REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO. 70 OF 2001

WELCOME PROPERTIES LTD ……..…….. APPLICANT

VERSUS

JACKSON KAMAU KARUGA

DEPOSIT PROTECTION FUND BOARD

CENTRAL BANK OF KENYA ……..…..RESPONDENT

RULING

Welcome Properties Ltd the applicant herein, has moved this Court by way of an originating motion filed in Court on 21st February 2001 to grant several reliefs claimed against Jackson Kamau Karuga, Deposit Protection Fund Board and Central Bank of Kenya, the respondents herein. The motion, is taken out drawn and filed by Waruhiu, K'Owade & Ng'ang'a the applicant's advocates. It is expressed to be brought under rules 7 (1) and 60 (1) of the Companies (Winding Up) Rules; section 237 (a); 238; 241 (3); 243 and 323 of the Companies Act cap 486 of the Laws of Kenya; Section 35 (1) of the Banking Act – cap 488 and all enabling provisions of the law. The reliefs sought are that:-

(a) That service of this application be dispensed with in the first instance.

(b) That this Honourable Court do order an in depth audit and/or investigation into the affairs of Reliance Bank Limited (in liquidation), from the date of placement of the said bank under Central Bank of Kenya statutory management to-date and that the same be carried out by an independent Court appointed auditor.

(c) That this Honourable Court do order rectification of any irregularities and/or acts or illegality that may be found to have been committed from the time of placement of Reliance Bank Limited (in liquidation) under Central Bank of Kenya statutory management to date.

(d) That this Honourable Court do order the respondents to refund to Reliance Bank Limited (in liquidation) all expenses incurred by themselves and/or their servants and/or agents for the period that this Honourable Court declared Jackson Kamau Karuga continued being Central Bank of Kenya appointed manager as illegal.

(e) That the respondents be ordered to provide reports and accounts of the operations of Reliance Bank Limited (in liquidation) since the appointment of the said Jackson Kamau Karuga as Central Bank of Kenya appointed statutory manager to date.

(f) That the liquidation agent Jackson Kamau Karuga be removed and a suitable person acceptable to the Honourable Court be appointed as the liquidation agent pending the hearing of the application for the appointment of a new liquidation agent *inter partes* or until further orders of the Court.

(g) That the liquidator, the Deposits Protection Fund

Board be removed and a suitable person acceptable to this Honourable Court be appointed as the liquidator of Reliance Bank Limited (in liquidation) pending the hearing of this application *inter-partes* or until further orders of the Court.

(h) That this Honourable Court be pleased to order the respondents to provide security on such terms as may be determined by this Court.

(i) That pending the determination of this application and the investigations all the assets be frozen and there be a stay of payment of any declaration and/or payment of any dividend howsoever.

(j) That the applicant be at liberty to apply for any further orders or directions as the Honourable Court may deem fit and just to grant.

(k) That the costs of this application be provided for.

It is would appear as if the applicant has in its capacity as a creditor of Reliance Bank Ltd, a company that has been placed in liquidation by the Central Bank of Kenya in exercise of its powers under section 35 of the Banking Act, decided to take up cudgels on behalf of the Company to right perceived wrongs committed against the company by respondents during the current period of liquidation as well as during the period the Company was under statutory management of the Central Bank of Kenya.

It would also appear as if some of the reliefs claimed are against Reliance Bank Limited (in liquidation). Jackson Kamau Karugu was initially the Statutory Manager of the Company duly appointed by the Central Bank and is now the liquidation agent duly appointed by the Central Bank and is now the liquidation agent duly appointed by the liquidator, the Deposit Protection Fund Board, which has been appointed as such by the Central Bank of Kenya. Affidavits in support of and in opposition to the application have been filed. They are highly contradictory. Various preliminary objections have been taken by the respondents to the motion. The first objection is that the proceedings are a nullity as summons has not been taken out as is required by the Civil Procedure Rules. On this point, Dr Kiplagat, counsel for the 1st and 2nd respondents, submitted that the originating motion herein is an originating process, the same needed to be sanctioned by the Court by issuance of summons. He placed heavy reliance on the case of *Kaur v City Auction Mart* [1967] EA 108 Mr Ougo, counsel for the 3rd respondent associated himself with that submission. He relied on the provisions of order VI rules 1, 3(1) and (2) of the Civil Procedure Rules to the effect that where a suit is filed, summons must issue and the summons must be signed by a judge or an officer appointed by the Court and sealed with the seal of the Court. Mr K'Owade, counsel for the applicant, responded that the *Kaur* case was decided *per incuriam* as it did not address itself to specific Ugandan provisions of the law but relied on an English case which was decided on entirely different procedural rules. He pointed out that in Kenya, an originating summons is signed by an advocate and not by the Court. He further submitted that the summons envisaged by order VI rule 3 which requires to be signed by the Court is a summons to enter appearance in a suit originated by a plaint, not any other kind of summons. He relied on the case of *Shalimarl Limited*

