REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS

Civil Suit 589 of 2008

PAN AFRICAN CREDIT FINANCE LIMITED (IN LIQUIDATION) THROUGH DEPOSIT PROTECTION FUND BOARD::PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI::DEFENDANT

WANJA G. WAMBUGU,ADVOCATE

Practising as W.G. WAMBUGU & CO.

ADVOCATES :::::::::::::::::::::::::::::INTERESTED PARTY/APPLICANT

RULING

The original disputants herein are Pan African Credit and Finance Limited (I.L.) through Deposit Protection Fund Board, as plaintiff and the City Council of Nairobi as the defendant. The salient features of the claim for purposes of this ruling are as follows:-

- The plaintiff had in June 1983 granted Kibucho Limited (now wound up) a loan facility of Kshs. 4 million.

- The security produced for the said loan was a legal charge over property known as LR. NO. 209/9749.

- The loan was not serviced and as at the time the plaintiff moved to court, the outstanding figure came to Kshs. 32,049,002.45

- The plaintiff moved to court, in order to enable it exercise its power of sale of the said property to recover the indebtedness to it by the said Kibucho limited and had in fact placed an advertisement for the sale of the said property which had been scheduled for sale on the 16th day of December 2008.

- It is their stand that no notification of sale or demand had been issued to the plaintiff by the defendant.

- The plaintiff disputed the intended auction of the said suit property by the defendant as being illegal, irregular and therefore null and void.

In consequences thereof the plaintiff sought:-

(a) A declaration that the said injunction intended sale is void for lack of service.

(b) An order of permanent restraining the defendant, its agents and/or servants from selling, advertising, disposing or dealing in whatever manner with the charged property L.R. NO. 209/9749 situated in Woodley Estate, Nairobi.

(c) Costs of the suit and interest born by the defendant in any event.

The plaint is dated 15th day of December 2008 and filed the same date. Simultaneously with the dating and filing of the plaint was the dating and the filing of an interim application brought by way of chamber summons brought under order XXIX rules 1,2,3 and 9 of the CPR. In a summary form, the relief sought was an interim injunction to restrain the defendant from disposing off the said suit property pending hearing and disposal of the interim application in the first instance, and the main suit in the second instance.

It is on record that the matter was placed before Osiemo J on the 16th day of December 2008, and the learned judge granted prayer 2 thereof on condition that the applicant deposits Kshs. 874,000 into court, within the time frame specified, and thereafter the matter was to be listed for hearing interpartes of the interim application. A formal order was extracted and issued the same date of 16th December 2008.

The defendants were served and on the 18th December 2008, they filed a notice of appointment of advocate dated the same day. Simultaneously with the filing of a notice of appointment, was filed a notice of preliminary objection dated the same date. The objection being leveled was that:-

“(i) The application is fatally and incurably incompetent and should be struck out in lemine.

When the matter came up on 19/12/2008, it was stood over to 20/1/2009 to enable parties negotiate a settlement, which settlement was reached and recorded in court on 1/4/2009 and a formal order extracted on the 7th day of April 2009 along the following terms:-

1. That the plaintiffs do pay to the defendants Advocate Kshs. 480,000/= being party and party costs and valuers charges all inclusive within 14 days from today.

2. That the plaintiffs do bear Auctioneers charges to be agreed or taxed.

3. That the amount of Kshs. 874,000/= that was deposited in court, pursuant to the order made in court on 16/12/2008 be forthwith released to M/S Cheptumo and Company Advocates.

4. That upon receipt of the said sum of Kshs. 874,000/ M/S Cheptumo and Co. advocates do settle outstanding land Rates in respect to LR. No. 209/9749 within 14 days. Thereafter and the defendant do issue rates clearance certificate to the plaintiff.

