



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 52 OF 2009

NEPTUNE CREDIT MANAGEMENT.....PLAINTIFF

VERSUS

INVESCO INSURANCE & OTHERS.....DEFENDANT

RULING

Section 228 of the Companies Act Cap 486 Laws of Kenya provides:-

“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.”

Section 235 of the Companies Act provides:-

“(1) The court may appoint the official receiver to be the liquidator provisionally at any time after the presentation of a winding up petition and before the making of a winding up order.

(2) Where a liquidator (in this Act referred to as an interim liquidator) is so appointed by the court, the court may limit and restrict his powers by the order appointing him.”

In Halsbury’s Laws of England 4th edition Vol. 7(3) Para 2652, the learned Authors state:-

“ When a winding-up order has been made or a provisional liquidator has been appointed then, except by leave of the Court and subject to such terms as it may impose, no action or proceedings may be proceeded with or commenced against the company.....”

In **paragraph 2654** of the same text it is stated:-

“The Court will exercise its discretion whether or not to give leave to proceed with or commence an action or proceedings against a company which is being wound up by the Court according to what is right and fair in the circumstances.”

And in paragraph 2655 it is stated:-

“An application to commence or proceed with actions and proceedings against a company after a winding up order must be made to the winding up Court and must be served on the liquidator.”

In the learned text of **Charles & Morse Company Law 14th Edition 1991** the authors have paraphrased Section 130 (2) of the English Insolvency Act 1986 (which is a consolidation of the English Companies Act 1985 and which is akin to our Section 228) at Pg. 762:-

“(3) After a winding-up order has been made or a provisional liquidator has been appointed no action can be proceeded with or commenced against the company except by leave of the Court. Section 130 (2).

The purpose of Section 130(2) is to ensure that when a company goes into liquidation the assets are administered for the benefit of all the Creditors.”(underlining mine).

On 23/01/2009, the Plaintiff commenced the current suit against the Defendants claiming, inter alia, Kshs.80,175,000/- together with interest. In a joint Defence filed on 20/2/2008 the Defendants pleaded that the 1st Defendant was then under statutory management and the Plaintiff did not seek and/or obtain leave of the court to file these proceedings. It was also contended that on 30th June, 2008, the High Court

had in HCCC No. 318 of 2008 barred the continuation or filing of any proceedings against the 1st Defendant during the currency of a moratorium declared by the statutory manager on 1st March, 2008. On 23rd March, and 14th May, 2010, respectively two applications were filed by the Defendants to strike out this suit on the grounds, inter alia, that the Plaintiff had not sought and obtained leave before commencing the suit.

Dismissing the said applications on 12th September, 2011, the Honourable Justice M. Mugo held that the challenge to the suit under Section 228 of the Companies Act was curable by the granting of leave to proceed with the suit. The court granted the Plaintiff 14 days to file an application for leave.

Before me therefore is an application dated 22nd September, 2011 brought pursuant to that order of 12th September, 2011 it has been brought under Section 228 of the Companies Act and Sections 3A, 1A and 1B of the Civil Procedure Act. It seeks leave of court for the Plaintiff to proceed with this suit and that leave be deemed to have been granted by virtue of the ruling of Mugo J dated 12/9/2011. The application is supported by the Affidavit of Bryan Yongo. In support of the application, Mr. Sagana learned counsel for the Plaintiff submitted that the suit is for the value of services provided, that Mugo J had considered the objections of the 1st Defendant to the suit and had ordered that the filing of the present application would cure any anomaly, he urged the court to grant the application.

Opposing the application Mr. Njenga learned counsel for the 1st Defendant relied on the Replying Affidavit of Geoffrey Njenga sworn on 17/10/11, he submitted that the 1st Defendant was placed under statutory management by the Commissioner of Insurance on 29th February, 2008 pursuant to the provisions of Section 67 C (5) of the Insurance Act, that the 1st Defendant commenced HCCC No. 318 of 2008 by way of an Originating Summons whereby orders were granted, inter alia, suspending and prohibiting the filing of any Civil Proceedings of any nature or form in any Court during the currency of a Moratorium declared on 1st March, 2008, that this suit was filed whilst those orders were still in force and that leave ought to have been sought before the filing of this suit, that Mugo J erred in failing to strike out the suit on 12/9/2011 and that the application should therefore be dismissed.

