REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

Civil Suit 130 of 2010

RUTH WANJIKU KAGIRI.....PLAINTIFF/ APPLICANT

VERSUS

RELIANCE BANK LIMITED (In Liquidation).....1st DEFENDANT/RESPONDENT

JOSEPH WAWERU NJOROGE.....2ND DEFENDANT/RESPONDENT

MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS.....3RD DEFENDANT/RESPONDENT

RULING

This ruling is the subject of a Notice of Motion dated 8th February 2012 by which the plaintiff/applicant seeks the following orders:

1. That this application be certified as urgent and heard ex-parte in the first instance due to the urgency and nature of the matter.

2. That the Honourable Court be pleased to grant leave to the Plaintiff herein to institute proceedings against the 1st Defendant messrs RELIANCE BANK LIMITED which is under liquidation and such leave be deemed to have taken effect from the date of filing this suit.

3. That the Defendants herein, their servants agents and whomsoever be restrained by an Order for temporary injunction from advertising, selling, destroying alienating, transferring, interfering or dealing in any manner whatsoever with the plaintiff's property known as PLOT NO. 4/31 MATHARE NORTH, NAIROBI pending the hearing and determination of this application for leave.

4. That the court do grant such other relief as it many deem fit to grant.

5. The costs of this application be provided for.

The application is supported by an affidavit sworn by **Ruth Wanjiku Kagiri**, the plaintiff herein on 8th February, 2012. After narrating the history of this matter, the plaintiff deposes that although the

provisions of the Companies Act Cap 486 required that leave be sought and obtained before the suit was filed, due to the urgency of the matter emanating from the threatened sale by public auction of the suit premises by the 1st Defendant, leave to file the suit was applied for simultaneously with the application for injunction. According to the deponent, in a ruling dated 4th March 2011 the Court ruled that the filing of the application for leave together with the application to restrain the Defendants from interfering with the suit premises was proper and that no appeal was lodged against the said decision. Upon hearing the application for leave and injunction dated 4th March 2010 the court was of the view that no sufficient evidence was tendered before it in support of the application for leave to institute proceedings against the 1st Defendant and it was therefore struck out. That is the genesis of the present application.

The application was opposed by an affidavit sworn by **Jane W. Waita**, an employee of Central Bank of Kenya. According to the deponent she has been advised by the 1st defendant's advocates on record that one cannot seek leave to institute proceedings which have already been instituted before leave is granted; that leave cannot be deemed to have taken effect from the date of filing suit while leave is just being sought to institute the suit; that prayer 1 in the said Motion is therefore ambiguous and is incapable of being granted. According to the deponent, the applicant herein filed suit on the 4th March 2010 without leave of the Court and her attempt to apply for leave failed and the application was dismissed. According to her, no suit can survive once it is filed without leave as opposed to where the winding up order is made during the pendency of the suit. Therefore, it is deposed, the applicant should withdraw this suit and procedurally obtain leave to file her suit. It is also contended that the application suffers from *res judicata* since, in the deponent's view, the applicant should have applied for review of the earlier decision.

In her written submissions, the plaintiff, through her learned counsel **Mr. Gichachi**, reiterates the contents of her affidavit sworn in support of her application and states that the Chamber Summons dated 4th March 2010 was just struck out but was never dismissed meaning that the Plaintiff is entitled to bring another application seeking the same orders so long as it meets the requirements and or the parameters set out by the court. According to the Counsel, the plaintiff should not be denied the requested leave simply because it was not first sought and obtained before the filing of the suit. According to the plaintiff the procedure under which the suit was brought was approved by the ruling of **Lady Justice Mugo** which ruling was never appealed against and or set aside. In refusing to grant the leave which is sought now and which was brought in the previous application, it is submitted the Court would be going against the provisions of Section 1A and 3A of the Civil Procedure Act and section 159(2)(d) of the Constitution of Kenya rather than the procedure as to how such justice is sought. It is further submitted that the fact that the Court did not strike out the suit is a manifestation that the contention that the whole suit should be withdrawn and then filed afresh after leave has been granted, has no basis whatsoever and more so when the respondents will not suffer any prejudice by the act of allowing this application. In contrast to the decisions cited earlier in these proceedings where leave was not sought, it is the plaintiff's case, that in this case a prayer for leave to be granted was incorporated in the Chamber Summons only that there was no sufficient evidence to support the prayer for leave. Relying on **Halsbury's Laws of England 4th Edition Volume 7(3) paragraph 2654**, it is submitted that this case is a proper case where leave cannot be denied and not be granted purely on procedure since there is no allegation that the respondents will suffer prejudice or loss. On the other hand, it will be unfair and unreasonable to tell the Plaintiff to withdraw her suit and file a fresh one, an action will occasion loss of filing fees and the time of both parties and the Court. Accordingly, the Court is urged to allow the application without undue technicalities and procedure.

