REPUBLIC OF KENYA

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

Civil Case 1255 of 1996

JACKSON N. WACHUGA ……………...………...... PLAINTIFF

VERSUS

EASTERN KITUI STORE LIMITED ………..............................…......… DEFENDANT

IN THE MATTER OF AN APPEAL TO A JUDGE IN CHAMBERS FROM AN ORDER OF A DEPUTY REGISTRAR

BETWEEN

ALI SHEIKHAN SALIM

FUAD SHEIKHAN……………………………….............…………………..APPELLANTS

AND

JACKSON N. WACHUGA……………………..............……………………RESPONDENT

J U D G E M E N T

This is an appeal from an order of the Deputy Registrar lodged under Order XLVIII, rule 5 (2) and (3) of the Civil Procedure Rules (the Rules). The decision appealed against is dated 2nd December, 2005 and was made by Hon. Ongeri (Mrs.), Deputy Registrar, pursuant to a preliminary objection raised in proceedings under Order XXI, rule 36 of the Rules. The part of that decision that is appealed against was that the Deputy Registrar held that her role under rule 36 aforesaid was to ascertain whether or not there are assets of the company still in existence or whether the same have reverted to the state under the doctrine of ***bona vacantia***. She delivered herself as follows:-

"***This court has no power to lift the corporate veil or to hold the directors personally liable but merely to inquire as to the assets of the company, whether the same have reverted to the state under the doctrine of*** *bona vacantia* ***or not."***

There are three grounds of appeal in the memorandum dated 7th December, 2005.

"1. *The learned Deputy Registrar was in error when she failed to hold that there being no judgment-debtor by reason of dissolution of the Defendant pursuant to section 339 of the Companies Act, there could not be any inquiry as to whether the Judgment/Debtor has any or what property or means of satisfying the decree.*

2. The learned Deputy Registrar fell in error when she held that the purpose of the examination would be to inquire as to the assets of the company, whether the same have reverted to the state under the doctrine of bona vacantia ***or not.***

3. No purpose would be served by the examination of the directors."

Mr. Nyakundi, learned counsel for the Appellants, submitted that the Deputy Registrar failed to appreciate that for an examination of directors to be conducted under Order XXI, rule 36 there must be in existence a body corporate which owes money pursuant to a decree. In the present case there was no such body corporate, the Defendant having been dissolved under section 339 of the Companies Act, Cap. 486. Mr. Nyakundi further submitted that the purpose of an examination under rule 36 aforesaid must be as set out in that rule and cannot be otherwise. The court cannot examine whether the properties of a dissolved company have reverted to the state under the doctrine of ***bona vacantia*** as such reversion is automatic under section 340 of Cap. 486 and a matter of law. In his view the Deputy Registrar ought to have dismissed the application for examination under rule 36 and let the matter lie there. He noted that there was no fraudulent conduct by the directors of the Defendant/Judgment-Debtor. Its assets were sold off in execution of the very same decree in this case and it could no longer carry on operations, and was eventually dissolved as already stated.

Mr. Nderitu, learned counsel for the Plaintiff/Decree-Holder, replied as follows. Under section 147 of Cap. 486, it is the duty of the directors and officers of a company to keep proper books of accounts in respect to its assets and liabilities. Up and until dissolution of the company, the directors and officers must perform that duty. Under the proviso to section 339 (5) of Cap. 486 the liability of the directors, officers and members of the company continues and may be enforced as if the company had not been dissolved. In his view the obligation imposed by rule 36 of Order XXI is a liability of the directors, and the same has been saved under the said provision. The directors are therefore under a duty to disclose if there were assets due to the company prior to its dissolution.

Mr. Nderitu also submitted that under section 339 (6) of Cap. 486 the court has power to order a reversal of dissolution of a company, so long as the application is made within ten (10) years of dissolution. It was therefore necessary for the directors to be examined in order for the Decree-Holder to determine if he should make application for reversal of the dissolution of the Defendant/Judgment-Debtor. Mr. Nderitu, however, conceded that there cannot be any execution against a company that has been dissolved.

Mr. Nyakundi, in his answer, submitted that the purpose of an examination under rule 36 of Order XXI is to show what the company is owed which can be attached in execution. Once a company has been dissolved under section 339 of Cap. 486, all its assets revert to the state. It no longer has any assets that can be called in to satisfy the decree because it no longer exists. A dissolved company will be dead and no execution can issue against it.

I have considered the submissions of the learned counsels._Rule 36 of Order XXI provides as follows:-

"***36. Where a decree is for the payment of money, the decree-holder may apply to the court for an order that-***

(a) the judgment-debtor; or

(b) in the case of a corporation, any officer thereof; or

(c) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor, and whether the judgment-debtor has any and what property or means of satisfying the decree, and the court may make an order for the attendance and examination of such judgment-debtor or officer, or other person, and for the production of any books or documents."

In order for the examination provided in this rule to be conducted the judgment-debtor, if a corporation, must of necessity be in existence. 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/Judgment-Debtor was struck off the register by the Registrar of Companies under the provisions of section 339 of Cap. 486 and thereby dissolved. The Defendant/Judgment-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 XXI. 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 (2) years of the date of the 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 an application made by the company or member or creditor, before the expiration of ten (10) years from the publication in the Gazette of the notice of the company having been struck off the register, if satisfied that 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 judgment-debtor is a corporation that no longer exists? In my judgment, none. An examination under that rule is intended to find out whether any or what debts are owing to the judgment-debtor, and whether the judgment-debtor has any and what property or means of satisfying the decree. The Judgment-Debtor herein was struck off the register of companies and dissolved. It no longer exists. No execution proceedings can issue against it because 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 sub-section (5) of section 339 must be liability to the company as provided for under the articles of the association of the company or by law. The duty to attend court to be examined under rule 36 of Order XXI is not such liability to the company. This is a duty owed to the court upon application by the decree-holder.

For the above reasons I hold that the learned Deputy Registrar fell in error by deciding that her duty under rule 36 of Order XXI was to ascertain whether or not there are assets of the company still in existence or whether or not the same have reverted to the state under the doctrine of ***bona vacantia***. I must therefore allow this appeal and set aside her order of 2nd December, 2005. I will substitute therefor an order dismissing the application for examination under the aforesaid rule. In the circumstances of this case the just order regarding costs will be that parties do bear their own costs. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 23RD DAY OF JUNE, 2006.

H.P.G. WAWERU

JUDGE