5. That this matter be mentioned on 29/4/2009 to confirm compliance.

During the pendence of the confirmation of compliance is when the current applicant presented an application by way of chamber summons brought under section 3A of the CPA, order 1 Rules 10 (1) and 2 and 22 of the CPR, rules section 52 of the advocates Act and all other enabling provisions of the law. It is dated 16th July 2009 and filed the same date. Five prayers are sought namely:-

1. The court be pleased to certify this application urgent and to hear it exparte in the first instance.

2. Leave be and is hereby given that Wanja G. Wambugu Advocate practising as W.G. Wambugu and Co. Advocates be enjoined to this case as an interested party.

(c) An order be and is hereby issued that a sum of Kshs. 3,492,390.20 together with interest @ 14% p.a from 7th April 2006 be and is hereby paid to the interested party as a priority from the proceeds of sale of all that parcel of land known as L.R. No. 209/9749 registered in the name of Kibucho limited, and which is the subject matter of these proceedings.

(d) The costs of the valuation of the subject matter of this suit, namely LR. NO. 209/9749, so as to facilitate its sale of Kshs. 357,280, be paid by the plaintiff out of the proceeds of sale.

(e) The costs of this application be awarded to the interested party to be taxed or agreed on and to be paid by the plaintiff out of the proceeds of sale.

(f) The costs of this application be awarded to the interested party to be taxed or agreed on and to be paid by the plaintiff out of the proceeds of sale of LR NO. 209/9749.

The grounds in support are set out in the body of the application, written skeleton arguments, and oral highlights in court. The major ones are as follows:-

- That the property LR NO. 209/9749 is registered in the name of Kibucho limited , a limited liability company.

- That there was a move to compulsorily acquire the said property by the Kenya government.

- The property is next to Moi Girls High School, a vacant plot held on lease hold for a period of 99 years from 1st August 1982 with the un expired lease of more than 72 years as at the time the applicant moved to court to seek redress.

- The property is situated along Joseph Kangethe Road in Woodley estate opposite the runner chapel.

- The property is prime property and as per the valuation documents held by the applicant the property is valued in excess of 120,000,000.00.

- The applicant grievances arises because the registered property holder instructed the said firm of advocates to act for them in HCCC Misc application No. 1259 of 1999 with a view to resisting a move by the Kenya Government to compulsorily acquire the said property which was successful.

- That the bill of costs in favour of the advocates' applicant was taxed at Kshs. 3,492,390.20 which amount is still outstanding.

- That in the mean time before the said bill was paid and or settled, the defendant herein the city council of Nairobi filed a suit at the Magistrate's court, city court being suit No. 86 of 2007 seeking orders to be permitted to auction the said property to recover rates owed to it by the owner.

- The current applicant duly filed objection in the said proceedings asserting her interests in the said property for purposes of non payment of the said taxed advocate's costs.

- It is her stand that a compromise was reached in the said proceedings between her as the objector, and the city council as the applicant to the effect that if the property is sold, then the advocates claim would be paid in priority to that of the city council.

- That despite the said agreement and arrangement in, the city magistrates court case No. 86 of 2007, the said city council who is the defendant herein has gone a head to secure a consent with the plaintiff herein for full payment of outstanding rates owed to it by Kibucho limited, the registered proprietor but failed to secure the payment of the applicant advocates fees as per the consent between the applicant and the defendant herein in Nairobi city, court magistrates court No. 86 of 2007.

- That the applicant is geneinunely aggrieved as per the above reasons and if not allowed to join these

proceedings, she will suffer financial loss as Kibucho limited has been wound up and the plaintiff herein is also in liquidation.

- That she is entitled to seek access to these proceedings through the provisions of law cited.

- That she is entitled to the claim sought and this court, should protect her interests.

- It is their stand that the consent reached between the plaintiff and applicant herein was fraudulent as the same was aimed at defeating the applicants claim and it should be viewed as such.

In their oral highlights in court, learned counsel for the applicant reiterated the grounds in the supporting affidavit and documents and then added the following.

- The costs due to her are governed by section 52 of the advocates Act which provisions make the payments of the same mandatory upon a certificate being issued.

- Herein there is a certificate in place which certificate has not been varied or set aside. Thus making it mandatory for the payment of the same.

