



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Winding Up Cause 04 of 2008
CAROLINE MATIRA ANAMI.....PETITIONER
VERSUS
ERICK MUNYASIA WANYONYI.....1ST RESPONDENT
MATILDA MUNYASIA SUNDOR.....2ND RESPONDENT
THE ACE RESTAURANT LTD.....3RD RESPONDENT

RULING

I have before me an application by way of a Notice of Motion lodged by the Interim Liquidator seeking the following primary orders:-

- (a) **That the Interim Liquidator's Report dated and filed on 6th October 2008 be adopted.**
- (b) **That the court orders the parties hereto to pay the Interim Liquidator's fees disbursements and costs as per the Interim Liquidator's report.**
- (c) **That in the alternative, the court do order that the Interim Liquidator realizes his fees and costs by selling the Company's Assets in his possession.**
- (d) **That the court be pleased to issue a certificate of release to the Interim Liquidator.**

The grounds for the application as expressed on the face of the application are as follows:-

- (i) **That the Interim Liquidator was appointed by an order of the court dated 29th July 2008 to take over the operations of Ace Restaurant Limited and preserve the company's assets.**
- (ii) **That the Interim Liquidator in exercise of his duties took over the operations of the company on 29th July 2008 however, the tenancy enabling the operation of the company business was terminated on 30th July 2009 and the Interim Liquidator was ordered to hand over vacant possession on 1st August 2008.**
- (iii) **That the parties herein in a meeting held on 2nd August 2008, and in the presence of the Interim Liquidator resolved to seek alternative premises to preserve the company assets.**
- (iv) **That the company assets were stored with and are held in a store to date by Mwara Auctioneers where they continue to accumulate storage charges.**
- (v) **That the Interim Liquidator having executed his mandate is entitled to his fees and costs.**

The application is supported by an affidavit sworn by George Mokuia Obiria a partner in the firm of Mokuia Onwonga & Company Certified Public Accountants, the Interim Liquidator. The affidavit is an elaboration of the said grounds. Annexed to the affidavit is *inter alia*, the Interim Liquidator's Report. The application is opposed and in that regard there is a replying affidavit sworn by the second respondent who swore the affidavit as a director of the 3rd respondent and with the authority of the 1st respondent. It is contended in the affidavit *inter alia* that the liquidatorship never took place in law and that actions of the purported Liquidator and the auctioneer are illegal, null and void. It is further contended that the petition itself is also a nullity for want of deposit in terms of Rule 237 (9) of the Companies (Winding-Up) Rules and that the petitioner and the Liquidator have stolen a match on the creditors and contributories of the company.

The petitioner on her part supports the Interim Liquidator's application and further challenges the *locus standi* of the advocate acting on behalf of the company.

When the application came up for hearing before me on 11th November 2009, counsel agreed to file written submissions which were duly filed by 11th March 2010. I have considered the application, the affidavits filed and the said submissions of counsel. Having done

so, I take the following view of the matter. The Interim Liquidator was appointed by the court on 28th July 2008 when the Petitioner, Caroline Matira Anami, appeared ex-parte before Serгон J. The appointment was limited to “*taking over the operations of the company and preserving its assets, records, collecting any dues of the company and doing all that appertains to a liquidator under the Law*” for a period of thirty (30) days. The petitioner had moved the court by way of Notice of Motion dated 28th July 2008 under the provisions of Section 222 (2) of the Companies Act, Rule 7 of the Company (Winding-Up) Rules and all other enabling provisions of the Law. That application does not seem to have been heard inter partes. The appointment of the Liquidator also seems to have come to an end by effluxion of time. It is in the context of that background that this application should be considered. Whereas in principle the expenses of a company’s liquidation are payable out of the assets of the company in priority to all other claims, the principle applies when the liquidation process is not in dispute. In the matter at hand, the petition is being challenged and so is the application under which the Interim Liquidator was appointed. The assets of the company are not all agreed. Those issues cannot be resolved conclusively in this application. If the Notice of Motion dated 28th August 2008 is determined one way or another, the issue of payment of the costs of the Interim Liquidator and how the costs will be paid will be beyond contention.

Before concluding this matter, an issue was raised regarding the Company’s representation by M/S Ndegwa Muthama & Katisya Advocates in the absence of a company resolution. Nothing, in my view, turns on that issue given that the said firm also acts for the 1st and 2nd respondents who required no resolution to instruct counsel as they were individually sued.

In the end a decision on how and who should pay the Interim Liquidator’s fees disbursements and costs shall abide the results of the petitioner’s application dated 28th August 2008. That application was certified urgent and I see no reason why it has not been concluded to date.

DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF APRIL 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Ndegwa for the 2nd and 3rd Respondents.

F. AZANGALALA

JUDGE

19TH APRIL 2010