On their part, the respondents, through their learned counsel **Mr. Omino,** submitted that the law and jurisprudential text available do not recognise the procedure that prayer 2 in the Notice of Motion dated 8th February 2012 invites the Court to follow. It is submitted that leave to commence a suit shall be applied for and must be obtained before the filing of the suit as stipulated under section 228 of the Companies Act. Relying on **Joseph Kaara vs. Thabiti Finance Co. Ltd Civil Application No. 120 of 1998**, it is submitted that a suit filed in breach of the mandatory provision of section 228/241 of the Companies Act renders the suit incurably defective. In this suit, it is submitted, the applicant has already filed the suit in gross violation of the mandatory provisions of section 228 of Cap 486 which renders the suit incurably defective. It is submitted that the only occasion in which leave can be given to continue

with a suit is where the suit was filed before liquidation. The Court's discretion to grant leave is guided by the principal law as well as procedure and the Court, it is submitted, cannot consider exercising discretion when there are no guiding rules and principles of law to be applied. According to the respondents, the paragraph of **Halsbury's Laws of England** cited by the applicant deals with the reasons or grounds upon which leave is to be granted and not the process and procedure for obtaining leave and the correct procedure is found in paragraph 1578 thereof. The only way forward, according to the respondent, is for the applicant to begin afresh and follow the procedure.

In my ruling dated 2nd February 2012 I expressed myself as follows:

The issue that I have to decide is the effect of the failure to obtain leave of the court before the institution of this suit. Section 228 of the Companies Act Cap 486 Laws of Kenya provides as follows:

"228. 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."

In JOSEPH KAARA MWETHAGA VS. THABITI FINANCE COMPANY LIMITED & OTHERS CIVIL APPLICATION NO. NAI. 120 OF 1998, the Court of Appeal held that a suit filed against a Company registered under the Companies Act undergoing an involuntary liquidation without leave being obtained in breach of the Mandatory provisions of sections 228 and/or 241 of the Companies Act (Cap 486) and/or section 35 of the Banking Act (Cap 488) renders the suit incurably defective and incompetent in law and it follows that an application for an injunction made in such a suit must also fail...The provisions of section 228 of the Companies Act have been extensively by the Court of Appeal in the case of *KIRTESH PREMCHAND SHAH VS. TRUST BANK LIMITED CIVIL APPLICATION NO. NAI. 188 OF 2006*where the Court stated as follows:

"There is no dispute that Part VI of the Companies Act on Winding Up which encompasses sections 212 to 344 of the Act, applies to liquidation of banking institutions by the Central Bank of Kenya. Section 35of the Banking Act expressly provides for that application. By the time the liquidator of the Bank was appointed, there were numerous cases pending before courts either instituted by the Bank or against it and there were others which the Bank contemplated instituting. Along list of some of the matters is exhibited with the record and formed part of the orders issued by the superior court sanctioning either continuation or commencement of such matters. But those orders were sought by and granted in favour of the Bank. The issue is whether the benefit of the orders could inure to the benefit of other persons or parties and whether the orders are limited in scope to the proceedings specifically disclosed to the court or would extend to consequential proceedings and appeals...The fact that the Court has stayed the rigours of a winding up order cannot whittle down the provisions of section 228 of the Companies Act. Until the winding up order is set aside, leave of the court is still required for the continuation of the proceedings by the company. Where leave to institute an appeal has not been made and the applicant seeks a discretionary order, the cannot ignore the provisions of section 228 as any appeal without leave of the court would be incompetent...On the facts of the case the court was right in making such a finding since no application for continuation of the suit with leave of the court had been made in the superior although the matter was squarely governed by the provisions of section 228...Section 228 was lifted verbatim from the provisions of the English law relating to companies which was in force at least since the Companies Act 1862 was enacted. Its operation commenced in 1962 and, like most of the other provisions of the Kenyan Companies Act, it has remained unchanged since then. In passing, this is a sad commentary on this country's legislative reform agenda considering that the provisions of the mother Act has over the centuries drastically changed in England to accommodate the ever changing nature and environment of business companies and Company Law. Be that as it may, English decisions and commentaries on the construction and application of section 228 are relevant today as they were in 1862. Without indulging in any comprehensive discourse on the subject, the court is of the opinion that the rationale for the provisions of the section was to ensure that the court, the acknowledged neutral arbiter of disputes, takes control of the disabled commercial entities and ensures justice and fairness to all creditors,