- Contends that the plaintiff has under valued the said property and wishes to dispose it off at an under value with a view to defeating other creditors competing claims.

- Contend that their claim is properly laid and has not been overtaken by events and as such they are properly before the seat of justice.

The application was ordered to be served upon both the plaintiff and the defendants. Only the plaintiff/respondend and participated in the proceedings. There is in place a replying affidavit sworn by one Doris Mugambi on the 20th day of July 2009 and filed on 21st day of July 2009. The salient features of the same are as follows;-

- The reason for bringing this suit against the defendant by the plaintiff was solely for securing the suit property namely LR No. 209/9749 which had been charged to it by Kibucho limited and which property the defendant herein was threatening to Auction to recover rates allegedly owed to it by Kibucho limited.

- The said auction had been scheduled to be held on the 16th day of December 2008 as shown by annexture DM1 which was subject of the proceedings, which proceedings were concluded by a consent reached between the original disputants herein by a consent order recorded on the 29th day of April 2009.

- That by reason of the conclusion of the said consent, the suit herein no longer exists.

- Further that the application has been overtaken by events as the property has been sold and transferred to a 3rd party.

- That the plaintiff has nothing to do with the said taxed bill of costs as they were not party to the proceedings in Misc application No. 1259 of 1999 and HCCC Misc application No. 1751 of 2005.

- The plaintiff herein was not called to defend itself in the said taxation proceedings.

- That Kibucho limited was wound up by the plaintiff in 1991 vide winding up cause No. 44 of 1991 and a receiving order made as shown by annexture DM3.

- That by reason of the said Kibucho limited having been wound up in 1991, it lacked capacity to give instructions to the applicant to defend it in Misc application No. 1259 of 1999 and as such any such purported instructions were null and void abinitio and in the process this nullity operates to make the said costs unrecoverable.

- Also contend that the charge registered over the interest in favour of Kibucho limited took in priority over any other claim.

- They are also not party to the proceedings in Magistrates court case No. CMCC NO. 86 of 2007 and as such any order issued therein were not directed at the plaintiff save that in accordance with the consent order of 29th April 2009 the plaintiff paid costs which were incidental to the proceeding in CMCC NO. 86 of 2007.

On the further affidavit, deponed on the 27th day of July 2009 and filed on the 28th day of July 2009, the deponement simply annexed documents to show that the property was no longer under their control as the same had been transferred to a 3rd party.

In their written skeleton arguments, the counsel for the plaintiff reiterated the content of the deponement and then stressed the following points.

- They are not liable to make good the applicants costs taxed against Kibucho limited because they were not parties in HCCC Misc application No. 1259/1999 and calling upon them to meet that claim to the applicant will be tantamount to condemning them unheard which will be contrary to the requirement of the rules of natural justice.

- That the plaintiffs have already exercised their statutory power of sale and sold off the property to 3rd parties to recover money owed to it by Kibucho Limited.

- As deponed, Kibucho limited having been wound up in 1991 lacked legal capacity to give instructions in 1999. This is demonstrated by a ruling in HCCC 3178 of 1995 where Kibucho limited had sued the plaintiff and the defendant which was dismissed by Aluoch J as she then was, on account of incapacity to file the same. It therefore follows that any purported instructions to the applicant by Kibucho limited was null and void due to the said incapacity and cannot give rise to any valid legal claims.

- Contend that the interested party applicant herein failed to disclose to the court issues of in capacity of the said Kibucho limited in both proceedings in HCCC Misc application No. 1259/99 and 1757 of 2005 and consequently she cannot be allowed to benefit from her own wrong.

- Contend the property has been Misc described.

- Contend that the value of the property does not exceed 25 million by reason of the fact that there have been several suits over the same, there are squarters on the same carrying on business and are therefore strangers to the valuation done by the applicant.

