



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 155 of 2003

SAMEX TRADING AGENCIES.....PLAINTIFF

VERSUS

BLOCK HOTELS LTD.....DEFENDANT

RULING

The background information is that Plaintiffs Samex Trading Agencies filed suit against Block Hotels Ltd vide their plaint dated 19th February, 2003 claiming Kshs 990,956/=, costs of the suit, interest on (a) above at rate of 20% p.a. from 30th September, 2002 until payment in full interest on (b) at court rates. Further perusal reveals that though defendants filed notice of appointment of Counsel, there was no entry of appearance and filing of defence.

Judgment was entered by consent for the plaintiff in the sum claimed of 990,956/=, on 16.7.03. On 5.11.03, the court was informed that Block Hotels had been placed under receivership and Counsel then appearing for them had no instructions. On 5.3.04 the bill of costs was allowed exparte at Kshs 103,640,00 all inclusive because it had been drawn to scale.

It is against the foregoing background information that the plaintiff/applicant has presented to this Court an application by way of chamber summon brought under Section 242 and 310 of the Companies Act Cap.486 Laws of Kenya and Rules 5(2) and 107(3) of the Companies (Winding Up Rules) and Section 3A of the Civil Procedure Act Cap.21 Laws of Kenya and all other enabling provisions of the Law. The orders they seek are:-

- (1)** That this honourable Court be pleased to grant leave to join the official Receiver as Party to the suit.
- (2)** That this honourable Court be pleased to issue an order directing the official receiver and liquidator (who is an officer of the court) to pay to the applicant within (14) days from the date of the making of the order by consent recorded on 16.7.2003 the applicants whole claim of Kshs 1,242,886/=, plus accrued interest thereon at the rate of 12% per annum with effect from and including 16.07.2003 until payment in full and together with all accrued interest.
- (3)** That the costs of this application be provided for.

The grounds in support are set out in the body of the application, supporting and further affidavit, annexures and written skeleton arguments and the major points relied upon are:-

- (1)** That the plaintiff has a decree in its favour which entitles the plaintiff to be a creditor of Block Hotels Ltd (in liquidation).
- (2)** That the official receiver was only appointed liquidator of the company by virtue of the debenture dated 6th December, 1994 in favour of Kenya Commercial Bank.
- (3)** That on the date of the said appointment the company was indebted to the applicant to the tune of Kshs 990,956/= plus costs and interest and did so admit vide consent recorded on 16.07.2003, which resulted into a decree in favour of the applicant but which has not been satisfied to date despite the same having been forwarded to the official Receiver for satisfaction way back on 1st February, 2005 both directly to the official Receiver and to the official Receiver's lawyers.
- (4)** To date the indebtedness remain unsettled.
- (5)** It is further their contention that the said official Receiver cannot hide under the change of title to Block Management Ltd and Block Hotels Ltd 2 to resist payment as the two are one and the same in that"
 - (i)** They share official accommodation.
 - (ii)** They share telephone, common address and telephone numbers.
 - (iii)** When demand was send to Block Hotels Management Limited, it was forwarded to lawyers for Block Hotels Ltd to respond to the same.
- (6)** They only issue raised at No. 5 above was proof of the indebtedness by supply of copies of invoices. The issue of legal personality and or identity of the first defendant was not an issue.
- (7)** The issue has just been raised to frustrate the execution process.

The Respondent has opposed the application on the basis of the grounds, in the replying affidavit, annexures and written skeleton arguments filed herein and these are:-

- (1)** That the deponent is the person named as the official Receiver in this application.
- (2)** That on 1.11.91 Block Hotels Management Ltd registered at the company's registry vide certificate number 14035 changed its name from Block Hotels Management Ltd to Block Hotels Ltd (BHL-1).
- (3)** That on 6th December, 1994 BHL-1 executed a debenture in favour of Kenya Commercial Bank Ltd a copy of which debenture is marked as LMC-1. Clause 9 of the said debenture authorized the said KCB Ltd as the debenture holder to appoint a receiver/manager over the assets and undertakings of the aforesaid company BHL-1 at any time after the money and liabilities intended to be secured shall have become payable pursuant to clause 8 of the said debenture.
- (4)** That on 3rd July, 1996 BHL-1 changed its name to Block Management Ltd (BMC). On the same date another company previously known as United Hotels Ltd (registered in the company registry as C.10987) changed its name to Block Hotels Limited (herein after called BHL-2).
- (5)** That both BML and BHL-2 continued doing business as legal entities separate and independent of each other.
- (6)** That BML as the predecessor in title to BHL-1 failed to repay the loan advances given by KCB Ltd, and consequently pursuant to clause 9 of the said debenture, the official receiver in the name and styles of the deponent Christopher Mwangi Chege was appointed as per LMC -2. is under receivership.