From the onset, I will not deal with the issue of the order of the court in HCCC No. 318 of 2008 since Mugo J had conclusively dealt with it and I cannot therefore re-open it. In any event, I doubt the constitutionality of the order obtained by the 1st Defendant in that suit. If the 1st Defendant is aggrieved by the filing of this suit on the basis of that order, the best forum to air its grievances, in my view, is in that suit. The Lesser I address the issue the better.

Were it not for the order of Mugo J of 12/9/2011 which ordered that in the event the Plaintiff did not file the present application within 14 days the suit would be for dismissal, I see no reason at all to grant the leave sought since in my view such leave was not necessary.

At the beginning of this ruling, I set out in full the provisions of Section 228 of the Companies Act which require leave before a suit is filed. I also set out the provisions of the English Law which are akin to ours on the issue of leave to bring a suit against a Company once a winding up order has been made. My understanding of Section 228 is that it is only when a winding up order has been given or where an interim liquidator had been appointed under **Section 235 of the Companies Act** that leave is supposed to be sought. Nowhere in the Affidavits on record have I seen any averment to the effect that a winding-up order was made or an interim Liquidator appointed under Section 235 of the Companies Act before this suit was filed.

To the contrary what is abundantly available on record is that sometimes in 2008, some person in the name and style of statutory manager had been appointed under Section 67 (C) (5) of the Insurance Act Cap 487 Laws of Kenya. That he took over the management of the 1st Defendant in terms of the provisions of Section 67C of the Insurance Act.

I have read extensively the provisions of Section 67C of the Insurance Act in total and nowhere does it incorporate either by reference or otherwise the provisions of the Companies Act regarding winding-up or Sections 228 or 235 aforesaid. My understanding of the said Section 67C of the Insurance Act is that it only gives power to the Commissioner of Insurance to appoint a manager to manage the affairs of the Board of Directors of the Insurance Company that requires inspection and control of that Commissioner. The powers of the said Manager are set out in Section 67C (5) and in my view they do not extend to the powers of an interim liquidator under section 235 of the Companies Act. To my mind therefore and I so hold, the so called statutory manager appointed under Section 67C of the Insurance Act remains as such, a manager and is not an interim liquidator in terms of Section 228 or appointed under Section 235 of the Companies Act.

Further, the appointment of such manager under Section 67C is limited to only 12 months unlike an interim Liquidator under Section 235 of the Companies Act.

In any event, if the manager under Section 67C of the Insurance Act was a kin to an interim liquidator under section 235 of the Companies Act, why did the statutory manager in that event decide to move the court in H.C. Petition No. 318 of 2008 under the provisions of the constitution of Kenya and Insurance Act to stop cases from proceeding or being filed against the 1st Defendant? The answer is because; he was just a manager and not an interim liquidator. An interim liquidator under Section 235 of the Companies Act only needs to go to the winding up court with a simple application and a stay of an action is almost automatic.

If I am wrong in my interpretation, I find that the plaintiff's suit is a genuine claim against the Defendants, the 1st defendant had sworn an affidavit in the winding up Cause No. 19 of 2007, and extensively referred to by Mugo J, in her ruling of 12th September, 2011 to the effect that the plaintiff should prove its claim by way of a suit, and applying the principle set out by the learned authors of the text referred to above by **Charles & Morse Company Law**, I hold that the purpose of Section 228 of the Companies Act is to ensure that when a company goes into liquidation the assets are administered for the benefit of the creditors. I am of the view that no party will suffer any prejudice if the prayers sought are granted.

Accordingly, I grant leave to the plaintiff to proceed with this suit against the Defendants as prayed. The costs of the application will be in the cause. It is so ordered.

Dated and delivered at Nairobi this 28th day of October, 2011.

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JUSTICE A. MABEYA