



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Winding Up Cause 36 of 1999
IN THE MATTER OF CITY CABANAS LIMITED
AND
IN THE MATTER OF COMPANIES ACT (CHAPTER 486) OF THE LAWS OF KENYA
RULING

This winding - up Petition was filed against a company called City Cabanas Limited on 15th July 1999. It was filed by an alleged creditor called Compusense Limited which claimed that it was owed a sum of Kshs. 974, 454 and that despite service of a Notice under Section 220 of the Companies Act dated 19.5.99, and expiry of 21 days therefrom the Company had refused and neglected to pay or satisfy the said sum.

By an application dated 5th August 1999, the Company herein applied to Court for Orders that the Petitioner be restrained from further proceeding with the petition and advertisement thereof pending the hearing and disposal of the application. It further sought an Order that the Petition be struck out and that in the alternative and without prejudice to the foregoing, the applicant be granted leave to file an affidavit opposing the petition out of time. The application was heard by my brother, Justice Njagi on 30.6.2003, who delivered his Ruling on 25th July 2003. The Court declined to give the orders for the time being but allowed the company to file its affidavit opposing the petition out of time.

The Company thereafter on 25th November 2003 filed the present Motion under Certificate of Urgency. It is made under inter alia, Section 223, 224 and 225 of the Companies Act and sought the following orders: -

1. That the court grants a temporary stay of proceedings in

the following cases, pending the inter parties hearing of

the application herein: -

(i) CMCC NO EJ 410 of 1999, Bernard Muchiri Mburu t/a Peeves Suppliers, Kenya - vs - City Cabanas Limited.

(ii) RMCC NO EJ 678 of 1999, Pinkertons Kenya Limited - vs - City Cabanas Limited

(iii) RMCC NO. 257 of 2000, Gailey and Roberts Limited - vs. - City Cabanas Limited

(iv) CMCC NO. 957 of 2001, Kenya Meat Supply Company Limited - vs. - City Cabanas Limited.

(v) *CMCC NO. 1177 of 2001 Meshack Tinega t/a Meelin Design Services - vs. - City Cabanas Limited*

(vi) *CMCC NO. 404 of 2002, Kenya Canvas Limited-vs- City Cabanas Limited*

(vii) *CMCC NO. 1994 of 2002, James Njoroge Muiruri -vs. - City Cabanas Limited*

(viii) *CMCC NO. 8324 OF 2003, Menje Holdings Limited -vs. - City Cabanas Limited.*

(ix) *CMCC NO 10927 of 2003, Catering Training and Tourism Development Levy Trustees -vs.-City Cabanas Limited.*

2. That the court be pleased to grant a temporary stay of proceedings in the said 10 cases.

3. That the Honourable Court be pleased to stay the suits referred to above under section 223 (b) 224 and 225 of the Companies Act pending the hearing and determination of the Petition herein.

4. That the applicant/Company be at liberty to apply for further orders and/or directions as the Honourable Court may deem fit to grant.

5. That the costs of the application be costs in the cause.

Apart from filing an Affidavit sworn by one Rosaline Njeri Macharia, a director of City Cabanas Limited, the applicant lists for 4 grounds to justify its application. These are: -

a) *That a petition to winding up the Applicant Company City Cabanas limited dated 12th July 1999 was presented to this Honourable Court on 15th July 1999.*

b) *That the several matters sought to be stayed are pending before various Magistrates' Courts while a Petition to wind up the Applicant Company is pending before this Honourable Court.*

c) *That in the light of the Provisions of Section 223 (b), 224 and 225 of the Companies Act chapter 486 Laws of Kenya, the aforementioned suits ought to be stayed pending the hearing and determination of the Petition filed herein.*

d) *That it is in the interest of justice that the proceedings in the aforementioned suits be stayed pending the hearing and determination pending before this Honourable Court.*

The petitioner was served with the application but did not appear by itself or its advocates at the hearing of the application. Six of the plaintiffs in the listed suits appeared at the hearing and opposed the application.

