



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL CASE NO 371 OF 2001**

**MUTHAIGA MINI MARKET LIMITED.....PLAINTIFF**

**VERSUS**

**LEISURE LODGES LIMITED .....DEFENDANT**

**RULING**

Muthaiga Mini Market Ltd a limited liability company incorporated in Kenya and having a place of business Ukunda South Coast in Kenya filed a plaint claiming Kshs 578,249.30/- interest and costs against Leisure Lodges Ltd also a corporation incorporated in Kenya. There is an alternative claim for Ksh 134,257.00 being an amount of a cheque which was dishonoured. The cheque was written by the interim liquidators. The written statement of defence contains 4 paragraphs in which the plaintiff two claims are denied. Notice to sue is also denied.

By Chamber Summons dated 14.12.2001 the plaintiff applied under Civil Procedure Rules order VI rule 13 (1) b & C. That the said statement of defence be struck out and judgment be entered for plaintiff as prayed in the plaint and costs of this application be provided for.

The application is supported by affidavit of MC Ruparel the Managing Director of the plaintiff who swears that during the 1996, 1997, 1998, 1999 2000 and 2001 the plaintiff supplied goods to the defendant at defendants request and that the payment of Shs 579,249.30 price for the goods has not been made. Statements of accounts and invoices have been exhibited. The defendant issued a cheque in the sum of Shs 134,257.00 which was dishonoured on presentation to the bank. Photocopy of the cheque is exhibited by a letter dated 2.5.2001. The money was demanded on behalf of the plaintiff by their advocates. No payment was made hence this suit.

Upon perusing the replying affidavit sworn by Suresh Patel, Accountant of the defendant. He says that the company was in hands of joint interim liquidators between 18.10.96 and 16.2.2001 pending a dispute between the shareholders. The accountant continues to say that during the tenure of liquidators the directors had no access to the documents of the company. The documents regarding this claim were requested for by a Mr ARK. Shariff who passed them to joint liquidators on 20.3.2001 to settle. In exhibit "MCR5" of supporting affidavit I see that on 20.3.2001 the defendant through Shariff the Accountant, wrote to the plaintiff a letter headed: "Outstanding amount during the interim liquidation period 18th April, 1997 to 16.2.2001." which states:

"Thank you for the statement of account you sent us recently together with company invoices covering the above period. We have forwarded all the details to the Joint Interim Liquidators and requested them to deal with the issue direct with yourselves."

The letter was written after the termination of the tenure of interim liquidators and before the suit was filed on 25.7.2001.

The contention by the defendant that they were waiting for an answer to the particulars from the plaintiff to enable them to file a more substantial defence, I find without merit as it is obvious from the exhibit that they had the information namely statement of account and copies of invoices which they perused and passed to interim liquidators even before the suit was filed. The request for particulars as framed is calculated to buy time and to delay the proceedings. The claim as stated in the plaint is clear and straight forward. The period during which the debt was incurred is specifically stated. This is the period the interim liquidators were in possession of the business. See exhibit MCR – 5. The statement exhibited as MCR-1t shows that as on 14.2.2001 the outstanding amount was 579,249.30. This claim had been scrutinized by the defendant – Mr ARK Shariff and by this time (20.3.2001) the defendant company had taken over possession of the company business from the interim liquidators. The defendant was therefore in a position to decline liability and refer the matter to the interim liquidators. The request for particulars is not genuine. On the issue of the dishonoured cheque the details of the cheque are shown on its face as drawn on Kenya Commercial Bank Ltd. Ukunda on 8.2.2001 must have been in the knowledge of the defendants by March 2001. I find that no material facts are necessary that were sought for in the request for particulars. The facts sought could not have made the defendants defence any better. It would only have shown that the plaintiffs claim was incurred during the period the interim liquidators were in office and that is the defence the defendant is putting forward to this suit for non payment of the plaintiffs claim.

That defence that interim liquidators are personally liable is a matter of company law. In winding up cause No 28 of 1996 High Court sitting at Nairobi(Justice Ole Keiuwa as he then was) on 16.10.1996 did appoint interim liquidators pending the disposal of the wind up petition filed against the defendant herein. Two persons were appointed namely Hezekiah Wangombe Gichohi and Mr George Kimeu. The powers of the said interim liquidators were spelt out in that order thus: “The powers of the said (interim liquidator be and are hereby limited and restricted to the powers set out under section 241 of the Companies Act Cap 486 except section 241 (2) thereof.