- (7) He was never appointed a receiver/manager of BHL-2 and he is not aware if BHL-2 is under receivership.
- (8) They contend that BML over whose assets, business, and undertakings he was appointed a receiver/manager was not a party to these proceedings and hence he cannot be made to settle a decretal sum incurred by a completely different legal person with which it is in no way associated.
- (9) He is not the official Receiver nor the liquidator of BHL-2 and is not even aware whether BHL-2 is under liquidation and an official receiver has been appointed in respect of the same.
- (10) They contend that in view of the aforesaid matters estoppel cannot arise as there has never been any misrepresentation made by the respondent to the Plaintiff in order to enable him invoke that doctrine of estoppel.
- (11) There is no mischief in the change of names as these took place in 1991,94 and 96 where as the proceedings herein were initiated in 2003 and decree issued in 2004.
- (12) They contend that the Plaintiff did not take time to find out the details and so the Receiver manager is right in asserting that he is not in charge of Block Hotels Ltd formerly united Hotels holdings Ltd which has been sued and he cannot therefore be made a party to the current proceedings to make good indebtedness the official receiver is not obligated to meet or pay as he is a stranger to the same.
- (13) No matter what the applicant does, the facts remain uncontraverted that Block Management Limited, over which Christopher Chege Mwangi is a receiver is a different entity from Block Hotels Ltd, the defendant herein and consequently the Court cannot be asked to compel the official Receiver to join this suit and settle the debt. On this account the applicant is asked to seek and go after the proper entity.
- (14) Alternatively even if this court were to rule that the official receiver is a proper party to be sued, the applicants debt does rank in priority and will have to await the eventual settlements of debts at the conclusion of the liquidation process. The Court cannot short circuit that process and make orders preferring an insecure creditor over secured ones and other non secured creditors who came on to the scene earlier than him.
- (15) It is their stand that they have represented to Court documentary proof in reply, cogent enough to unequivocally vindicate the official receiver.

On the courts assessment of the facts herein, it is clear that the facts demonstrated by presentation of both parties enjoin this court first of all to determine that it has been properly moved for the relief being sought and then secondly to determine its merits.

As regards whether the Court has been properly moved, the Court has to revisit the provisions of law cited. Section 242 of the Companies Act Cap.486 Laws of Kenya generally deals with the exercise of the liquidators powers. Of importance to us is Section 242(5) which reads *“If any person is aggrieved by an act or decision of the liquidator, that person may apply to the Court and the court may confirm, reverse or modify the act or decision complained of and make such order, in the premises as it thinks just”*.

The applicants complaint is failure to meet the indebtedness of the defendant by the official receiver. There is therefore jurisdiction for this court to intervene.

Section 310 of the Companies Act Cap.486, on the other hand permits the operation of bankruptcy rules to protect the rights of both secured and unsecured creditors in respect to any provable claims. The applicants claim is one of an unsecured creditor and so it is covered by this provision. Whereas winding up rules 5(2) simply gives the Court jurisdiction to dispose of the application in chambers hence the applicants rights to approach the seat of justice by way of a chamber summons. As for section 3A of the Civil Procedure Act it is a matter of trite law and judicial notice that it is a safety valve in civil proceedings. In the case of **WANJAU VERSUS MURAYA [1983] KLR 276** it was held inter alia that

section 3A of the Civil Procedure Act (Cap.21) although saving the inherent powers 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. From the foregoing it is clear that the main role of this rule is to empower the court to make such orders as are necessary for the ends of justice or to prevent abuse of the process of the court. The foregoing being the position, the court is satisfied that it is procedurally seized of the matter.

Procedural satisfaction leaves the issue of *locus standi* and the merits of the application to be dealt with. The issue of locus standi, arises as a result of the official receiver contenting that he has no authority to appear for the named defendant. The basis for the official Receivers' objection is found in the papers annexed to the replying affidavit. He contends that vide certificate of change of name No.14035 vide an entry made on 1.11.1991 an entirely known as Block Hotels Management changed their name to Block Hotels Ltd. Vide the same certificate and by an entry made on 3.7.1996 the same changed the name back to Block Hotels Management Ltd. The debenture in favour of KCB had been executed while the entity was still under the name of Block Hotels Ltd. It was executed on 15.12.1994. It therefore follows that as at 3.7.1996 when the entity changed the name to Block Hotels Management Ltd the debenture executed in favour of KCB was still in force. This being the case then it means that there is no way this entity which had changed name on 3.7.96 could have used the same names to enter into transaction with the Plaintiff in 2002 in order to give rise to the proceedings whose judgment is sought to be enforced in 2003.

