



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1255 of 1996

JACKSON N. WACHUGAPLAINTIFF

VERSUS

EASTER KITUI STORES LIMITED.....DEFENDANT

RULING

In an application dated 24th October, 2007 the plaintiff sought two orders:

- (1) That this Honourable be pleased to review and set aside its orders of 23rd June, 2006.
- (2) That pursuant to (1) above this Honourable court be pleased to reinstate the order of honourable Ongeri (Mrs.) Deputy Registrar of the 2nd December, 2006 and the matter do accordingly be referred to the Deputy Registrar for examination of Directors of the defendant as then prayed.

The order under review was made by Waweru J on 23rd June, 2006 and in that ruling the Judge had this to say;

“In order for the examination provided in this rule (Order 21 rule 36) to be conducted the judgement debtor if a corporation must of necessity be registered. A company that has been struck off the register and hence dissolved cannot be said to be in existence. There is no dispute here that the defendant/judgement debtor was struck off register by the Registrar of companies under the provisions of Section 339 of Cap 486 and thereby dissolved. The defendant/judgement debtor is therefore no longer in existence. Furthermore by operation of Section 340 of Cap 486 all its assets subject to any order which may at any time be made by the court under Section 338 or Section 339 of the Act, is deemed to be bona vacantia and shall accordingly belong to the Government. Whether or not the government has taken over such property in fact cannot be investigated under Rule 36 of Order 21. The law says that that is what must happen, and this cannot be second-guessed by the Deputy Registrar under the aforesaid rule. Section 338(1) gives the High Court power to declare dissolution of a company void at any time within two years of the date of dissolution on an application being made for that purpose by the liquidator of the company or by any other person who appears to the court to be interested. Section 339(6) gives the court power, on application made by the Company or by member or creditor before the expiration of 10 years from the publication in the gazette of the notice of the company having been struck off the register, if satisfied the company was at the time of striking off carrying on business or in operation or otherwise that it is just that the company be restored to the register, order that the name of the company be restored to

the register. It is common ground that there are no orders as aforesaid that have been made. One must therefore ask the question what useful purpose will be served by an examination under rule 36 where the judgement debtor is a corporation that no longer exists. In my judgement none. An examination under that rule is intended to find out whether any or what debts are owing to the judgement debtor and whether the judgement debtor has any and what property or means of satisfying the decree. The judgement debtor herein was struck off the register of the company and dissolved. It no longer exists. Whatever property it may have had at the time it was dissolved reverted to the Government by operation of the law. Therefore there cannot be any or valid purpose for an examination under rule 36 of Order XXI as no execution can issue against it. I so hold. The liability of directors mentioned in the proviso to subsection 5 of Section 339 must be a liability to the Company as provided for under the Articles of Association of the Company or by law. The duty to attend court to examine under rule 36 of Order 21 is not such liability to the company. This is a duty owed to the court upon application by decree holder”.

Having reached the above conclusion Honourable Judge dismissed the application for examination of directors and held that the Deputy Registrar failed in error by calling for the examination of the directors in order to ascertain whether or not there are assets of the company still in existence. The judge was also of the opinion that the effect of dissolution meant that any property that may have been in existence reverted to the Government therefore, there cannot be any or valid purpose for undertaking the examination of directors. The effect of allowing the application dated 24th October, 2007 was to overturn the decision made by Waweru J on 23rd June, 2006. That application was heard *ex parte* and it is the case of directors that they were not served with the said application. Some of the directors also alleged that there was oversight by the advocate in failing to attend court during the hearing of that application. The 2nd and 4th directors gave an impression that they were aware of the hearing but due to an oversight Mr. King’ara advocate acting on their behalf did not attend court.

The other directors through their advocate Mr. Nyakundi stated that they were not served with the hearing notice for the hearing of the application scheduled for hearing on 11th March, 2007. The issue is whether there is any legitimate reason to enable me to set aside the *ex parte* orders given on 11th March, 2008.

I have considered the two applications by the directors and affidavits in support and reply to the applications. The point that stands out is that this dispute is fairly old and the issues involved are fairly intricate. The directors want to contest the application to review the decision of Waweru J made on 23rd June, 2006. They allege they have not been given adequate opportunity to present their side of the story to enable the court to reach a fair judgement. On my part having considered the two applications, I think it is fair to give the directors an opportunity to participate in the application to review the decision of Waweru J. It is also my position that in having read the decision of Waweru J, it is fair and just to give an opportunity to all the parties involved so that a judge called upon to review the decision of Waweru J would be adequately equipped to the heavy task. It is for that reason that I must exercise my discretion in favour of the directors so that the real issues in dispute between the parties should be addressed in the presence of all the parties. I therefore think that the interest of justice would be best served by setting aside the orders made on 11th March 2008. In doing so I have taken into consideration the totality of the dispute and the fact that the application to examine the directors cannot be split.

In the premises I allow the two applications by the directors. The plaintiff shall be at liberty to list his application dated 24th October, 2007 on priority basis. For any inconveniences that may have been suffered by the plaintiff, I order the 2nd and 4th directors to pay costs of Kshs.10,000/= to the plaintiff within the next 10 days.

Dated, signed and delivered at Nairobi this 16th day of June 2008.

M. A. WARSAME

JUDGE