v Meridian Holdings Limited (H C Misc Case No 342 of 1997 (OS)) (unreported). Counsel also submitted that he had not invoked the procedure under the Civil Procedure Rules but under the Companies Act, cap 486 which was saved by section 3 of the Civil Procedure Act itself. Dr Kiplagat replied that the *Kaur* case is authority for the consequences of not issuing a summons generally and that the *Shalimarl* case was wrongly decided.

In his view, under our procedure an originating motion and an originating summons are treated as the summons in themselves and they must be sanctioned by the Court by way of signature. Having read the

cases cited to me by counsel and considering all the above submissions, it appears to me as if the real issue in this point of preliminary objection is whether the applicant has failed to comply with a fundamental statutory requirement and, if it has, whether the proceedings are consequently a nullity.

The proceedings herein have been initiated by way of originating Notice of Motion. The motion does not purport to be made under any order or rule in the Civil Procedure Rules. Instead it invokes the Companies Act, the Companies Winding Up Rules and the Banking Act. This is not to me surprising for the Civil Procedure Act does not purport to be exhaustive on procedural law in civil matters. Indeed, as Mr K'Owade pointed out, section 3 of the Act expressly saves special jurisdiction and powers including procedural rules and forms under any other law in force. Such saved laws include, for instance, the Law of Succession Act (cap 160) and the Companies Act (cap 486). The procedure invoked in the instant matter is that under the Companies Act. And I can see nothing in the procedural rules invoked which require that a motion, originating or otherwise, be signed by the Court. But even if the originating process herein were to be viewed as being within the ambit of the Civil Procedure Rules, and in my view it is decidedly not, I would reject the submission that it is nullified by want of signature by Court. In my view, it is not every originating process under the Civil Procedure Rules that must be sanctioned by the Court by means of issuance of a summons duly signed by a judge of other court officer. My reading of order IV which is relied on for the opposite proposition leads me to conclude that it is only the summons to enter appearance accompanying a plaint which must be so sanctioned. I always take the view that rules of procedure must be read in their context and if that is done here, it becomes evident that any reading of order IV rule 3 (1) which ignores sub rules (3) and (5) of the same rule, can only lead to an erroneous conclusion of law. In this regard, I agree with the view of Otieno-Onyango J in the *Sharimarl* case that an originating summons is not required to be signed by the Court as it is not a summons to enter appearance in a suit initiated by way of plaint. And I am unable to be persuaded by the decision in the *Kaur* case without the benefit of reading the full provisions of order V of the Uganda Civil Procedure Rules which were relied on by Jones, J while on this point, I may mention that apart from a plaint and an originating summons the other mode of initiating proceedings known to the Civil Procedure Rules is a motion on notice under order LIII. That other mode also does not in my opinion, require to be signed by the Court. In the result, I take the view that the applicant's originating process has not failed to comply with any fundamental statutory requirement and the preliminary objection thereto in that regard is overruled.

The second ground of preliminary objection canvassed is that the initiating process is a nullity and fails to comply with the provisions of the Companies Act and Rules made thereunder. It was contended by Dr Kiplagat that the originating motion herein having been filed pursuant to the provisions of the Winding Up Rules, a summons should have been issued from the Court. Rules 8-11 of the Companies (Winding Up) Rules were relied upon. Mr K'Owade countered that by pointing out that rule 60 of the Companies (Winding Up) Rules expressly provides that applications under the sections of the Act which the applicant had invoked were required to be made by motion supported by an affidavit. To consider these rival submissions it is necessary to refer to the pertinent rules. Rules 8-16 inclusive of the Companies (Winding Up) Rules apply to proceedings. The term proceedings is narrowly defined in rule 2 to mean the proceedings in the winding up of a company under the Act, or proceedings under section 211 of the Act. Rule 11 reads:

"Every summons in proceedings in Court shall be prepared by the applicant or his advocate and issued from the office of the Registrar; a summons, when sealed, shall be deemed to be issued; and the person taking out the summons shall file in the office of the Registrar a duplicate copy thereof."