In their oral highlights the learned counsel for the respondent added the following:-

- The legality of the locus standi of the interested party herein and in the suits which gave rise to the taxed costs are in issue as Kibucho limited has wound up in the year 1991 giving rise to a situation of in capacity to instruct and act for.

- The rights of the plaintiff arising from the charge instrument can not be extinguished by an order for costs.

- Contend that the valuation reports filed herein will not dictate the competence of the matters filed herein.

- Contend that the interested parties costs fall into the section 48 and 49 of the Advocates Act procedures whereby the interested party is required to file a suit to claim the same. As such they do not fall under the section 52 (2) of the Advocates Act procedure in view of the fact that there is a dispute over the retainer due to lack of capacity to give instructions.

In response counsel for the interested party applicant reiterated that the bill of taxation in her favour falls under the section 52 (2) of the Advocates Act procedures, and not section 48 and 49 of the same Act procedures.

That an order was issued in 2006 giving the interested party's claim priority over that of the defendant herein which order has not bee challenged and as long as it stands it provides benefits to the applicant.

- Section 52 (2) of the advocates Act is a response to the plaintiffs assertion that its change ranks in priority over any other competing claims.

- The valuation reports go to the core of the claim because they show that the value of the property and the amount of money likely to be realized will be more than enough to meet the competing claims herein. They also go to show that the plaintiff intends to dispose off the said property at an under value thus to defeat the other competing claims.

- It is their stand that challenge to instruction can only come by way of reference and not in the manner presented herein.

On case law the interested party applicant relied on the case of IN RE LONDON METALLURGICAL COMPANY (1895) CHANCERY DIVISION 758 whose holding is that "*Rule 31 of the companies winding up rules 1890 does not affect the property which under the old practice attached to costs ordered to be paid by the liquidator out of the assets of the company to a successful litigant and the costs directed to be paid by an order in that form or prima facie payable immediately and in full out of the net assets of the company.*

The onus is on the liquidator to show that the condition of the assets is such that immediate payment cannot be made, and if he shows that other persons have a prior right to or are entitled pari passu with the successful litigant no order for payment will be made without providing for the other claims".

In RE LONDON DRAPERY STORES (1898) CHANCERY DIVISION 684 on payment of costs for an action commenced before winding up. It was held interalia that "*the claimant was entitled to be paid all his costs in full and not merely the costs as from the commencement of the winding up with liberty to prove for costs previously incured.*"

IN RE STOCK PART RAGGED INDUSTRIAL AND REFORMATORY SCHOOL (1898) 2 CH. DIVISION 687 where it was held interalia that "*the consent of the charity commission to the presenters of the petition and to the proposed mortgage was necessary*".

IN RE PACIFIC COAST SYNDICATE LIMITED (1913) 2CH.26 where it was held inter that "*costs of an unsuccessful litigation incurred by a liquidator whether in a voluntary or compulsory winding up are payable to the party entitled out of the assets of the company in priority to the costs of the liquidation. The rule applies whether the order simply directs payment of costs or directs that the costs be paid out of the assets of the company or that the liquidator do pay the costs with liberty to recoup himself out of the assets.*

The case of IN RE WEN BORN AND COMPANY (1905) 1 CH. DIVISION 413 where it was held interalia that:- *where there is a winding up of a company (whether compulsory or voluntary) all claims of creditors including those in respect of costs ought prima facie to be dealt with in the winding up in accordance with the rules applicable to the distribution of the asset, but if an action is pending to which the company is a party and the company by its liquidator determines to prosecute or defend the proceedings for the estate, the estate must be treated as the party litigant and must in case of failure pay the costs in full.*

On the courts', assessment of the facts herein, it is clear that the following facts do not seem to be in dispute namely:-

1. That the interested party applicant herein acted for an entity known as Kibucho limited in Misc application No. 1259/1999, and Misc application No. 1751 of 2005.

2. That the said acting is what gave rise to a bill of costs which was filed in Misc application No. 1751 of 2005.

3. That the bill of costs subject of the proceedings in Misc application No. 1751 of 2005 appear to be in respect of services rendered to the said Kibucho limited in HCCC Misc application No. 1259/1999, a fact not contested by the interested party applicant.

