IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 2326 OF 1997

HERITAGE BANK LIMITED (IN LIQUIDATION)…….PLAINTIFF

versus

MOSES KURGAT T/A

KURGAT & ASSOCIATES………………………………DEFENDANT

J U D G M E N T

On 18th September 1997, Heritage Bank Ltd., then in liquidation filed the suit against Moses Kurgat t/a Kurgat and Associates who was prior thereto, one of the advocates acting for it and providing it with legal services.

The bank claims that based on his fee notes, it paid him certain sums of money subsequent to which the Deposit Protection Fund (hereinafter called DPF) found no evidence of any work having been done by him. The plaintiff now demands a refund of the said sums together with interest thereon at 18% p.a.

It is stated in the plaint and rightly so, that the Deposit Protection Fund had obtained leave of the court to bring the suit on behalf of the plaintiff. The suit was drawn and filed by Kiplagat & Associates, Advocate.

In his defence, while admitting having acted for the plaintiff, he however contends that the said amounts were paid for services rendered and he denies owing any money to the plaintiff. In his defence, he intimated that he would at the first opportunity raise a preliminary point of law in objection against the entire suit.

The defendant has now moved the court and seeks to have the plaint struck out and the suit dismissed. He also prays that the costs of this application be borne by the Plaintiff's "advocate".

His application is based on the grounds inter alia, that in instituting the suit, DPF who were the instituting party as liquidators of the bank did not seek the sanction of the court or the committee of inspection to appoint the lawyers on record, to act on its behalf. It is also his ground that no sanctions of the court or of the Committee of Inspection, were sought to institute the suit as required by law. This last ground has since been satisfied, as it has been established that the sanction of the court had been actually obtained.

In view of the above, it is his contention that the plaint has been drawn signed and filed by an unauthorised and invalidly appointed person and that the suit is null and void, as it contravened Section 241 (1) of the Companies Act.

Although the above mentioned application was not opposed, as no replying affidavit was filed, counsel for the plaintiff chose to move the court by way of a Notice of Motion and sought an order that the firm be granted retrospective sanction to appoint themselves to act in the suit. It is worthy to note that in the

application, counsel described themselves as “advocates for the plaintiff”.

This latter application was made under Section 35 of the Banking Act, Section 242 (3) of the Companies Act, Rule 3 of the Companies (High Court) Rules and Rules 7(1) and 203 of the Companies Winding Up Rules amongst others.

The said provisions of the Banking and Companies Acts stipulate that:

> **35 (1) If an institution becomes insolvent, the Central Bank may appoint the Board established under section 36 to be a liquidator of the institution; and the appointment shall have the same effect as the appointment of a liquidator by the court under the provisions of Part VI of the Companies Act and references in that Act to “the relevant date” and “commencement of the winding up” shall be deemed to be references to the date on which the Board is appointed as liquidator.**
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> **(2) No liquidator of an institution shall be appointed under the provisions of the Companies Act if the Board has already been appointed as liquidator and no liquidator of an institution shall be appointed in any event without the approval of the High Court which shall not grant such approval unless the Central Bank shall certify that it does not intend to exercise its powers under this section or shall fail to exercise its powers within such period not exceeding three months as may be prescribed by the Court.**
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> **(3) In any case where a liquidator of an institution has been appointed, the Central Bank may, at any time, apply to the High Court for an order that the liquidator be removed and the Board appointed as liquidator in his place; and the provisions of the Companies Act shall, subject to the provisions of subsection (7), apply to a liquidation by the Board but only to the extent that they are not inconsistent with the provisions of this Act and any regulations made thereunder.**
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> **242. (3) The liquidator may apply to the court in manner prescribed for directions in relation to any particular matter arising under the winding up.**

I allowed both the applications to proceed simultaneously.

It was the submission of Mr. Koyoko for Moses Kurgat that Kiplagat & Associates having conceded that the requisite sanctions for their appointment had not been obtained, they could not now be obtained retrospectively. It was also his submission that Kiplagat & Associates had already acted in contravention to Order III rule 1 of the Civil Procedure Rules which makes it a mandatory requirement, that a party may be only represented by a recognized agent, or by an advocate duly appointed to act on his behalf. It was his contention not having been duly appointed, then Kiplagat and Associates could not act on behalf of DPF and all action undertaken by them as such was null and void.

In his submission Mr. Maingi of Kiplagat & Associates, conceded that he was not aware of the requirements for the sanctions but that he only became aware of it in 1998 when the court made its ruling in the Civil Appeal Case Trade Bank Ltd. (in liquidation) v. L. Z Engineering Construction Ltd. & Others CA No. 14 of 1998. In that case, a firm of Advocates had filed a Notice of Appeal prior to obtaining a court’s sanction or order of appointment. The Court of Appeal had held that:

> ***“by section 241 (1) (c) of the Companies Act, the liquidator cannot appoint advocates without the sanction of the court or the Committee of Inspection and sanction means approval in advance.***

The Court of Appeal proceeded to find that the Notice of Appeal filed in that case by advocates who had not obtained the required sanction was invalid and of no effect and it was struck out.

The Court of Appeal had in that case been referred to the case of Re Leisure – Lodge Travel Leisure and

Services Ltd. (in liquidation) [1978] 2 All ER 273, where such sanction had not been obtained prior to taking action, and where the issue of whether it could be given retrospectively, was considered.

The Court of Appeal had observed that:

(1) "Section 245 (1) (c) (Section 241 (1) (c) of our Companies Act) did not authorise a liquidator to appoint a solicitor without first obtaining the sanction of the court or the committee of inspection; the sanction could not be obtained retrospectively so as to authorise the prior appointment of a solicitor"

(ii) "However the court had power either under section 246(3) as under its inherent jurisdiction to give retrospective sanction in a proper case to action taken under section 245(1) without proper sanction.

And in that case the appointment had been sanctioned albiet retrospectively, since the liquidator had incurred a liability to the solicitors and the benefit of that expenditure was considered reasonable and had accrued to the company. That being the case then, it was considered a proper case to grant the said sanctions at the late stage. The court had however emphasized the fact that, "a liquidator should obtain prior sanction and if he does not do so he will have to satisfy the court that his expenditure should be allowed."

Having established that unless there is proper case, then the sanction cannot be granted retrospectively, the issue that arise then is whether this application raises a proper case to warrant granting the orders being sought, retrospectively where an applicant discerns that he has a proper case the application should be brought to the attention of the court without undue delay.

Save for stating that the Court has inherent jurisdiction to grant the sanction retrospectively, the pleadings in the plaintif's application and its supporting affidavit have not established that a proper case exists to warrant granting the sanction retrospectively. In any event, the applicant is guilty of laches. If as conceded by Mr. Maingi, he became aware of the requirement in 1998, one wonders why it took him more than two years to move the court. The application by Kiplagat & Associates lacks in merits and the same is dismissed with costs.

Having found as I do, the suit, which was thus filed by an incompetent person whose appointment had not been sanctioned, cannot therefore lie. The said firm of advocates acted without proper sanction and authority and they are liable to costs of these two applications. The suit is invalid and can not lie.

I therefore grant orders to prayer numbers 1 and 2 of the application that was made by way of chamber summons and filed on 21st September 2000.

Dated and delivered this 13th day of February 2001.

JEANNE W. GACHECHE

COMMISSIONER OF ASSIZE

Delivered in the presence of Mr. Koyoko for the applicant and Mr. Tures holding brief for Mr. Maingi for the respondent/plaintiff.