REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CENTRAL REGISTRY

CIVIL CASE NO. 1441 OF 1995 (.S)

THE OFFICIAL RECEIVER AND PROVISIONAL LIQUIDATOR
CONTINENTAL CREDIT COMPANY LIMITED (IN LIQUIDATION)…….....
……..PLAINTIFF

-VERSUS-

CITY COUNCIL OF NAIROBI……...……..…….……1ST
DEFENDANT
RAFIKI ENTERPRISES LIMITED…….....……...……2ND
DEFENDANT
CAPITAL AUCTIONEERS……...……..…….3RD
DEFENDANT
AFRICAN EXPORT-IMPORT LIMITED……..…….....…..…….4TH
DEFENDANT
HEULANDS LIMITED ……...…….5TH
DEFENDANT
REGISTRAR OF TITLES (INLAND REGISTRY, NAIROBI)…….....……6TH
DEFENDANT

RULING

After the suit was withdrawn by the Plaintiff with costs to the Defendant, the costs were taxed in the sum of Kshs.746,707/=. After certificate of costs was issued, Judgment was accordingly entered. The Decree holder, the 2nd Defendant then filed an application to issue the Notice to Show Cause against the Plaintiff/Judgment-Debtor namely Official Receiver Continental Credit Finance Limited.

It can be noted that the plaint was filed by the Official Receiver, of the said finance company on leave having been granted by the court order.

On the service of Notice to Show Cause, the Plaintiff/Judgment-debtor has filed a Notice of Preliminary Objection dated 25th March, 2010. The notice mainly contends that the Plaintiff who is an Official Receiver and Provisional Liquidator of the Company was appointed as such by the court order dated 7th August, 1996 in Winding Up Cause No. 29 of 1996. He is an agent of the court and thus no execution can be made against him as per the provisions of the Companies Act (Cap 486).

Written submissions filed by the parties were adopted during the hearing of the Preliminary Objection. The learned counsel for the Plaintiff has reiterated the facts of his appointment as the Official Receiver and relied on the provisions of Sections 223, 225 and 228 of the Companies Act. The effects and purport thereof in short, are that no execution can be levied against the estate of the company under liquidation and that any claim against the company has to be realized as per the provisions of Winding Up of Companies.

Sec. 225 and 228 of the Act were specifically cited which stipulate:-

"Sec. 225: Where any company is being wound up by the court, any attachment, distress or execution put in force against the estate after the commencement of the Winding Up shall be void."

"Sec. 228: When winding up order has been made or an interim liquidator has been appointed under Sec. 235, no action shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may purpose."

It is thus submitted that looking to the mandatory nature of the aforesaid provisions, the Notice to Show Cause is thus fatally defective and be declared as null and void.

The case of ***Official Receiver and Provisional Liquidator Nyayo Bus Service Corporation –vs- Firestone E.A. (1969) Ltd. (Civil Appeal No. 172 of 1988*** *(Unreported)* was cited and following passage thereof was relied upon.

"Section 225 of the Act provides in no uncertain terms that any attachment after commencement of the Winding Up 'Shall be void'. It is clear therefore that the superior court has power to review proceedings in an action when the same are void. The right to have the issuance of warrants of attachment set aside when the issuance is void ab initio is one remedy that the provisional liquidator of a company has. Mr. Kipkorir's argument that a Creditor can move to attach after a winding up order is made is incorrect. The order for winding up places the company in the custody of the provisional liquidator and the company remains under winding up provisions until it is actually wound up where after the course there is nothing much left to do." *(Emphasis mine)*

It was further emphasized that the Court of Appeal in the said case has observed that ***"A Judgment debt as opposed to a secured debt, takes no priority, it remains an unsecured debt."***

Thus it was submitted that the Judgment-Creditor like any other Creditors has to prove its debt to the liquidator for payment as per the realizable assets of the company under liquidation, priority of the debt and scheme of arrangement to be agreed as between the Creditors.

The Judgment-Creditor having a Judgment in its favour should be directed to avail himself to the provisions of the Winding Up Rules made under the Act.

