



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

MISC. APPLICATION CASE NO. 52 OF 2009

**NEPTUNE CREDIT MANAGEMENT
LTD.....PLAINTIFF**

VERSUS

INVESCO ASSURANCE CO.....1ST DEFENDANT
JOSEPH KYULA.....2ND DEFENDANT
JOSEPH GITAU MBURU.....3RD DEFENDANT
JOSEPH KARIUKI.....4TH DEFENDANT
TAFI ENTERPRISES.....5TH DEFENDANT
ROMICHI COMPANY LTD.....6TH
DEFENDANT
GALE COURT HOLDINGS LTD.....7TH
DEFENDANT
NGUYU NGUBUINI.....8TH DEFENDANT
LINMERX INVESTMENTS LT.....9TH
DEFENDANT

R U L I N G

Before me are two Chamber Summons applications dated 23rd March 2010 and 14th May 2010, respectively. The Chamber Summons dated 23rd March 2010, was filed by the 1st Defendant in this suit, praying either that; the Plaintiff's Plaint be struck out with costs or the Plaintiff's claim against the

1st Defendant/Applicant be marked as settled.

The application is brought under **Orders X1 Rule 6 and V1 Rule 13 (1) (b) and (d)** of the **Civil Procedure Rules (2009 Revised Edition)** and is based on the grounds, firstly, that the Plaintiff cannot sustain a claim against the 1st Defendant/Applicant having compromised all and any monetary claims it may have had against the 1st Applicant by virtue of a consent order recorded in **Winding Up Cause No 19 of 2007**. For this reason the 1st Defendant/Applicant considers the present suit to be abuse of the process of the court. In the petition the Respondent alleged that the 1st Defendant/Applicant owed it some KShs. 14,760,000/=, being the balance of commission payable in respect of debt collection services undertaken by the Respondent on behalf of the 1st Defendant/Applicant. Following negotiations which led to the recording of the consent order, a sum of KShs. 4,000,000/=, representing the final payment of such commission, was paid to the Respondent.

The second ground upon which the 1st Defendant/Respondent's application is brought is that the suit is bad in law, having been filed in violation of a moratorium declared by the statutory manager of the Respondent on 29th February 2008, and in contravention of orders made by the court on 20th June 2008, to the effect, inter alia, that no civil proceedings of whatever nature or form would be entertained or filed in any court or tribunal against the 1st Defendant/Applicant during the currency of the moratorium. Filed with the Chamber Summons and in support thereof is an affidavit sworn by the 1st Defendant/Applicant's manager on 23rd March 2010, to which documents evidencing the 1st Defendant/Applicant's relationship with the Respondent, and the terms of the service contract entered between them, are annexed. Documents evidencing the payment of commission and particulars of how and when made are also annexed to the said affidavit.

In the Chamber Summons dated 14th May 2010, brought under **Order V1 Rule 13 (1) (a) (b) (c) and (d)** of the **Civil Procedure Rules 2009 Revised Edition, Section 1A, 1B and 3A** of the **Civil Procedure Act**, the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Defendant pray that the Plaintiff's suit against them be dismissed with costs for the following reasons:

- 1. That the suit was commenced without leave of the court yet the 1st Defendant was under statutory management.**
- 2. That the suit was filed in contravention of the orders of the court issued on 30th June 2008, in H.C.C.C. NO. 318 of 2008, to the effect that no civil proceedings of whatsoever nature or form should be filed and/or entertained in any court of tribunal against the 1st Defendant while the moratorium issued by the statutory manager on 1st March 2008, was in force.**
- 3. That by enjoining the Applicants in the proceedings the Plaintiff has violated the company law principle that a limited liability company is a distinct and separate entity from its shareholders and directors and that shareholders cannot be sued for the wrongs of the company.**
- 4. That the suit is an abuse of the process of the court for having been filed whilst the Plaintiff's voluntary Winding Up Petition (W.C. NO. 19 of 2007) was pending, which petition has since been settled by consent.**
- 5. That the Plaintiff has no locus standi to plead or sue the Applicant on account of the various issues set out in the Plaintiff's Complaint, which Complaint, according to the Applicants, introduces irrelevant and extraneous matters.**

6. **That the Plaintiff lacks the locus standi to sue and/or plead on behalf of members of the public as purported in the suit.**
7. **That the Plaintiff's suit, not being maintainable as against the 1st Defendant, for reasons that it is fatally defective and without merit, cannot stand as against the Applicants.**
8. **That the Plaintiff does not disclose any cause of action against the Applicants.**

The 2nd to 9th Defendant/Applicant's application is supported by the affidavit of the 3rd Defendant/Applicant, Joseph Gitau Mburu sworn on 14th May 2010, on behalf of himself and his co-defendants, deponing to the facts as set out above. Annexed to the affidavit are, inter alia, a letter dated 29th February 2008, appointing Geoffrey Njenga the Statutory Manager of the 1st Defendant's affairs and a notice by the Statutory Manager declaring the 12 months moratorium in the following terms:-

“---TAKE FURTHER NOTICE that in exercising of powers conferred by Section 67 C (10) of the Insurance Act, the Statutory Manager declares a moratorium on the payments of the said insurer (1st Defendant) of its policy holders and all other creditors for a period of twelve (12) months with effect from the date of this Notice.

