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

Winding Up Cause 7 of 1997

IN THE MATTER OF FISHES INVESTMENT LTD TWO FISHES HOTEL

A N D

IN THE MATTER OF COMPANIES ACT

EDWARD NDUNGU

OMAR JUMA

SAIDI BUGU

ALI JUMA

HAMISI OMARI CHARERO

HUSSEIN ALI MKALA

JOHN IRAVONGA

MWANGADU CHARO

JUMATATU ALFAN BOSU

ABDI ABDULAHI ……...…….. APPLICANTS

- Versus -

PATCH OSODO …… RESPONDENT

Coram: Before Hon. Justice L. Njagi

Dr. Khaminwa/Lijoode for applicants

Ms Okumu/Wameyo for respondent

Court clerk – Kinyua

R U L I N G

The application before the court is by a Notice of Motion dated 10th March, 1999, and expressed to be brought under section 323 of the Companies Act, Cap 486 of the Laws of Kenya, and Rules 5(1) k, 7 and 60 of the Companies (Winding Up) Rules. It seeks from the court five orders –

1. A declaration under section 323 of the Companies Act that one PATCH OSODO, the Respondent, was knowingly party to the carrying on of the business of Fishes Investments Limited with intent to defraud creditors of the company and for other fraudulent purposes, and that he is responsible, without any limitation of liability for all the debts of the above company amounting to Kshs. 431,137,926.50.

2. That if necessary an account of the debts of the said company be made.

3. That the said PATCH OSODO do pay to the applicants the said sum of Kshs. 431,317,926.50.

4. That the said PATCH OSODO do pay the applicants the costs of this application.

5. Such further **or other relief this court may deem fit to grant.**

The grounds upon which the application is based are not given, but there is on record an affidavit sworn by the applicants on an undisclosed date, which seems to answer to the supporting affidavit.

On 27th August, the defendant filed THE FOLLOWING grounds of opposition –

1. **That the application is frivolous and vexatious and an abuse of the process of the court.**

2. **That the application is bad in law.**

3. **That the application is grounded on falsehood and is overly speculative.**

Along with the grounds of opposition was also filed what is entitled "supporting affidavit" sworn by **PATCH OSODO** on 27th August, 1999, but which affidavit is both in form and substance really a "replying affidavit". This is confirmed by the fact that on 13th September, 1991 Mr. Osodo swore a further affidavit on the same date and in paragraph 2 thereof he states –

"**further to the replying affidavit sworn on the 27th day of August 1999 …"**

In the first affidavit, he deposes that he has never been a director of South Coast Hotels Limited or Fishes Investments Limited, and that he has never been the Chief Executive of the Company. However, he admits having been a General Manager of the company but only during the period between 1st January, 1997 and 31st October, 1997. He further states that a Mr. Ennos Olang'o was the person incharge of the financial operations of the two Fishes Hotel. He also contends that he was essentially an employee of the company just like the applicants.

During the hearing of the application, Dr. Khaminwa appeared for the applicants and Mr. Wameyo appeared for the respondent. After hearing both counsel, I find that there are matters of a procedural nature to dispose of first before considering the substantial application. The first procedural point touches upon the affidavit in support of the application. It is notable that even though the oath therein is made by 10 people whose names appear on the face of the record, the jurat seems to carry only nine signatures. Of greater moment and import is a blatant contravention of section 5 of the Oaths and Statutory Declarations Act which states –

"**Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."**

The affidavit in support of this application does not comply with the mandatory dictates of this section.

In disobedience, the jurat does not state at what place and on what date the affidavit was made.

To this irregularity, Dr. Khaminwa sought a cure from the provisions of order VI rule 12 and order XVIII rule 7 of the Civil Procedure Rules. Order VI rule 12 is in the following words –

"**No technical objection may be raised to any pleading on the ground of any want of form."**

For its part, part, order XVIII rule 7 states as follows –

"**The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof."**

The common denominator between these rules is that they are both embedded in subsidiary legislation whereas section 15 quoted above is a statutory provision. At no time can subsidiary legislation supersede the express provisions of any statute. Put in another way, the former is always subservient to the latter. For that reason, I find that the affidavit in support of this application is fatally defective for being in contravention of statutory provisions of an Act of Parliament.

This leads me to section 323 of the Companies Act under which the application is expressed to be made. Subsection 1(a) of that section provides as follows:-

"**If in the cause of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court, on the application of the official receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct."**

Under this section, the court is required to be moved by the official receiver, or the liquidator or any creditor or contributory of the company. There is no dispute that the applicants in this matter are neither the official receiver, nor are they the liquidator nor contributories of the company. The only category which they remain to satisfy is that of creditors. Are they creditors of the company?

In his submissions, Mr. Wameyo referred to rule 29 of the Companies (Winding Up) Rules which provides the requisite procedure to be complied with in the event that any person wishes to appear on the hearing of a winding up petition. Rule 29 is in three paragraphs which provide, so far as is relevant, as follows :-

"**(1) Every person who intends to appear on the hearing of a petition shall serve on the petitioner or his advocate … notice of his intention to do so.**

(2) Such notice … shall be served in time to reach … not later than four o'clock in the afternoon of the day before the day appointed for the hearing of the petition …

(3) Any person who fails to comply with the provisions of paragraph (1) shall not, without the special leave of the court, be allowed to appear on the hearing of the petition."