The said official Receiver has gone further to state that as at the time he was appointed official Receiver on 2nd October 2003, the entity for which he acts was still known by the name and style of Block Hotels Management Ltd to the present day. He went on further to depone that at the time the entity he represents changed the name from Block Hotels Management Ltd there was another entity known by the name United Hotel Holdings Ltd which changed its name to Block Hotels Ltd on 3.7.96 vide certificate no C10987 on 3.7.1996. The official Receiver does not know the status of the said entity as at 2002 and 2003 when events herein were set in motion or the current status of the same entity as at the time the application subject of this ruling was presented. But he is sure that he is not an official Receiver for Block Hotels Ltd.

The official Receivers documentations had been presented in opposition to the documentation presented by the plaintiff/applicant. The applicant relies on the purchase order documents annexed to the further affidavit as SMF 1. They are marked in a bundle and they are dated between 15.05.02 and 17.05.02. They are on the letter heads of Block Hotels Ltd. The address given on them is P.O. Box 40075, Telephone 540780 and fax number 543810. The values of the goods requisitioned is what formed the basis of the claim presented to Court on 19th February, 2003.

The claim was presented against Block Hotels Ltd. The record reveals that on 16th July 2003 Messers Waweru Gatonye and Company Advocates filed a notice of appointment of advocates on behalf of the defendants Block Hotels Ltd. No appearance or defence was ever filed by them, but they participated in the entry of judgment by consent in favour of the Plaintiff. Thereafter the Plaintiff filed his bill of costs and in the process of taxation is when the court was informed that the defendant had been placed under receivership. This was on 5.11.03. Thereafter the bill was taxed as drawn because it had been drawn as per scale. On 5.3.04. It is noted from the record that counsel for the defendant then though indicated to have been served was not present. He had not filed notice of cessation to act and so in terms of the provisions of Order III Civil Procedure Rules, he was still on record for the defendant.

Thereafter the decree was drawn and the plaintiff embarked on the execution process in order to enable him realize the same. The documentation attached to the further affidavit as SMF2 namely 3 without prejudice letters dated 25.4.03, 19.08.03 and 3.09.03, 19.08.03 and 03.09.03 all go to reveal that **MESSERS WAWERU GATONYE & ADVOCATES** who were then on record for Block Hotels Ltd were willing to settle the said debt.

On 5.11.03 is when the Court was informed that Block Hotels had been placed under receivership. On 1st February, 2005 vide annexure SM4, Counsel for the Plaintiff/Applicant lodged his claim with the official receiver sought to be brought in. This was the same letter which was forwarded to Messers Ochieng,

Onyango, Kibet and Ohaga mentioned in SMF3 to the further supporting affidavit. The Counsel asked for further documentation from the Plaintiff, forwarded by letter marked SM3 dated 7.30.05 annexed to the first supporting affidavit.

The sum total of the official Receivers argument is that he does not act for Block Hotels, but Block Hotels Management Ltd and as such he is wrongly sought to be brought on board herein. Where as the sum total of the applicants arguments is that the two entities are one and the same thing more so when it is evident that they share the same address and fax number and the court had been informed that they had been placed under receivership almost at the same point in time that the current official receiver was appointed. That as per the documentations, presented the said official receiver and agents have held themselves out as appearing or representing the interests of the judgment debtor and as such they are the proper persons to be called upon to make good the indebtedness of applicant.

This court has given due consideration to the afore set out competing arguments and it is of the considered opinion that in order to concussively determine this matter, the court needs to be supplied with the following.

(1) Documentation as to the status of the entity which changed the name from United Hotels Ltd to Block Hotels Ltd on 3.7.96 as at:-

(a) The time the goods giving rise to the decree herein were supplied.

(b) As at the time the plaintiff came to Court on 19.2.03.

(c) As at the time judgment, taxation and decree were passed.

(d) As at the time the applicant came to court to seek a jointer of the current official Receiver.

(2) Documentation as to whether the said entity is under receivership and if so information as to when it was placed under receivership, reason for placing it under receivership and who the official receivers are.

(3) Since the court has noted from the documentation, displayed herein, that the address and fax machine number appearing on the order documents for the goods subject of these proceedings by Block Hotels Ltd, is the same as that of Block Hotels Management Ltd under receivership, the Court, to be supplied with the legal link between the two entitles.

The afore mentioned information can be supplied by either the applicant or the official receiver.

For the reasons given the merits of the decision sought is deferred until the court is supplied with the aforementioned additional documents.

2. Costs incurred to await the decision on the merits of the application.

3. Parties are at liberty to set dates when additional affidavits are to be filed to enable the court set the date for ruling on the merits.

DATE, READ AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2008.

R.N.NAMBUYE

JUDGE