4. It is not disputed that the bill of costs was taxed at Kshs. 3,492,390.20 as per annexture A to the application.

5. That the said costs were not enforced against the said Kibucho limited. Instead when the defendant herein and who is not participating in these proceedings attempted to auction an asset belonging to Kibucho limited vide an order to do so sought through the magistrates court case No. 86 of 2007, the interested party applicant raised objections because of the said bill of costs.

6. It not disputed and has been demonstrated by annexture F to the application that the said objection by the interested party applicant resulted in a consent whereby it was agreed that "*the objectors' claim contained in the objection dated 11th December 2008 be considered first upon the sale of the judgement debtors property taking place, in the first instance and in the second instance that each party be at liberty to mention the matter for further orders.*

7. That it has now transpired that as at the time events leading to this application were set in motion, the said Kibucho limited had mortgaged the suit property to the plaintiff to secure a loan advanced to it which loan the said Kibucho limited had fallen in arrears with its repayment.

8. That it has transpired in the course of the proceedings and as demonstrated by annexture DM3 to the plaintiffs replying affidavit that there existed winding up cause no. 44 of 1991 in the matter of Kibucho limited. The petition for winding up had been presented by Pan African credit and finance limited, a creditor, who is the plaintiff herein. The relevant portion of the said annexture reads thus:- *upon hearing counsel for the petitioner and upon reading the said petition, an affidavit of Jagdishson Pal Director of the Petitioner/creditor in support of the petition, the Affidavit of Rustam Hira Advocates sworn on 11th June 1992, the Kenya gazette of 5th June, 1992 and the Nation News paper of 28th May, 1992, each containing an advertisement of the said petition, this court, doth order that Kibucho limited be wound up under the provisions of the companies Act and that the official Receiver be constituted the provisional liquidator of the said company. The costs of the petition be paid from the assets of the company given under my hand and the seal of the court this 24th day of September, 1992 issued this 5th day of October 1992"*

9. That the interested party's applicant grounds in the body of the application, supporting affidavit and further affidavit are silent as to whether as at 1995 and 2005 when the said proceedings took place, the interested party applicant had knowledge that the said Kibucho limited had been wound up. Save that there is adeponement that the fact of winding up is not a bar to them being paid their costs.

10. That the plaintiff had a legal charge over the suit property and had a right to realize the said security.

11. That the said plaintiff moved to this court, to protect its rights under the mortgage because the defendant who is not participating in the proceedings subject of this ruling had filed Nairobi magistrates court case No. 86/2007 for an order to sell the subject property to realize rates owed to it.

12. That the said civil case No. 86/2007 was filed against Kibucho limited which had apparently been wound up in 1992.

13. That the proceedings in 86/2007 is what prompted the filing of these proceedings in HCCC NO. 589/2008.

14. That a compromise was reached by the plaintiff and defendant which in effect settled the defendants claims in 86/2007.

15. That indeed a consent had been entered between the defendant and applicant herein that in the event of the defendant moving to dispose off that property then the interested party applicants claim would rank in priority over that of the defendant and that the same be paid first.

16. That it is not in dispute that the plaintiff herein was not a party to HCCC Misc application number 1259/1999 or 175/2005.

17. There is no dispute that as at the time the taxation was done and certificate of taxation given, the said Kibucho limited had long been wound up.

