

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

Winding Up Cause 30 of 2006

IN THE MATTER OF KIRIMA BUS SERVICES LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT (CAP 486) LAWS OF KENYA

R U L I N G

By notice of motion purportedly made under **Section 235** of the **Companies Act** and **Rules 27(1)** of the **Companies (Winding Up) Rules**, Obadiah K. Macharia, the petitioner sought for the appointment of the official receiver as the interim liquidator with powers to take possession and collect rent from various properties owned by Kirima Bus Services Ltd (*hereinafter referred to as the company*), namely Pumwani Road – LR No.209/7144, Lagos Road –LR No.209/3542 and Murang'a Building – Fort Hall Township/Block 11/10 (*hereinafter referred to as the suit properties*). The grounds in support of the application are on the face of the application.

The petitioner contends that it is essential for an interim liquidator to be appointed for the properties of the company to be safeguarded for the benefit of the shareholders. The petitioner stressed that he had established that the directors of the company intended to dispose of some of the suit properties to defeat the winding up petition. The petitioner contends that the directors of the company had misappropriated the company's funds by failing to account for the rents collected from the suit properties and by channeling the same for their personal and exclusive use. The petitioner was apprehensive that if an interim liquidator was not appointed, the debts accumulated by the company would be such that the ownership of the suit properties by the company would be imperiled by threats of civil suits. He further stated that it would be in the interest of justice and fairness of all the shareholders, creditors and debtors for an interim liquidator to be appointed to safeguard the interest of the minority shareholders from that of the majority. The application is supported by the annexed affidavit of the petitioner. He swore a further affidavit in support of the application.

The application is opposed. Lucy Waithera Mwangi, the secretary of the company swore a replying affidavit in opposition to the application. She deponed that the company held an extraordinary general meeting on 3rd August 2007 which resulted in the election of new directors. She swore that the petitioner was one of the officials of the company who were ousted from office after the said elections. She submitted that after the new directors had taken office, they have put in place new structures which has enabled efficient collection of revenue including rents from tenants. This enabled the company to pay off some of its debts including the land rates and the outstanding income tax. She annexed copies of the receipts of the sums paid as evidence of the said payments. She deponed that the new directors had embarked on refurbishing and re-painting the premises owned by the company which had previously been neglected by the former officials. She swore that in view of the effort made by the new directors, it would not be necessary for an interim liquidator to be appointed since no shareholder was now complaining. She deponed that the company, in the circumstances, was facing no risk of its assets or properties being sold or auctioned to pay off the outstanding debts. She was of the view that the events which informed the petitioner when he made the present application were no longer in existence. She urged the court to dismiss the application.

At the hearing of the application, I heard the rival submissions made by Mr. Gachie for the applicant and

Mr. Karuga for the company. The two counsel basically reiterated the contents of the application together with the supporting affidavits filed thereto by their respective clients. The issue for determination is whether the petitioner made a case to entitle this court grant him the order sought in his application. Section 235 of the Companies Act grants this court power to appoint the official receiver as an interim liquidator any time after the presentation of a winding up petition and before the making of a winding up order. In the present application, the petitioner sought the appointment of the official receiver as the interim liquidator on the basis of his apprehension that the properties of the company would be wasted or get disposed off before the winding up petition is heard and determined. The petitioner in particular complained about the conduct of the directors of the company, who in his view, were guilty of dereliction of duty by failing to pay off the debts of the company and by further mismanaging the affairs of the company.

It seems that the petitioner's fears were well founded since the shareholders appeared to be of the same opinion. The shareholders were dissatisfied with the conduct of the said directors, and on 3rd August 2007, elected new directors who have now been so recognized by the Registrar of Companies. Lucy Waithera Mwangi, a director and secretary of the company persuaded this court when she deponed that the new directors of the company were trying to rectify the ills that had been committed by the previous directors who were ousted from office. She deponed that the new directors had commenced to pay off the accumulated debts, including taxes owed to the government and the land rates owed to various local authorities where the suit properties are situate.

Having carefully considered the respective cases made by the petitioner and the company, it is clear to the court that the properties and the management of the company is now in relatively good hands compared to when the said properties and management were in the grasp of the former directors. The fears expressed by the petitioner at the time he filed the present application are no longer in existence. Although the petitioner disputes the election of the new directors of the company, it is evident that the new directors appear to be, for the time being, accountable to the shareholders of the company. If the petitioner is dissatisfied in the manner which the new directors were elected into office, he is at liberty to requisition a meeting of the shareholders of the company as provide by the memorandum and articles of association of the company.

The petitioner did not place before the court any compelling reason to entitle this court invoke its powers and appoint the official officer as an interim liquidator. In reaching the foregoing decision, this court is not expressing any opinion regarding the substance of the winding up proceedings brought to this court by the petitioner. This court's observations are limited to the application now before court. The petitioner's application craving for the appointment of official receiver as an interim liquidator is not merited in the circumstances. It is hereby dismissed with costs to the company.

It is so ordered.

DATED at NAIROBI this 15th day of OCTOBER 2008.

L. KIMARU

JUDGE