedoms of the individual)** High Court Practice and Procedure Rules 2006 although made pursuant to **Section 84** of the **Repealed Constitution** was created to cure such a situation. It provided as follows;

“Where a constitutional issue arises in a matter before the High court, the Court seized of the matter may treat such issue as a preliminary point and shall hear and determine the same.”

18. As new Rules are being promulgated in line with the Constitution, 2010, the above provision will remain relevant.

19. Having said the above, I must express my dissatisfaction that the 2nd Respondent has been in office for twenty six (26) years and yet remains interim. **“Interim”** is defined in the Oxford English Dictionary, Indian Edition as **“intervening period”; “provisional”; “relating to less than a full years business activity”**.

20. **Section 235** of the **Companies** envisaged interim as being the period before the Winding Up Order is issued or the Liquidation is lifted. Twenty six (26) years cannot be interim by any stretch of the imagination and my sentiment’s aside, it behoves the Petitioners to move the Winding Up Court to issue the necessary Orders and that much as I have my strong views on the matter, the Petition before me is an abuse of the process of Court as it has ignored the right forum to ventilate all the issues now raised.

21. For obvious reasons, I will not delve into whether the orders sought can be granted or not because that is for the trial judge in H.C. Winding Up Cause No.31/1984. The Petitioners can raise all the matters in that Court to avoid conflicting decisions by the High Court.

22. In the event, I will politely and with respect, dismiss the Petition.

23. As to costs, from my statements above, no party has wholly succeeded and this case is one where each party must therefore bare its owns costs.

24. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 16TH DAY OF MARCH, 2012

ISAAC LENAOLA
JUDGE

CORAM

ISAAC LENAOLA – JUDGE

Miron – Court Clerk

Mr. Kariuki hold brief for Mr. King’ara for Petitioner

Miss Gitau hold brief for Mr. Njenga for 2nd Respondent

ORDER

Judgment duly read.

ISAAC LENAOLA

JUDGE

16/3/2012