



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI COMMERCIAL & TAX DIVISION)

CIVIL SUIT NO. 227 OF 2010

SANDHURST LIMITED.....1ST PLAINTIFF
LANCASTER LIMITED.....2ND PLAINTIFF
LANGATA ROAD ARCADE LIMITED.....3RD PLAINTIFF
REST VILLA LIMITED.....4TH PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST
DEFENDANT
EAST AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK.....2ND
DEFENDANT
TRITON PETROLEUM COMPANY LIMITED (IN RECEIVERSHIP)3RD
DEFENDANT
NELLEA LIMITED.....4TH
DEFENDANT

R U L I N G

On 21st April 2010 the 1st to 3rd defendants filed a preliminary objection raising the following preliminary objections to the plaint filed on 14th April 2010 on the following grounds:

1. The plaintiffs have not obtained leave of the court to file suit against the 3rd defendant pursuant to the mandatory provisions of section 228 of the Companies Act as an interim liquidator has been appointed in Milimani Winding Up Cause No. 9 of 2009 in the matter of Triton Petroleum Co. Limited.
2. The suit is fatally defective as there are no valid resolutions authorizing and/or appointing the firm of P.W Wena & Co. Advocates to file suit on behalf of the companies
3. The plaint should be struck out with costs and the firm of P.W. Wena should be condemned to pay costs personally for lack of authority to file the suit by the plaintiff companies.
4. George Dicks Atetwe and Kailesh Jobanputra have no legal capacity or authority to swear any affidavits on behalf of the Plaintiffs as their purported appointments, if any, are null and void ab initio.
5. The plaint filed on 14th April 2010 and served on the 1st to 3rd defendants is neither dated nor signed.

In their written submissions, the 1st to 3rd defendants emphasized that the leave of the court has not been obtained under section 228 of the Companies Act prior to the filing of the suit considering that an interim liquidator was appointed in respect of the 3rd defendant. In support of their submission, the 1st to 3rd defendants quoted the case of Milimani Winding Up Cause No. 9 of 2009 in the matter of Triton Petroleum Company Limited in which the trial judge held as follows:

“a. The appointment of an interim liquidator of the company would not interfere or affect the

powers enjoyed by the receivers and managers pursuant to the debentures. The receivers would continue managing the assets and property of the company that are charged to the debenture holders pursuant to the debentures.

b. The court proceeded to appoint an interim liquidator under section 235(1) of the Companies Act.

c. The Interim liquidator's powers would be limited to and restricted to tracing, taking possession of, collecting, revering and protecting the assets of the company pending further orders of the court.

d. The Interim liquidator's duties would not extend to administering the assets and property secured by the debentures upon which the receivers and managers herein were appointed. He would not have power to manage or inquire into the assets of the company that is established to be the subject of the debentures.

e. The winding up proceedings were stayed pending further orders of the court."

In addition to the above, the counsel for the 1st to 3rd respondents also referred this court to section 228 of the Companies act. The same reads as follows: -

"When a winding up order has been made or an interim liquidator has been appointed under section 235, no action or proceedings shall be proceed with or commence against the company except by leave of the court and subject to such terms as the court may impose."

To support the above submission the learned counsel quoted the following authorities: **Bisai & Anor. vs. Kenya Commercial Bank Limited [2002] 2 EA 346**. An interim liquidator had been appointed and suit filed against the company without leave of the court. The court struck out the suit with costs as leave of the court was not obtained prior to filing suit. Leave was mandatory and fundamental requirement. **Mwethaga v. Thabiti Finance Co. Limited & Others Civil application No. 120 of 1998**. The Court of Appeal struck out an injunction application because leave to file the same was not obtained under section 228 of the Companies Act. **Deposit Protection Fund Board vs. Sunbeam Supermarket Limited & Others Milimani HCCC No. 3099 of 1996**. Justice Ringera (as he then was) was faced with a suit filed by a company in Liquidation and a counterclaim by the defendant. He followed an English Court of Appeal decision **Langley Construction Limited vs. Sells [1969] 2 All ER 46** where it was held that if a company in liquidation brings an action, the Defendant to that action may without leave of the court under section 231 of the Companies Act, 1948, (the equivalent of section 228 of our own Companies Act) set up cross-claim for liquidated or unliquidated damages, but only as a set off to reduce or extinguish the Plaintiff's claim and accordingly the Defendant cannot without leave counterclaim in the action for an amount in excess of the Plaintiff's claim. His Lordship went on to strike out the counterclaim which had been commenced without leave of the court.