During the hearing, the company inter alia, stated that it wishes to have protective orders to preserve the assets of the Company and in particular against preferential treatment of some creditors to the detriment of the general body of creditors. That any execution of any decree or disposition would amount to a fraudulent preference, which is against the law. Also that any subsequent attachment of the Company's assets resulting from a decree from any of the listed suits would be wrongful. That the company would suffer prejudice and could close down.

I have considered the application, the grounds and affidavits in support, the Replying Affidavit in submissions of all counsels. I am of the view that the High Court has the power and discretion to order a stay of proceedings or restrain the proceedings in any suit pending before a lower court or any other court with lesser jurisdiction. Section 223 (b) of the Companies Act provides: -

"223 At any time after the presentation of a winding-up petition, and before a winding up order has been made, the company, or any creditor or contributory, may -

(a)

(b) *Where any other suit or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the suit or proceedings;*

and the court to which application is so made may, as the case may be, stay or restrain, the proceedings accordingly on such terms as it thinks fit.

This provision gives the court very wide powers and discretion. However, I would think that the invocation of the power or exercise of the discretion must be justified. There must be some sufficient and justifiable cause. In other words, some very good reasons in law and fact, balancing the interests of all who would be affected and all the circumstances of the case. So, are the reasons given by the Applicant good enough? Do they fit the grounds that I have set above? The said fetter I have proposed to the Courts' power and discretion are not founded on any authority that I have read but they would be the principles that I would apply in considering this application.

In the premises, I will ask myself, what will happen if the 10 suits or proceedings which are pending in Court are not stayed and/or restrained? What prejudice will the Applicant suffer? And lastly, whether continuation of the suit or proceedings will result in any violation of any provision of the Law e.g. preferential treatment of the Plaintiffs as creditors and/or fraudulent preference.

To answer the said question I would categorize the 10 suits into two general groups: namely: -

a) *Those where the cases have been concluded and there is judgment in favor of the plaintiff.*

b) *Those where the suit is still pending and are awaiting trial or are partly heard. In other words those in which judgments have not been given yet and are still pending to be heard on the merits.*

I will deal with each group successively.

Group a: -

In the cases where there are judgments in favor of respective plaintiffs and there are possible or impending executions of decrees, I would say that the Applicant is not likely to be affected or prejudiced whatsoever neither can any preferential treatment or fraudulent preferences arise. This is as a result of operation of the Law under Sections 224 and 225 of the Companies Act, the very provisions upon which the applicant relies. Section 224 provides as follows: -

"224. In winding up by the Court, any disposition of the property of the Company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding up, shall, unless the court otherwise orders be void.

Strictly speaking the provision relates to dispositions of the property of the Company in the ordinary course of business. However, in my view, any disposition or transfer of the property of such a Company as a result of a Court Order, or judgment other than the Court having jurisdiction to wind up the Company (i.e., High Court) or the Court of Appeal would be affected or caught by the provision of Section 224. In the premises, I would add that I am of the view that Section 224 contemplates not only the orders of a Court with competent jurisdiction to order such disposition and/or transfer but one that has specifically addressed its mind to Section 224 and given the reasons for the order or exception to the said provision.

If I am right in the aforesaid interpretation of Section 224, then I do not accept that the Applicant herein will be prejudiced if the 10 suits listed and are part of Group (a) herein above are not stayed. Section 224 prohibits the disposition of the Company assets or transfer thereof. Secondly, the Courts in which all the 10 suits have been filed do not have the jurisdiction to invoke the provision thereof as the Resident Magistrate's Court and the Chief Magistrate's Court do not have the power to act under Section 224 which is a preserve of the High Court and the Court of Appeal under the provisions of Sections 218 and 223 (a) of the Companies Act.