The provisions of section 241 (1) of the Companies Act Cap 486 provides as follows:

- “The liquidator in a winding up by Court shall have power with the sanction of either the Court or the committee of inspection.
- a. -----
  - b. to carry on the business of the company so far as may be necessary for the beneficial winding up thereof.
  - c. -----
  - d. -----
  - e. -----

Section 241 (3) provides that

“The exercise by a liquidator in a Winding up by the Court of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to court with respect to any exercise or proposed exercise of any of those powers.”

I see no application to control the powers exercised by the interim liquidators made by anyone during the period the liquidators were in office. In addition section 239 of the said Act provides that the interim liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled. By the time the interim liquidators were appointed in this case the company was a going concern. It was carrying on business of a high class tourist hotel in South Coast, Kwale District. The winding up was brought under section 219(f) in that the petitioner was of the view that it was just and equitable that the company should be wound up. The interim liquidators were appointed at the request of the petitioner as shareholder and given the powers mentioned above. They were carrying on the business which they took possession of. This was envisaged by Court order. It is to be observed that when the appointment of these liquidators was terminated by the Court of Appeal the

said Court ordered them “within 120 days from the date of the order (16.2.2001) to render to the defendant full audited accounts of their stewardship from 18.10.1996, such accounts to include profit and loss accounts and balance sheets for each year with leave to apply.”

The objections raised by the defendants Suresh Patel in his replying affidavit sworn on 5th February, 2002 at paragraph 12 and 13 thereof are that the interim liquidators were authorized to carry on business so far as may be necessary for the beneficial winding up thereof but did not include the power to run the company into debt. The defendant therefore is of the view that there is here triable issues where facts and law should be argued out.

Authority numbered 11 in the plaintiffs list is *Palmers Company Law* 21st Edition by CM Shitthoff and James H Thompson who at page under the heading “Carrying on Business” states

“one of the powers which the liquidator may exercise without the sanction of the Court is to carry on business of the company so far as may be necessary for the beneficial winding up thereof. Beneficial winding up does not refer necessarily to financial benefit ----- but, atleast when the winding up is for a reconstruction includes the carrying on of the business for a smooth take over by new company”.

On page 789 it goes on to say that “in carrying on business the liquidator is not *prima facie* liable on the contracts which he makes but he should be careful to act in the name of company and to disclose the fact that the company is in liquidation, so that no one may be misled.” This was held in the case of *Stead, Hazel and Co vs Cooper* [1933] 1KB Page 840 where the liquidator had carried on business and was sued by creditors. In the present case the Court never proceeded to make a winding up order and therefore, under provisions of rule 27 (3) Companies Winding Up Rules the interim liquidators are “entitled to be paid out of the property of the company all costs, charges and expenses properly incurred by them as interim liquidators.”

The relevant authorities have been placed before the Court regarding the issue of liquidators liability to third parties when he chooses to carry on business pending winding up order.

I have taken time to peruse the many authorities offered by both sides and general principles appear to me to be as follows:

Where the liquidator carries on business he can do all things reasonably necessary for carrying it on, and accordingly he can buy and sell and make contracts, draw and accept and endorse bills of exchange.

In this case the company was a major tourist concern. The winding up was initiated by a shareholder disputing that the affairs of the company were being run in such oppressive manner that it would only be just to wind it up. Obviously it was prudent for the interim liquidators not to disrupt the business but to carry on business in the ordinary manner for the benefit of winding up. And in carrying on business the tourists had to be fed and other activities of the hotel had to continue, and the financial obligations of the company met in the ordinary course of business. As it happened the winding up petition was dismissed and the company affairs returned to the company directors as a going concern and with goodwill intact. The interim liquidators should be commended by the company for preserving the business.

Also the liquidators were agents of the company in carrying business and all debts and liabilities incurred on behalf of the company by interim liquidators must be met by the company out of the assets of the company.

The plaintiff’s claims in this case have not been shown that they were not incurred for and on behalf of the company neither is it shown that the plaintiff was not aware the company was in interim liquidation when it supplied goods. Neither is it shown that the interim receivers were negligent in carrying out their duties. For these reasons I find no triable issues in the defence case. I also find that failure by the plaintiff to supply the particulars sought is not fatal to this application.

The request was not necessary and information sought could not have advanced the defendants defence to the suit. I note that the defendant has already filed an application here to serve third party notice under order 1 rule 14 claiming contribution in respect of part of claim brought by the plaintiff into his suit against the defendant. In that case the plaintiff cannot be delayed until the liability of third party is determined. Any issues between the defendant and the third parties (interim liquidators) shall no doubt be resolved. In the circumstances I allow the application as prayed with costs of the suit and this application. The application dated 29.10.2001 by defendant is hereby undertaken by my ruling herein and the same is dismissed with costs.

**Dayted and delivered at Mombasa this 18th day of Jun, 2002**

**KHAMINWA CA**

**JUDGE**