Dated 29th February 2008.”

Accordingly, the moratorium period was to expire on 28th February 2009.

To oppose the application the Plaintiff/Respondent filed a Replying Affidavit sworn by its Managing Director, Bryan Yongo in which he depones, inter alia that:-

1. **The veil of incorporation was properly lifted when suing the directors personally on the ground that it had become apparent that the business of the 1st Defendant (or some of it) was being carried out with the intent of defrauding its shareholders/directors**
2. **That the orders of Lady Justice Lesiit prohibiting the filing of any suit against the 1st Defendant during the moratorium period had been ousted by orders made by Lady Justice Khaminwa and that although the same were reinstated sometime in July 2009, there was no order in place to stop the filing of the suit when the Plaintiff was filed.**
3. **The stay of proceedings or moratorium was lifted by the consent of the parties to the suit.**
4. **That leave was not required to institute any proceedings against the Applicants and would only be required in the case of the 1st Defendant.**
5. **That there is no provision in law barring a party from filing a suit in respect of a liquidated claim in addition to a Winding Up petition filed against a debtor.**

Written submissions were filed herein, with the 2nd to 9th Applicants citing the following authorities to support their position.

1. **GARDEN SQUARE LTD V KOGO & ANOTHER [2003] KLR 20**

2. **OMONDI & ANOTHER V CENTRAL BANK OF KENYA & 2 OTHERS** [2001] KLR 579
3. **MAATHAI V KENYA TIMES MEDIA TRUST** [1989] KLR 207
4. **THE LAW SOCIETY OF KENYA V COMMISSIONER OF LANDS & 2 OTHERS** [2001] KLR 706.

On behalf of the 1st Defendant/Respondent the following authorities have been cited:

1. **BULLEN & LEAKE & JACOBS PRECEDENTS OF PLEADINGS** (Chapter 12, “striking out of pleadings)
2. **HORKAN INVESTMENT LTD V NAMAYUK SELF HELP GROUP** H.C.C.C. No. 2185 of 2001
3. **BAKARI ALI KASMANI V STANLEY MURMA WANGUYE** H. C. C.C. No. 538 of 1999
4. **D. T. DOBIE & CO. (K) LTD V MUCHINA** [1982] KLR 1.

No authorities have been cited to back up the Respondent’s submissions filed on 8th December 2010, neither did counsel for the Respondent attend court to highlight the same on the date taken by consent for the purpose. On the whole, the Respondent’s response to the two applications is that:

1. **The order recorded before Justice Lesiit, barring the filing of suits and/or proceedings was nullity, since, according to the Respondent, it sought to oust the jurisdiction of the court.**
2. **That there is no nexus between the Winding Up Cause which was settled by consent and the present suit.**
3. **That the Respondent’s claim against the 2nd to 9th Applicants is distinct from the one directed at the company and the legal requirement that leave of the court be obtained before instituting the suit against the company cannot be inferred as relates to the claim against the 2nd to 9th Defendant/Applicants, since it is the company and not them as directors and/or shareholders which was under statutory management.**
4. **That the Plaintiff discloses several issues which require that evidence be called and the court should therefore refrain from proceeding summarily but allow the suit to proceed to hearing on merit.**

From my perusal of the documents presented in support of the two applications before court, it is clear that the debt claimed in the **Winding Up Cause No. 19 of 2007** arises out of the same legal relationship between the 1st Defendant/Applicant and the Respondent as is relied upon to support the claim against the 1st to 9th Defendants in this suit. This contractual relationship is pleaded in paragraphs 16 and 17 of the Plaintiff filed on 23rd January 2009. The debt for which the Winding Up Petition was filed is stated in paragraph 5 of the petition which reads as follows:-

“5. The Company is indebted to your petitioner in the sum of Kenya Shillings Fourteen Million Seven Hundred and Sixty Thousand (14,760,000/=) being the balance of the sum due and payable in respect of services rendered to the company at the request of the company pursuant to an agreement dated 25th May 2007 made between the company on the one part and the petitioner of the other part.” (underlined by the court).

On 27th November 2009, the parties to the petition, that is the Respondent and the 1st Defendant/Applicant, filed a consent letter dated 25th November 2009, which was adopted by the court and orders recorded as follows:-

“IT IS HEREBY ORDERED

By consent of the petitioner and the company;

1. THAT the petitioner’s claim espoused in this petition be and is hereby marked as settled and the petitioner hereby confirm (sic) that it has no further claims against the INVESCO ASSURANCE COMPANY LIMITED (underling and additionby the court)

2. THAT this petition be and is hereby marked as withdrawn with the Petitioner and the Company bearing their own costs.”

The services for which the Respondent was engaged by the 1st Defendant/Applicant were investigative services in regard to several fraudulent and/or fictitious insurance claims alleged to have been made against the 1st Defendant/Applicant and settled t through advocates across the country.