On the basis of the above submissions and authorities, the learned counsel for the 1st to 3rd respondents prayed that the suit be struck out with costs.

On the other hand, the plaintiffs have opposed the preliminary objection which has been field by the respondents. In their written submissions the plaintiffs have submitted that a preliminary objection by its nature is a matter that goes to the root of the entire suit. It is also a matter which arises from pleadings and is so obvious that it determines the fate of the suit without further investigations to be carried out by the court or any evidence to be adduced. According to the plaintiffs, grounds No. 2, 3 and 4 of the defendants' preliminary objection are not grounds suitable for determination at a preliminary stage. The issue of the plaintiff's requiring a resolution before filing suit or whether the deponents have authority to swear affidavits, are issues which have to be canvassed and supported by evidence to prove or disapprove the allegations. (For example, the defendants have to prove that there exits a dispute within the membership of the plaintiff companies and that not all members have consented to the institution of legal proceedings on behalf of the plaintiff companies. The plaintiffs on the other hand have to tender evidence to show that no such dispute exits and members all support the action.) These matters are evidential and can only be canvassed through a substantive application with evidence by affidavits. They cannot be

determined at a preliminary point. As far as ground No.1 is concerned, the plaintiff's counsel has submitted that the failure to obtain leave of court to institute the suit against the 3rd defendant does not render the entire suit defective. Even if the suit is struck out as against the 3rd defendant the suit is still maintainable against the other defendants. In addition to the above, the plaintiff's counsel also submitted that the prayers in the main suit are for declarations that a deed of settlement between the plaintiffs and 1st and 2nd defendants is illegal, null and void. To them, the action is still maintainable against the 1st and 2nd defendant without the 3rd defendant being a party to the suit. Further to the above, the learned counsel also submitted that the 3rd plaintiff is not in possession or control over the plaintiff's various suit properties. To them all the actions complained of by the plaintiffs relate to the 1st and 2nd defendants and to some extent to the 4th defendant. They also submitted that the injunctions sought affect the 1st, 2nd and 4th defendants and not the 3rd defendant who has played no part in the attempts to alienate or sell or transfer the suit properties. They also submitted that the injunction application for the entire suit is still maintainable against the other defendants even if the suit is struck out against the 3rd defendant. In summary, they submitted that failure to obtain leave to file suit against the 3rd defendant does not render the entire suit defective. They concluded that no leave is required to file suit against the other defendants and the action is still maintainable against the defendants.

This court has carefully considered all the opposing submissions by the learned counsels. Needless to state, section 228 of the Companies Act Cap 486 is very explicit. At the risk of repetition, I do wish to quote the said section.

“When a winding up order has been made or an interim liquidator has been appointed under section 235, no action or proceedings shall be proceeded with or commence against the company except by leave of the court and subject to such terms as the court may impose.”

In this particular case, there is no doubt that the third defendant is under receivership. Even the plaintiff itself acknowledges that particular fact. In the case of **Bisai & Another vs. Kenya Commercial Bank Limited**, Justice Mwera held as follows: -

“In order to commence any action or proceedings against the 3rd defendant which was in liquidation, the plaintiffs were obliged mandatorily by the Companies Act to first obtain leave from the court.