In the instant case, the winding up petition was advertised in the Standard newspaper of Wednesday, 5th November, 1997. This was followed by a similar advertisement in the Daily Nation of 6th November 1997. The notice was clear that anyone intending to appear at the hearing of the petition was required to serve notice on the firm of Anjarwalla Abdulhussein & Co., Advocates, not later than five o'clock in the afternoon of 5th December, 1997. The applicants herein served their notice on 8th December, 1997 and it was duly struck out on the basis that it was filed out of time, thereby failing to comply with Rule 29(1). Pursuant to Rule 29(3) the applicants lost any footing to appear on the hearing of the petition. Having

lost that footing, I don't see that they could thereafter have a locus to petition the court under section 323 of the Act. To hold otherwise would create uncertainty as to who the company's creditors are, as some would purport to come even in the dying stages of the winding up process alleging to be owed money, and this would unsettle the entire process. This was the mischief that the rule sought to curb, and that is why those who do not bring themselves within the scope of Rule 29(1) need the special leave of the court before they can be allowed to appear on the hearing of the petition. There is no evidence that any such leave was sought and or obtained. For the purposes of the winding up petition herein, I hold that the applicants lack the locus of creditors, and more so for the purposes of filing an application under section 323 of the Act.

At a higher level of abstraction, the law recognizes employees as a special interest group in a company on account of their special contracts of service which give them special contractual entitlements. For this reason, the law provides for preferential payment of their wages and salaries in the course of a company's winding up. Section 311 (1) of the Companies Act states –

"**In the winding up of a company there shall be paid in priority to all other debts –**

(a) all taxes and local rates due from the company …

(b) all Government rents not more than one year old

(c) all wages or salary (whether or not earned wholly or in part by way of commission) of any clerk or servant (not being a director) in respect of services rendered to the company during four months next before the relevant date and all wages (whether payable for time or for piece work) of any workman or labourer in respect of services so rendered.

(d) All retirement benefits contributions and vested benefits of any clerk or servant of the company.

…"

This provision covers those employees of a company who are not directors. In any event, a director is not a servant of a company.

It has been alleged in paragraphs 6, 13 and 14 of this application that the respondent herein has, since the formation of the company, been a shareholder, chief executive and general manager of the company. In his affidavit sworn on 27th August, 1999, the respondent denied having ever been a director of the company or its chief executive, but admits having been the general manager but only during the period between 1st January, 1997 and 31st October, 1997. He also gives in that affidavit the name of a Mr. Enos Olang'o as the internal auditor and the person who was in charge of the financial operations of the company and who was directly answerable to the directors on those operations. In his further affidavit sworn on 13th September, 1997, he reiterates that he was not a director. To that affidavit, he attached a copy of a letter dated 8th November, 1996 signed by the Assistant Registrar of Companies which confirms that as of that date, the respondent was only a non-director shareholder. This is adequate confirmation that he was not a director.

Barring any changes incorporated in a company's articles of association, and no such change has been pleaded in respect of the company herein, the power to manage a company's affairs is vested in the board of directors acting collectively as a board. This is summarized in Article 80 of Table A which in summary provides –

"**The business of the company shall be managed by the directors, who … may exercise all such powers of the company as are not, by the Act or by these regulations, required to be exercised by the company in general meeting …"**

In the absence of evidence to the contrary, it cannot be assumed that the general manager was in charge of the financial operations of the company, for the "general manager" is not the same as the "chief executive officer" which is Americanism for the "managing director." And even if the general manager was responsible for those operations, it is not enough to generalize. Dr. Khaminwa submitted that at the time when the respondent was general manager, the company continued in business and the indebtedness was colossal. He then submitted that the mere size of the figures amounts to defrauding creditors. With respect, this court cannot subscribe to that view. Figures alone cannot spell fraud. Small time debts may be contracted fraudulently while large sums are contracted above board. I find this application very generalised and it is not enough to generalise. The applicants should have pleaded the particulars of what the respondent specifically did to lead the company along the road to self destruction. That has not been done. Instead, it has been left to pure conjecture which cannot translate to fraud. What is fraud?

In the case of **RE WILLIAM LEITCH BROS LTD** – [1932]2 ch 71, the court attempted a definition of this term. Maugham J. said at p. 77 –

"… **I must hold with regard to the meaning of the phrase carrying on business 'with intent to defraud that, if a company continues to carry on business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment of those debts, it is, in general, a proper inference that the company is carrying on business with intent to defraud …"**

In the subsequent case of **RE PATRICK & LYON** [1933] 1 Ch. 786, the same judge, referring to the same section, observed at p. 790 –

"… **the words 'defraud' and 'fraudulent purpose' where they appear in the section in question, are words which connote actual dishonesty involving, according to current notions of fair trading among commercial trading, real moral blame."**

As indicated earlier, the allegations levelled against the respondent in this matter have not been substantiated. How, for instance, did he know in advance that the company was not in a position to repay the debts? This is very central to establishing fraud under this section, but it has not been answered. On the contrary, the respondent attributes the company's inability to service its debts to the slump in the tourism industry at the material time which is plausible.

In sum, I find that the affidavit in support of this application is fatally defective; that the applicants have no locus to apply under section 323 of the Companies Act; that the respondent was neither a director nor the chief executive; and that there is no evidence upon which to hold that there was fraudulent trading. For these reasons, the application is dismissed with costs.

Dated and delivered at Mombasa this 19th day of September, 2006.

L. NJAGI

JUDGE