The case of ***Nyayo Bus*** *(Supra)* only differs in respect of a fact that the suit was filed by a Creditor against the company which was later placed under Receivership. This case, in contrast, is filed by the Official Receiver of the Plaintiff's company after the leave of the court was obtained to file the suit. Later the Plaintiff withdrew the suit against the 2nd Defendant with costs to be payable by the Plaintiff.

With this relevant difference between the facts of the ***Nyayo case*** *(Supra)* and this case, the following submissions were made.

It was submitted by the learned counsel for the 2nd Defendant/Applicant that the Official Receiver once appointed by the court is subject to the provisions of Laws and Statute and his obligation thereunder extends to payment of costs of proceedings which he has bought or defended on behalf of the company. (See Carr – The law of Administrator and Receivers of Companies at page 725).

In the case of in ***re Wenborn & Co. (1905) 1 Ch. 413 at 417***, it was held viz.

"When the voluntary liquidator or the liquidator in a compulsory Winding Up, comes to the court for leave to bring or defend an action by or against the company and obtains this leave the judge in effect pledges the assets of the company for the costs of the action which he authorizes the liquidator to bring or adopt or defend." *(emphasis mine).*

It was further observed at the outset as under:

"Where there is a winding-up of a company (whether compulsory or voluntary) and claims of Creditors, including those in respect of costs, ought prima facie to be dealt with in the winding-up in accordance with the rules applicable to the distribution of the assets; but if an action is pending to which the company is a party, and the company by its liquidator determines to prosecute or defend the proceedings for the estate, the estate must be treated as the party litigant, and must in case of failure pay the costs in full." *(emphasis mine)*

In the present case, the facts are not disputed. The Official Receiver for the Plaintiff company which has been earlier placed under receivership sought leave to file this suit against six Defendants. The suit was filed on obtaining leave from the court. The suit against the 2nd Defendant was withdrawn after the interlocutory applications were heard. Thereafter, the Bill of Costs were protractively contested and was taxed eventually. Certificate of cost was issued and it is evident that the Receiver of the Plaintiff company has not challenged the same in any event.

I further note that even in the case of ***Prof. David Musyimi Ndetai –vs- Daima Bank Ltd.*** *(in liquidation)* which is relied by the Plaintiff/Respondent the case was filed against the Defendant company and Judgment was obtained while it was solvent. Thereafter, the liquidator was appointed for the Defendant Company. Because of that fact, the proof of debt form inevitably had to be filed and which was filed. The court thus was right in directing the liquidator to consider the proof debt forms for the settlement thereof.

This case presents a different scenario. Here, it is the liquidator who commenced and proceeded with the present action and it was properly filed, with the leave of the court. The liquidator was involved throughout with the action and was aware of the process and orders made by the court.

The purpose, spirit and tenor of the relevant provisions for winding up process of the Companies Act, in my view, are to protect the estate and assets of the Company in liquidation against the company by its Creditors in the actions filed against the Company (see 228 of the Act). This present action has been brought by the liquidator as a Plaintiff and, as the luck had it, the company had been adjudged, after due process, to be indebted in costs taxed.

It would take support in the case of ***National Westminister Bank –vs- Pawney (1990) 2 W.L.R 1084,*** whereinit was held that the word ***"action" did not include an application for leave to issue execution on a Judgment or to extend the process of execution.***

Rule 81 of the Winding Up Rules, with due respect to the Plaintiff/Judgment-debtor, does not have any relevance to the present matter.

Similarly in Gower's Principles of Modern Company Law (page 730) it is observed namely:-

"in a winding up Creditors may normally prove for all debts whether due immediately or payable contingently and for all claims present, future, vested or contingent, ascertained or sounding only damages, a valuation being placed on them where necessary. Prima facie, therefore, every sort of claim, whether in contract, tort or otherwise, can be proved."

However, I do find that this claim is the order of the court in the case filed by the liquidator himself and is a valid claim. I shall thus find that the Notice to Show Cause is valid and do further direct that the Plaintiff/Judgment-debtor shall show cause.

Costs in the cause.

Dated, signed and **delivered** at Nairobi this 8th day of **April, 2011**

K. H. RAWAL

JUDGE

8.04.2011