Although the Respondent has not provided the court with any material to support its contention that the petition and the suit herein are founded on separate and distinct causes of action it has, in its pleadings averred to a separate contract as regards investigations carried out in relation to Mombasa matters. It is suggested in paragraph 13 of the Reply to the Defence of the 2nd to 9th Defendants that, pursuant to such agreement the Respondent herein is owed KShs. 60,000,000/= by the 1st Defendant/Applicant.

Being guided by the principle that summary judgment, as is sought herein, can only issue in clear and obvious cases, I am of the view that the words

“being the balance of the sum due and payable in respect of services rendered----“

are not adequate to establish with certainty that the original debt owed to the Respondent is the same debt claimed under the Plaint in order for the court to find that it was indeed satisfied in full in a manner that would lead a court of law to admit the consent order as evidence of a legal discharge of all claims, past, present and future, which is not stated.

From the pleadings. It is clear that the 2nd to 8th Defendant/Applicants have been sued as directors of the 1st Defendant/Applicant while the 9th Defendant/Applicant is sued as its subsidiary. Their alleged individual liability is challenged on the basis that they are not personally liable for the wrongs of the 1st Defendant/Applicant. Although in my view, the nature of complaints levelled against the 2nd to 9th Defendants in paragraphs 14, 34, 35, 36, 37, 38, 39, 40, 41 and 42 of the Plaint are complaints in respect of which only shareholders and or members other than a creditor would ordinarily make, it appears that the Respondent’s decision to sue them was informed by the averments contained in an affidavit filed on the 1st Defendant/Applicant’s behalf to support a **Miscellaneous Application, No. 24 of 2008**, which

affidavit is annexed to the supporting affidavit herein (document No. 9), but without the application itself. From the depositions in paragraphs 19, 20, 21, 22 and 23 of the said affidavit, the court can only assume that the application had been filed to challenge the **Winding Up Cause No. 19 of 2007**, referred to on paragraph 3 of the affidavit.

The deponent of this affidavit has deponed to acts of fraud on the 1st Defendant/Applicant's officers, albeit, with possible collusion of the Respondent herein. (See paragraphs 8, 10, 12, 13, 14 and 15 of the annexure).

As is evident from the same affidavit, the 1st Defendant's position as at 24th January 2008, was that the Respondent should prove its debt through the filing of a Civil Suit rather than by way of a Winding Up Petition, in view of the suspected fraud. In this regard, it was deponed in paragraphs 21 and 22 as follows:-

"21. THAT I verily believe that since the nature of the company's business involves an interest of the policy holders, claimants and the public at large, it is prudent and in the interests of justice that the Respondent be barred from proceeding with or commencing any action against the company until his alleged debt is substantiated and proved without prejudice to the Respondent's right to have the proving (sic) being done by way of lodging a suit in court-----"

22. THAT I further verily believe that since the scrutiny of the company's documents point at the possibility of fraud, it is the more reason the process of this court be not invoked until the fundamentals question as to the existence of alleged debt has been conclusively determined, even if by way of a civil action on the part of the Respondent; the company may also seek appropriate orders against the Respondent if the monies paid were in fact not payable at all."(underling and addition by the court)

With the above in mind it is curious that the 1st Defendant/Applicant would now turn around and challenge these proceedings, seeking that the same be determined by summary procedure, when in its own admission triable issues cannot be ruled out.

Considering the above, I am of the view that the suit ought to be sustained in order that the various issues, including fraud, are proved once and for all in the interests of all concerned. I accept counsel for the Respondent's interpretation of a moratorium and do hold that filing of the suit during the pendency of the court's order which gave effect to the moratorium is not fatal although it does constitute a clear ground for contempt proceedings.

As regards the challenge to the proceedings under Section 228 of the Companies Act, I am of the view that the defect is curable by the granting of leave to proceed with the suit. I order that the Respondent do file an application in that regard within 14 days. In the event that the said application is not filed within the said period, the court shall, on the application of the Defendants, even orally at a mention, declare the suit null and void.

In view of my findings that this is not a suitable case for the striking out of the Plaint and/or the granting of a summary judgment I disallow the two applications with an order that each party bears its own costs thereof.

DATED, SIGNED and DELIVERED at NAIROBI this 12TH day of SEPTEMBER, 2011

M.G. MUGO

JUDGE

In the presence of :

Mr. Onyango holding brief for Mr. Ondieki For the Applicant

Mr. Wambugu holding brief for Mr. Kingara For 1st the Respondent

No Appearance For 2nd to 9th Respondents