



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 531 of 2007**

**DAVID GILBERT HASTIE .....1<sup>ST</sup> PLAINTIFF**

**JESSICA ENID KAZINA .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**TRUST BANK LTD. (IN LIQUIDATION) .....DEFENDANT**

**R U L I N G**

Application by Chamber Summons dated 22/10/08 brought under Section 3, 3A, Civil Procedure Act, Order VI Rule 13 (1) (d) of Civil Procedure Code, Section 228 Companies Act, Cap. 486. Orders sought is to strike out the plaint dated and filed on 11/10/07 and the interlocutory judgement that was entered on 19/6/07 be set aside for being a nullity. Grounds relied upon are stated and the supporting affidavit of Diana Ogula, an advocate of High Court having the conduct of this matter.

The issue raised by the applicants is that the plaintiff filed a plaint without leave to commence proceedings against the defendant who is described to be (in liquidation). On the same date an application was filed seeking leave to commence proceedings together with other prayers. The application was heard on 12/10/07 and leave was granted. It is submitted that leave to commence proceedings cannot operate retrospectively and therefore the judgment obtained in these proceedings on 19/6/2008 is a nullity.

The applicant filed written submissions. The facts are according to the record and are not disputed. Section 228 Companies Act provides:-

*“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 commenced against the company except by the leave of the court, and subject to such terms as the court may impose.”*

The applicant also relies on the case of Bisai & another vs. Kenya Commercial Bank Ltd. & others [1997] KLR 1094 where it was stated:-

*“Leave ought to be sought before bringing an action or proceedings and not after .....”*

Again in the case of Omega Enterprises Kenya Ltd. vs. Kenya Tourist Development Corporation & others – C.A. No. 59 of 1993 and Macfoy vs. United Africa Co. Ltd. [1961] 3 All ER 1169 where the Privy Council stated:-

*“If an act is void then it is in law a nullity, ..... you cannot put something on nothing and expect it to stay there. It will collapse.”*

The respondent addressed the court citing the case of Jessee Kimani vs. McDonald & another where the court considered what was a reasonable approach to exercising court discretion in setting aside ex parte judgment.

Upon reading the provisions of the Companies Act and authorities relied upon and upon hearing submissions regarding the issue, it is clear that the proceedings by or against a company in liquidation must be controlled by court to avoid the disposing of the companies assets for the benefit of only some of the creditors. It is therefore mandatory that before commencing suit, leave must be obtained from the court. Failure to do so renders the suit a nullity. In this case there is no doubt that the plaint was filed one day before the leave was granted.

I therefore allow the application and grant orders as prayed namely that the plaint filed on 11/10/07 is hereby struck out. And interlocutory judgment entered on 19/6/2008 is hereby set aside. Each party shall pay its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 30<sup>th</sup> day of October, 2009.

**JOYCE N. KHAMINWA**

**JUDGE**