This rule when read with rule 2, as it should, shows that the summons referred to therein is a summons taken out in proceedings to wind up a company. It does not apply to any and every other proceeding taken in respect of a company in the process of being wound up. On the other hand, rule 7 states that every application in Court, other than a petition, shall be made by motion, notice of which shall be served on every person against whom an order is sought. And rule 60 (1) provides that an application made to Court under, *inter alia*, section 323 of the Act shall

be made by motion. It is to be noted that one of the provisions of law under which the applicant in the present case seeks relief is the said section of the Companies Act.

In light of the above provisions of law, it is clear to me that the proceedings initiated by the applicant herein are in proper form and were not required to be by way of a summons issued from the office of the Registrar. This ground of preliminary objection is also overruled.

The third ground of objection taken is that the procedure of originating motion is not appropriate where, as here, there are many contentious matters of fact deposed in affidavits. It is submitted that an action would have been the convenient and appropriate form in a case where the affidavits are contradictory. Reliance was placed on the case of *Uganda General Trading Co Ltd v V N T Patel* [1965] EA 149. Mr K'Owade responded that this objection was in reality an objection to the form and procedure by which the proceedings had been originated and as such it did not go to the jurisdiction of the Court. In addition to the case relied upon by Dr Kiplagat in support of the objection, counsel cited a plethora of other authorities to the effect that a procedural defect cannot vitiate proceedings unless the Court concludes that there will be prejudice or injustice to the adversary. I am in agreement with the main thrust of Mr K'Owade's submissions that a procedural defect does not oust the jurisdiction of the Court and that unless injustice or prejudice is shown defects of form and other procedural lapses cannot vitiate the proceedings.

In the instant case, the respondents do not complain of any prejudice or injustice. What they do complain of is that if the Court proceeds to hear the application as presented that may amount to deciding disputed issues of fact on affidavits. They contend that an action would have been the most convenient form of procedure. That may very well be so but since procedure by way of action is not made mandatory by the company's winding up rules, and the procedure by which the applicant has approached the Court is a permitted one, the proceedings cannot be vitiated. They are competent. What can be done is to make such orders as will ensure that the issues raised in the proceedings are aired as openly as possibly on *viva-voce* evidence subjected to the usual forensic safeguards. Such orders can be made in the exercise of the inherent powers of the Court to secure the ends of justice. In the result, I overrule this ground of preliminary objection also.

The fourth point of objection taken is that Reliance Bank which is said to be a relevant and necessary party to these proceedings and in respect of whom orders are sought has not been joined as a party. It is submitted that such non joinder is fatal to the proceedings. The cases of *Lochab Brothers v Kenya Furfural Co Ltd* [1982-88] 1 KAR 335 is relied upon. The response to this was that no suit can be defeated by non joinder or misjoinder of parties and the Court itself has very wide discretionary powers to enjoin necessary parties. It was also submitted on behalf of the applicant that *Lochab* case is only authority for the proposition that a receiver cannot institute proceedings in his own name alone and if he does so those proceedings are a nullity and the non joinder of the debenture holder cannot be saved by order 1 rule 9 of the Civil Procedure Rules which provides that no suit shall be defeated by reason of the misjoinder or non joinder of parties.

Upon my own reading of the case, I find that to be so. The receivers were held to have no *locus standi* to sue in their own names as on crystallization of the debenture the property secured thereby was vested in the debenture holders. Without joining the debenture holders in their action, the same was a nullity in law. Can it be said that by parity of reasoning, the applicant herein, who is a creditor, cannot sue the liquidator and the liquidation agent without joining the company under liquidation as a necessary party?