It follows therefore that there can be no preferential treatment or fraudulent treatment through any of the 10 cases in which decrees or judgments exist. It would otherwise be against the law and illegal. As the law has taken care of this, no purpose will be served to make any orders for stay of suit or proceedings. Section 225 provides as follows: -

"225. Where any company is being wound up the court, any attachment, distress or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void"

The words in and meaning of this Section are simple and clear. They speak for themselves. Executions of any judgment and/or decree against a company being wound up is in effect prohibited by Section 225 and if any takes place it would be void. This means that the Plaintiff in the 10 suits who have judgments and/or decrees in their favor against the Applicant cannot in law execute the same. As a result, once again there would be no useful purpose to be served to stay the said suits or proceedings. There is no likely prejudice to the applicant or likelihood of any preferential treatment or fraudulent preference. I now turn to Group b.

Group b

These are suits in the list which are still pending and are awaiting trial. What may happen if the said suits or proceedings are not stayed or restrained from proceeding? What prejudice will the applicant suffer and will the continuation of the said proceedings result in any of the events apprehended by the applicant?

The only and logical consequence is that either the plaintiffs will succeed and obtain judgment against the Defendant or Plaintiffs will fail in the claim and the suits dismissed in favor of the applicant herein which is Defendant in those suits. If the Defendant is successful in any of the suits then it has nothing to fear and it cannot suffer any prejudice neither can any creditors or the general community of creditors. In the event any of the Plaintiffs succeed and obtain judgments in their favor and the consequential decree or orders, as we have seen above, the same cannot in law be executed or enforced against the Applicant by virtue of the provisions of Section 225 of the Companies Act. The effect of the said provisions has been set out above. Due to the said results, there is no useful purpose to be ultimately achieved in staying the said suits or proceedings.

To the contrary, there will be definite prejudice and inconvenience not only to the plaintiffs in the said suit but also to the administration of justice. If the said suits or proceedings are stayed and the matters do not take their course to trial, the suits will not be disposed of expeditiously and there would be unnecessary delay and uncertainty. It would be unclear and uncertain how long the suits would take since it will not equally be clear and certain when the petition herein will be heard and disposed of. It is going to almost 5 years now yet the petition has not been heard. It is outrageous and untenable that the Petitioner has been allowed to sustain the existence of the Petition so far and for such a long period. Already, it may well be that many creditors of the applicant could have withheld action against the Applicant due to the Petition. It is not known but one cannot rule out that possibility. It is another file at the Court Registry reflecting negatively on performance of this Court.

To allow the 10 suits or those that have not gone to trial or determined, be stayed will only lead to Plaintiffs in the said suits to suffer unreasonably and unfairly by delay of their cases. They may suffer irreversibly as witnesses may pass on, leave jurisdiction and as we all know, time dims one's memory even for the available witnesses. Documents and other evidence could get lost or be destroyed. All these possibilities would operate to the detriment of the Plaintiffs whether they succeed subsequently on the merits or not. To have one's day in Court is a fundamental right by itself.

This court will not allow such a situation to arise if it can help it. In the end result, I do hereby unreservedly accept the Respondents' submissions in this application. The Applicant's application has no merits whatsoever and I am tempted to believe that it was intended to defeat the rights of the plaintiffs in the said suits and deny them their rights. To allow the application would amount to perpetuation of an abuse of the Court process.

I have no hesitation in dismissing the Applicant Company's application, which I hereby do with costs to

the Creditors who participated in this application and are on record.

In order to ensure that this Petition is disposed of expeditiously, in the interest of justice and invoking the Court's powers under the Companies Act and its inherent powers, I do hereby order that this Petition be set down for hearing within the next 45 days by the Petitioner or the Company, failing which this Court will take appropriate action at its own instance. The petitioner is to be served with a copy of the Order resulting from this Ruling within the next 10 (ten) days from the date hereof. Service to be effected by the Applicant Company. Orders accordingly.

DELIVERED and SIGNED at Nairobi this 27th day of April 2004

M K .IBRAHIM

JUDGE