18. That the result of the decision in HCCC Misc application No. 1259/1999 have not been exhibited. Neither is there information on how the bill of costs in HCCC Misc application 175/05 was served on to the said Kibucho limited

19. There is no dispute that the interested party applicant intends to rely on the provisions of law cited.

Due consideration has been made by this court, of these findings and considered them in the light of the Rival arguments herein, and the court, makes a finding that the central issues for determination herein are two namely:-

1. Whether the court, has jurisdiction to enjoin the interested party applicant to the proceedings herein.

2. Whether the protective relief being sought by the applicant herein are available or not

3. What are the final orders herein?

Regarding question No 1 it is clear that only the plaintiff has filed a pleading herein, namely the plaint. In it the plaintiff has directed its complaint against the defendant. The intended interested party has not featured anywhere. It is on record that the defendant on the other hand did not put in a pleading. Only filed a notice of appointment and a preliminary objection. The interested party intends to join the proceedings but has not annexed the intended pleadings to show the nature and extend of the claim they intend to lodge against the plaintiff and defendant. The lack of annexing of a pleading not withstanding, it is evidently clear that the content of their grievances is contained in the affidavits on record.

Reliance has been placed on the provision of law cited as an avenue through which to access the seat of justice. It is therefore necessary for this court to interrogate these provisions to determine whether they are available to the applicant or not.

Section 3A of the CPA reads:-

" *3A Nothing in this Act shall limit or otherwise affect the inherent power of the court, to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court'. A reading of this provision reveals that the circumstances under which the said inherent jurisdiction of the court, is to be invoked have not been given. It is now trite and this court has judicial notice of this fact that this has now been settled by case law emanating from the court of appeal and as dutifully followed by the superior court. There is no harm in reflecting a few herein. There is the case of* ***WANJAU VERRSUS MURAYA (1983) KLR 276*** *where Keneller JA as he then was held interalia that section 3A*

of the CPR cap 21 although saving the inherent power of the court, to make such orders as may be necessary for the ends of justice or to prevent the abuse of the power of the court, should not be cited where there is an appropriate section or order and rule to cover the relief sought.

The case of **MEDITERENEAN SHIPPING CO. SA VERSUS INTERNATIONAL AGRICULTURAL LIMITED ETCO (MSA) LIMITED (1990) KLR 183** where it was held interalia that:- " *It is now trite law that the inherent jurisdiction of the court should not be invoked where there is a specific statutory provision which would meet the ends of the necessities of the case.*

(2) Section 3A of the CPA ought not to be called into the aid of a litigant in disitution not specifically legislated for.

Lastly the case of **TANGUS VERSUS ROTEL (1968) E.A. 618** where it was held interalia that "*the courts; inherent jurisdiction should not be invoked where there was a specific statutory provision to meet the case"*.

Order 1 rule 10 (1) and 2 on the other hand read:-

"*Order 1 rule 10 (1) where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit if satisfied that the suit has been instituted through a bonafide mistake and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court think fit.*

(2) The court may at any stage of the proceedings either upon or without the application of either party and on such terms as may appear to the court, to be just order that the name of any party improperly joined, whether as plaintiff or defendant be struck out, and that the name of any person who ought to have been joined whether any plaintiff or defendant or whose presence before the court, may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all questions involved in the suit be added" Rule 22 is simply a procedural rule specifying the mode of procedure when approaching the seat of justice when seeking a relief under rules 2,8,15,17 and 20 which is by chamber summons which procedure the applicant herein complied with.

Section 52 of the Advocates Act on the other hand whose content this court has judicial notice of, simply makes provision that "*a certificate of costs issued infavour of an advocate where retainer is not disputed and which has not been varied or set aside is enforceable in a summary procedure and in the absence of special circumstances warranting the said advocate being required to file a suit under the section 48 and 49 of the Advocates Act procedures where by a suit is filed to enforce the same"*.

This court, has construed the said provisions and it makes findings that in order for the provisions of order 1 rule 10 (1) to apply the following conditionalities have to be met namely;-

(i) A suit must have been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff. Herein indeed there is a suit in place but there is no allegation from any participating party, not even the interested party applicant that the same has been instituted in the name of a wrong plaintiff or that it is doubtful as to whether the right plaintiff has been named or not.

(ii) The court has jurisdiction at any stage of the proceedings if satisfied that the suit has been instituted through a bona fide mistake. Herein there has been no allegation by either side that the suit has been instituted through a bonafide mistake.