That the leave ought to be sought before bringing an action or proceedings and not after and cannot operate retrospectively. That non obtaining of the said leave is of a very fundamental nature, and not merely procedural. It went to the jurisdiction of the court. That the appointment of liquidator under section 35 of the Banking Act, (Chapter 488) has the same effect as the appointment of a liquidator by the Court under part VI of the Companies Act. Simba Lines Limited vs. Heritage Bank Ltd. [2001} LLR at page 1439 (CAK applies)”

In the case of **Mwethaga vs. Thabiti Finance Co. limited and Others, CA No. 120 of 1998**, the Court of Appeal stated as follows:

“Undeterred, the plaintiff renewed his application before this Court. Before we deal with the merits of the application, we mention one matter goes to the jurisdiction of the court. As stated earlier, the first defendant is described by the plaintiff in his plaint as being a limited company registered under the Companies Act and is currently undergoing involuntary liquidation. This is not disputed. In such a case the plaintiff required leave of the Court to proceed with the suit against the first defendant. It is not in dispute that such leave has not been 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). This renders the suit incurably defective and incompetent in law. It follows that an application for an injunction made in such a suit must also fail as must an application made to this Court.

That notwithstanding, Mr. Kihara on behalf of the plaintiff, in a valiant attempt to save the day, argued that if that was right, then the reliefs sought against the other defendants are not affected. We do not agree. The basis of the suit and the application for an injunction was the claim against the first defendant from whom the second and fourth defendants derived title. Inevitably, claims against these defendants for an injunction made in proceedings which are incompetent must also fail.”

From the above quotation of the law and the authorities which have been cited, it is very clear that the plaintiffs omitted to obtain leave of the court before filing suit against the 3rd defendant. The provisions of the law are explicit that the leave of the court is mandatory before any litigant can bring a company which is under receivership to court. The rationale behind the above position of the law has been actually reflected very clearly in the analysis of Justice Mwera in the case of **Bisai & Another vs. Kenya Commercial Bank Ltd & others** in which he stated as follows:

“A little research and probably in another proceeding will bring to the fore the historical and present extent of the need for the court to be always in the know about what civil matters are instituted by or against the company. Suffice to say that the court supervising liquidation of a company has a duty to ensure that some unjustified or improper activity is not taken against/by the company to the detriment of itself, the creditors, shareholders, etc. That leave ought to be sought before bringing an action or proceeding and not after. The law is clear in this. It is mandatory. The Companies Act does not leave room for either obtaining leave with a view to apply it retrospectively or that the court has discretion in that regard.”

Obviously, the above case was decided by a court of concurrent jurisdiction. Needless to state, the said authority is not binding to this court. However, I hereby find that the said authority is not only logical but the reasoning is sound and reflects the correct position of the law. As far as the decision of the Court of Appeal is concerned, it is binding to the court. In view of the above analysis, I hereby uphold the preliminary objection which was raised by the 1st to 3rd defendants in as far as it relates to Triton Petroleum Company Limited which is under receivership. The upshot is that this court finds that this suit is not maintainable against the 3rd defendant. Costs will follow the event. That means the plaintiffs will have to pay the 3rd defendant’s costs.

Those are the orders of this court.

MUGA APONDI

JUDGE

Ruling read, signed and delivered in open court in the presence of:

Miller & Wena for the Plaintiff

Gichuhi for the 1st, 2nd and 3rd Defendants

Kimondo for the 4th Defendant

MUGA APONDI

JUDGE

13TH JULY, 2010

Miller:

I apply for leave to file a supplementary affidavit.

Kimondo:

The loss to the Plaintiffs is colossal.

Gichuhi:

There are three properties in this case. Two of them have already been sold. You gave a temporary injunction for only 14 days and the same cannot be extended according to the law.

Court:

By consent, the application dated 18th June, 2010 will be heard on 22nd July 2010 at 11.00 a.m. The plaintiffs are hereby granted 7 days leave to file a supplementary affidavit. Interim orders are extended till then.

MUGA APONDI

JUDGE
13TH JULY, 2010