



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Civil Suit 547 of 1999**

**KENYA BUS SERVICES (MSA) LTD.....PLAINTIFF**

**VERSUS**

**C.M.C. MOTORS GROUP LTD.....DEFENDANT**

**RULING**

On 6<sup>th</sup> December 1995 the plaintiff, Kenya Bus Services (MSA) Limited, instituted this suit against the defendant, CMC Motors Group Limited, seeking injunctive reliefs, damages and costs. The plaintiff then on 13<sup>th</sup> January 2000 filed an amended plaint but maintained the same reliefs sought in the original plaint. The plaintiff appears to have been re amended the plaint by consent on 11<sup>th</sup> February 2000.

The defendant on 15<sup>th</sup> December 1999 delivered its defence and set up a counter-claim against the plaintiff and 5 others for Kshs. 140,410,699/95 plus interest and costs. On 4<sup>th</sup> February 2000 the five defendants in the counter claim filed their defence. The plaintiff had earlier on 18<sup>th</sup> January 2000 delivered its reply and defence to the counter claim.

The record shows that on 9<sup>th</sup> October 2001 the defendant, by its Originating Summons lodged then sought leave of this court to proceed with its counter-claim against the plaintiff who had been placed under receivership. That application was allowed on 31<sup>st</sup> October 2001.

The plaintiff then went into liquidation and on 29<sup>th</sup> February 2008 discontinued its suit against the defendant. The discontinuance was with the consent of the defendant. As a Winding Up order had been made against the plaintiff, the defendant has sought leave of this court to continue with its counter claim against the plaintiff by its Chamber Summons lodged on 14<sup>th</sup> March 2008.

Counsel for the plaintiff has taken a preliminary objection to the effect that this court has no jurisdiction to grant the leave sought in these proceedings. Counsel contends that such leave can only be obtained in the Winding-Up cause. In support of the contention he relied upon Atkins Encyclopedia of Court Forms 2<sup>nd</sup> Edition Vol. II page 556 paragraph 139 which reads as follows:-

**“139. Stay of proceedings on winding-up. Once a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding may be proceeded with or begun against the company except with the leave of the court and subject to such terms as the court may impose.**

**Application for leave is made in the winding-up proceedings by summons served on the liquidator**

**and supported by an affidavit.”**

Counsel further cited two English cases namely **Eastern Holdings Establishment of Vaduz – v – Singer & Friendlander, Ltd. (Able securities Ltd, in Liquidation First Claimant. Sempah (Holdings), Ltd. – second claimant, [1967] 2 All EE 194** and **In Re Rio Grande Do Sul Steamship Company [1877]5 Ch.D 282**. In the former it was held that the court having jurisdiction to wind up the company, that is the Companies Court, was the one with the jurisdiction to grant leave to proceed with or commence proceedings against a company in respect of which a winding up order has been made. In the latter, the Court of Appeal held that leave to take proceedings against a company being wound up should be sought in the winding-up cause.

In response, counsel for the defendant contended that, Alkin’s Court Forms relied upon by the plaintiff were out dated and cannot be relied upon. In his view, our Rules are not the same as the English Rules. In the premises he urged me to overrule the preliminary objection.

Section 228 of the Companies Act Cap 486 of the Laws of Kenya reads as follows:-

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

Section 228 of the Companies Act appears to be similar to Section 231 of the Companies Act 1948 of England which the court in the **Eastern Holdings etc – v – Single etc** supra case was considering. In the English decision, “the Court” was taken to mean “the court having jurisdiction to wind-up the company that is to say the Companies Court not the Chancery Division of the High Court.”

Our Section 2 (1) of the Companies Act defines “the court” to mean the High Court. I am not therefore invited to give a different definition to the term since the same has been decided by Parliament. It is illustrative that in the Companies (Winding-Up) Rules “judge” means a judge of the High Court.

It would appear therefore that the practice in England is different from the practice in this country. In my view it is not without reason as in England the High Court Divisions are clearly demarcated and sharp whereas in our jurisdiction the divisions of the High Court which obtain at the Central Registry in Nairobi are merely for administrative convenience but are not constitutionally created.

In my view therefore, the English practice appears different and I am unable to follow the decisions relied upon by counsel for the plaintiff as those decisions construed Section 231 of the English Companies Act in the light of the circumstances then obtaining in England where indeed Companies Court existed and still exists.

The upshot is that I overrule the plaintiff’s preliminary objection. Costs shall be in the cause.

Order accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 19<sup>TH</sup> DAY OF MAY 2008.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:

Shah H/B for Inamdar for the Respondent and Mushelle H/B for Magram for the Applicant.

**F. AZANGALALA**

**JUDGE**

**19<sup>TH</sup> MAY 2008**