(iii) The addition must be for the reason of determining the really issues between the parties. Herein the really issues for determination is whether the original plaintiff is obligated to meet the interested party applicant's claim in payments of costs from the proceeds of sale of property to be sold in the exercise of their statutory rights of sale upon default of payment of a mortgage.

(iv) The party to be substituted or added should be one who is to be substituted or added as plaintiffs.

Due consideration has been made by this court, of the above construction of order 1 rule 10 (1) CPR and applied them to the rival arguments herein, and the court makes a finding that the interested party applicant cannot access the seat of justice through this provision as they are not seeking to join the proceedings as a plaintiff.

Order 1 rule 10 (2) on the other hand has the following conditionalities to be satisfied.

(i) The court has a discretion to take the intended action at any stage of the proceedings.

(ii) The action is to be taken on such terms as the court may deem fit to take.

(iii) Among action to be taken is the jurisdiction to strike out a party wrongly joined to the proceedings as a plaintiff or defendant.

(iv) The action can be taken upon invocation of the provision by the litigant or the court can do so on its own motion.

(v) The court, has jurisdiction to order that any person who ought to be added as a plaintiff or defendant be added.

(vi) The precaution that the court has taken is that it has to be ensured that the presence of the person to be joined is necessary for the determination of the really issues before court.

This court, has construed the above provision of order 1 rule 10 (2) in the light of the rival arguments herein and has arrived at the conclusion that order 1 rule 10 (1) and 2 have no provision for the joining of a party to the proceedings as interested party but only as a plaintiff or the defendant. It therefore follows that if the applicant has to join these proceedings they can only do so through the inherent jurisdiction of the court donated by section 3A of the CPA. As noted earlier on, the section is usually invoked where there is no specific provisions catering for the particular situation under review. Herein the same is applicable in this courts' opinion because having discounted the order 1 rule 10 (1) and 2 provisions, this is the only avenue through which the applicant can use to access the seat of justice.

Having ruled so that the intended interested party applicant could access the seat of justice through the provisions of section 3A CPA the question that arises for determination is whether interest of justice will be served by them joining these proceedings in its current form. Due consideration has been made of this question and the same considered in the light of the rival arguments herein, in the light of the other findings already made on the record and the court makes a finding that if the interested party were to join the current proceedings in the form in which they are, there is bound to be a miscarriage of justice to them for the following reasons:-

1. It has not been specifically sued as a defendant herein. Neither are they seeking to join the proceedings as defendants. It will therefore be difficult for them to counter claim against the plaintiff.

2. By their conduct, the defendant entered no appearance nor filed any defence herein, they have not even bothered to participate in these proceedings leading to this ruling. The court has no doubt that an issue of locus standi for the said defendant to participate further in these proceedings arises. This court has judicial notice of the fact that the invitation of the defendant to participate in these proceedings was through the order 50 rule 16 CPR procedures where by this invitation and participation in the initial proceedings was limited to the filing of a notice of appointment and then responding to the interim application either by way of replying affidavit or grounds of opposition. They did neither and instead raised a preliminary objection which culminated in the filing of the consent which is still on the record.

It therefore follows that without the defendant having a locus standi to continue participating in these proceedings, there is no way the intended interested party can ventilate its grievances against the defendant, whom from the content of the deponements presented, the intended interested party appears to be having a genuine complaint against them by reason of what transpired in the city magistrates court case number 86 of 2007 which orders have not been varied, discharged or set aside and which orders contribute largely to what the applicant is putting forward as a reason for seeking the courts', intervention. It therefore means that it is necessary for the court to provide directions on the best way forward in resolving this matter. This is done not because the court, has been called upon to assume the role of being an advocate for one of the parties but because it is a court of justice and one of its duties in the dispensation of justice is to give directions on the best mode of a procedure that can be adopted to resolve the dispute between the parties in the interests of justice to both parties. This is further fortified by the fact that in the absence of a sound pleading on which to anchor the interim application being put in place, the applicants relief will be rendered nugatory.