whether secured or unsecured, and the contributors. That is why the liquidator must answer to the court for all his activities, as he owes a statutory duty to the creditors and the contributories. The elaborate provisions and procedures under Part VI of the Act and the "The Companies (Winding Up) Rules" made thereunder attest to the jealous concern of the court in guiding the process of liquidation and it matters not that the words used in section 228 are "action" and "proceeding" and that they are not defined. The construction of the words must be wide enough to include any form of proceedings in court brought by any lawful procedure before such court...The object of the winding-up provisions of the Companies Act 1862 is to put all unsecured creditors upon an equality and to pay them *pari passu.****To accomplish this it is indispensable that proceedings against the company by way of action, execution, distress or other process should be suspended; otherwise the winding up would resolve itself into a scramble for the assets. Section 226 (of the English Act) gives the Court jurisdiction after presentation of the petition to retrain proceedings, and by section 228 and 231, on winding up order being made, or a provisional liquidator appointed, proceedings are automatically stayed and cannot be proceeded with without leave of the court. In this way creditors and others are compelled to come in and prove their claims in winding up, and a rateable and just distribution of the company's assets is effected. "Proceedings" under section 231 is given a wide meaning, and includes execution and interpleader summonses. The words "any other action or proceeding" in section 226 (b) likewise are general and not limited to actions in England but extend to actions and proceedings in Scotland; Northern Ireland being covered by section 226(c). The court can also, in a voluntary winding up on application under section 307, restrain executions and other proceedings..The foregoing, with necessary changes to suit local circumstances, underscores the rationale for the control of the winding up process by the court and also the wide construction of the actions and proceedings targeted in that process...The instant application is targeted at the Bank, which is in liquidation. Expenses are likely to be incurred in that process and that may be materially detrimental to the creditors and contributories. There is no provision in the Companies Act precluding applications and appeals to the Court of Appeal from the rigours of section 228. They are in category of "actions" and "proceedings" referred to in that section. It seems logical therefore that a party intending to proceed against the Bank in the Court of Appeal must seek the leave or sanction of the winding up court and it matters not that the superior court granted leave in the same matter earlier. The sanction or leave of the court is sought and granted on the basis of the facts and circumstances existing when the matter is laid before the court and the court exercises its discretion on those particular facts...For the foregoing reasons, the preliminary objection raised by the respondent is upheld and the application seeking stay of execution is incompetent and is struck out."***

Similarly, in the case of KISSI PETROLEUM PRODUCTS LTD VS. KOBIL PETROLEUM CIVIL APPLICATION NO. NAI. 309 OF 2003 the Court of Appeal held that where a winding up order has been made but is not operational because its rigours has been stayed, such an order of stay cannot whittle down the provisions of the section 228 of the Companies Act and until the winding up order is set aside, leave of the Court is still required for the continuation of the proceedings by the company. The Court stated further that if leave to institute the appeal is not obtained and as the applicant is seeking a discretionary remedy, the Court cannot ignore the provisions of section 228 as any appeal without leave of the Court would be incompetent...In order to drive this point home Mwera, J in the case of *BISAI & ANOTHER VS. KENYA COMMERCIAL BANK LTD & OTHERS [2002] 2 EA 346* stated 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...Accordingly, based on the above authorities, which are binding on me I am unable to entertain this application.

It is therefore clear that I was of the view, based on the foregoing authorities both from the High Court and the Court of Appeal that leave must be obtained before legal proceedings are commenced against a company under liquidation. In ***Kirtesh Premchand Shah vs. Trust Bank Limited*** (supra), the Court of Appeal was clear that ***a party intending to proceed against the Bank in the Court of Appeal must seek***

the leave or sanction of the winding up court. It is therefore not true that the Court was dealing only with instances where there was no application for leave as submitted by the applicant. My understanding of the holding that leave must be sought by "a party intending to proceed" is that leave must be sought before the proceedings are instituted. A party intending to proceed means a person who is yet to institute legal proceedings and cannot be equated to a party who has instituted the proceedings. My understanding of section 228 aforesaid as well as the authorities above, is that where a winding up order is made against a company, all pending proceedings against the company are stayed until leave to continue therewith is granted. On the other hand, fresh proceedings are expressly barred unless leave is granted and conditions attached thereto are complied with. Even if I was to find, as the applicant would wish me to, that **Hon. Lady Justice Mugo** had found the procedure in order, in light of the foregoing decisions from the Court of Appeal, that finding would respectfully be *per incuriam*. However, the same is not per *incurium* since I have found that **Mugo, J** was not seised of the application for leave and therefore did not and could not have decided that issue. Until the matter is revisited by the Court of Appeal or the Supreme Court, this Court cannot be expected to find otherwise.

It therefore follows that as no leave was granted before these proceedings were instituted, these proceedings were improperly instituted. A failure to comply with a provision of a statute with respect to conditions precedent to the filing of a suit cannot, in my view, be brushed aside as being merely procedural.

In the foregoing premises I find no merit in this application which I find to be incompetent having been brought after the suit was filed. Accordingly, the same is dismissed with costs to the 1st and 3rd respondents.

Ruling read, signed and delivered in court this 25th day of July 2012

G.V. ODUNGA
JUDGE

In the presence of:

Mr Gachie for Mr Gichachi for the Applicant

Mr Etemesi for Mr Omino for the Respondents