I think not. The creditor is not an agent of such a company and he does not derive his standing to sue from the company. He is suing in his own right *qua* creditor. To that extent the *ratio decidendi* of the *Lochab* case is not strictly applicable to the matter at hand. However, if one looks at the reliefs sought by the applicant and in particular in paragraphs (b), (c), (d) and (i), it becomes crystal clear that the same cannot be granted in any proceedings where the Company is not a party. I accordingly accept the submission that Reliance Bank (in liquidation) is a necessary party to these proceedings. And while I don't accept that non joinder of a necessary party to the proceedings is as a general rule a fatal procedural lapse, everything depends on the specific circumstances of each individual case.

In the circumstances of this case, I defer a decision on the point of objection until I have considered another point which is taken by the respondent's counsel to the effect that the proceedings are in any event invalid as leave to institute the same was not obtained as required by law.

The fifth ground of preliminary objection taken by Dr Kiplagat on behalf of the 1st and 2nd respondents is that the liquidation agent cannot be sued in his own name. It is contended that he acts in a representative capacity.

The liquidator should not be referred to by name and accordingly the name of Jackson Kamau Karuga should be struck out. Reliance was placed on section 236 (f) of the Companies Act and *Halbury's Laws of England,* 4th Edition, paragraph 1109. Section 236 (f) of the Companies Act provides that on a winding up order being made-

"a liquidator shall be described, where a person other than the official receiver is liquidator, by the style of

'the liquidator' ….of the particular company in respect of which he is appointed and not by his individual name."

The passage in *Halsbury's Laws of England* relied upon is to the same effect. The response by counsel for the applicant is that the acts complained of are not by the Deposit Protection Fund Board, the liquidator, in its corporate capacity but by the first respondent, who is its agent, as a person.

The situation is compared to a misfeasance action against an officer of the company. It is contended that the proceedings here are against the liquidator and its agent because the allegations are made against the agent. Section 236 (f), it is further submitted, does not preclude a suit against the liquidator's agent. In reply, counsel for the 1st and 2nd respondents, submits that the distinction sought to be made of the liquidation agent acting in his official and personal capacities is untenable as the person concerned is not discharging any personal duties at the company in liquidation agent acting in his official and personal capacities is untenable as the person concerned is not discharging any personal duties at the company in liquidation. It is submitted that under section 34 (8) of the Banking Act, an officer or employee of the Central Bank or any manager or other person appointed, designated or approved by the Central Bank under the provisions of part VII of that Act is not liable in respect of any act or omission done in good faith by him in the execution of the duties undertaken by him.

In my view, both advocates have perfectly valid points. The point that a liquidator is not to be sued in his own name is well taken. In the instant case, the liquidator is the Deposit Protection Fund Board. Mr Jackson Kamau Karuga is its agent. So the Deposit Protection Fund Board as the liquidator ought to have been styled "the Liquidator of Reliance Bank".

However, there is nothing in law to preclude an agent of such a liquidator being sued in his own name where, as here, the complaints raised take the colour of malfeasance by the said agent. If the agent is entitled to any immunity of the type contended for, that would be a matter for decision in the substantive hearing as the immunity claimed is applicable only where it is shown that the acts complained of have been done in good faith. I would in the premises decline to strike off the name of Jackson Kamau Karuga from the proceedings at this state on that ground only. As regards the wrong styling of the liquidator, I take the view that it is an irregularity that does not vitiate the proceedings. It causes no prejudice to the applicant and it is capable of being rectified by an appropriate amendment.

The sixth ground of the preliminary objection taken is that leave to institute these proceedings has not been obtained and, accordingly, they are a nullity. Sections 228 of the Companies Act, and the case of *Sololo Outlets Ltd & Others v National Social Security Fund Board of Trustees & Others* [HCCC No 914 of 1994] (unreported) are relied upon in support of this ground. Section 228 of the Companies Act reads:

"When a winding up order has been made or an interim liquidator appointed under section 235, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose."