Before giving directions on the mode of procedure, the court, has to determine whether there are serious issues for interrogation herein. Due consideration has been made of this by the court, and the court, finds that there is demonstration of there existing serious issues for interrogations between the parties in a court of law. These are:-

(i) Whether after the winding up orders of Kibucho limited in 1992, the said Kibucho limited had capacity to instruct counsel to file proceedings for the protection of one of the assets subject of the winding up cause.

(ii) If the winding up orders were still operational as at the 1999 when the instructions giving rise to the bill subject of this ruling were given, what legal effect did this have on the said instructions.

(iii) By reason of what has been stated in number (ii) above are the said proceedings as well as the resultant order made there from tainted will illegality as asserted by the plaintiff.

(iv) Does the said illegality operate to taint the taxation proceedings? Do they extend to the certificate of taxation relied upon.

(v) Did they have any effect on the proceedings in the Nairobi city magistrates court case no. 86 of 2007?.

(vi) Since the plaintiff has admitted in its submissions that they have honoured the defendant claims against Kibucho limited that gave rise to the proceedings in the magistrates court case number 86/2007 have they honoured a claim based on proceedings, tainted with illegality?, can this be used as an anchor also to agitate the intended interested party's claim?

(vii) Can this issue be effectively dealt with by way of affidavits?

(viii) Which is the best litigating title through which the intended interested party can agitate its claim.

For the reasons given in the assessment the court, proceeds to make the following orders:-

1. Order 1 rule 10 (1) and (2) procedures cannot provide an avenue through which the intended interested party applicant can access the seat of justice as they relate specifically to addition to and removals of parties from proceedings in their capacity as plaintiff and or defendants.

2. There is no other provision known to this court, under the CPA/CPR provisions through which a party can be joined to proceedings as interested party.

3. By reason of what has been stated in number 2 above the intended interested party can only access the proceedings herein through the inherent jurisdiction of the court donated by section 3A of the CPA.

4. The finding of the court in number 3 above not withstanding the court is of the opinion that allowing the applicant to join the proceedings on the basis of the pleadings currently on record will not adequately assist in the resolution of the dispute between the parties because.

(i) The intended interested party is not intending to join the proceedings as a defendant. As such it cannot counter claim the said amount from the plaintiff.

(ii) From its deponements it appears to be having a genuine complaint against the defendant arising from the orders made in the Nairobi magistrates court case number 86/2007 which orders have not been varied and or set aside, which cannot be enforced against the defendant herein because the said defendant has no locus standi to participate in these proceedings.

- They neither entered appearance of defence. As such the defendant locus standi to participate in these proceedings was limited to the order 50 rule 16 CPR procedures which were compromised by the consent entered herein.

5. The issue of illegality raised by the plaintiff are hanging as they are not anchored on their plaint. They need to be anchored on a proper pleading.

6. By reasons of what has been stated in number 1-5 above the best way of resolving the dispute herein is for the intended interested party to layout, its claim against the plaintiff and the defendant in an own suit to which the plaintiff and defendant can respond and thereafter parties to proceed according to law.

7. Due to the nature of the vulnerability of the intended interested party's claim which is likely to be rendered nugatory if no temporary preservative order is made, the court, on its motion extend the interim orders granted herein to the intended interested party for a period of 60 sixty days from the date of the reading of the ruling within which the said intended interested party is expected to put its house in order and then seek appropriate relief against the plaintiff and defendant after bringing them on board.

8. The action in number 7 is taken because this court, has judicial notice of and is alive to a cardinal principle of law that a litigant is entitled to a decision on the merits of its claim once brought to court for adjudication. By reason of the difficulties outlined above an adjudication on the merits of the issue raised is not feasible in these proceeding hence the directions being given herein.

9. Since the intended interested party has not been properly joined to these proceedings no order of costs can be made against them. Each party will therefore bear own costs.

DATED READ AND DELIVERED AT NAIROBI THIS 20^{THE} DAY OF NOVEMBER 2009

R.N. NAMBUYE

JUDGE