In *Sololo Outlets Ltd* case, Shah, J, as he then was, held that the word

"company" in section 228 meant "company in liquidation" and the liquidator was accordingly the proper person to sue. In his view, leave is required to sue a liquidator and failure to obtain such leave makes the suit invalid. The applicant's counsel's response to this is that the suit herein is not against the company in liquidation but against the liquidator. In his view, Shah, J erred in holding that leave to sue a liquidator was necessary. Now, if one looks at the reliefs sought in these proceedings, one is not persuaded that the Company in liquidation is not involved. As I have said when considering the ground that the proceedings are fatally defective for non joinder of the Company, it is crystal clear that the Company is a necessary party. One of the reliefs sought is an order for an in depth audit and or investigation into the affairs of Reliance Bank Ltd (in liquidation) from the date of its placement under Central Bank of Kenya statutory management to-date. The other is that pending such investigations all assets be frozen and there be a stay of payment of any declaration and/or payment of any dividend whatsoever. There is also, a prayer for an order to rectify any irregularities and illegalities discovered by the investigations sought. In light of all that, it appears to me to be a trifle disingenuous to hold forth that no relief is sought against the Company in liquidation. In the premises, I am of the opinion that in the circumstances of the case before me, it was necessary to obtain leave to sue the liquidator of the Company. I am in agreement with the views of Shah, J in the *Sololo Outlets* case in that regard. This ground of preliminary objection is sustained.

It is now convenient to revert to the fourth ground of the preliminary objection in respect of which I suspended judgment. Having come to the conclusion that the Company in liquidation was a necessary party and that leave to sue the same was necessary, I am impelled to conclude further that in the absence of such leave having been sought and obtained, it is not open to the Court to cure or direct a cure of the defect in these proceedings by an amendment thereto. The proceedings are a nullity *ab initio*. In the result, the proceedings against the 1st respondent (who is an officer of the 2nd respondent and could, accordingly, not be sued alone) and the 2nd respondent are for striking out on account of having been instituted without the requisite leave of the Court.

The seventh ground of preliminary objection was that there was no *locus standi* on the part of the applicant to institute the proceedings as the same were challenging the winding up of a company by a liquidator appointed by the Central Bank of Kenya and not by the Court. This ground was taken by Mr Ougo, counsel for the third respondent. He read out the provisions of the Companies Act on which the relief sought was said to be predicated to demonstrate that they apply to a court appointed liquidator. Mr K'Owade responded to this by stating that section 35 of the Banking Act, cap 488, provided that the appointment of a liquidator by the Central Bank 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, accordingly, part VI of the Companies Act applied to winding up by the Deposit Protection Fund Board. Mr Ougo replied that section 35 of the Banking Act does not in terms state that the provisions of part VI of the Companies Act shall apply to a liquidation under the Act. In his view, no provision of law currently exists to govern liquidations under the Banking Act. On considerations of these submissions, I am inclined to agree with Mr K'Owade. In my opinion, section 35 of the Banking Act is a classic example of legislation by reference. Such a mode of legislation is often employed for the sake of brevity. Sometimes that may result in less than perfect lucidity. However, when section 35 is read in its entirety and particular attention is paid to subsection 3 thereof, there is no want of lucidity here. It is plain to me that the Legislature intended that all the winding up provisions in part VI of the Companies Act should apply in so far as they are applicable and are not inconsistent with the provisions of the Banking Act under the said Act. In that connection, some of the reliefs sought in the present application, for instance, the appointment of a liquidator other than the Deposit Protection Fund Board, may be unavailable even if the proceedings were to proceed to the hearing on the merits for the reason that they are inconsistent with the provisions of the Banking Act. But that is a digression. To return to the matter at hand, the ground of objection to the effect that the provisions of part VI of the Companies Act do not apply to liquidations under the Banking Act is overruled. Last, but not least, Mr Ougo objected to the third respondent being a party to these proceedings when no substantive relief is claimed against it. A reading of the prayers sought confirms the validity of that objection. In any event, having found, as I have, that the proceedings against the 1st and 2nd respondents are a nullity for want of leave to institute them, the substraction of the entire proceedings is destroyed and it would be the vainest stand to proceed against the third respondent only. This ground of objection is sustained.

The upshot of my consideration of the preliminary objections taken is that the proceedings are struck out with costs to the respondents. I thank all counsels who appeared before me for their diligent researches and lucid presentations of rather clever arguments on behalf of their respective clients.

Dated and delivered at Nairobi this 22nd day of May, 2001

A.G. RINGERA

……..

JUDGE