



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS APPLICATION NO. 935 OF 1997

IN RE PAN AFRICAN CREDIT & FINANCE LIMITED

RULING

This application has been brought under this court's inherent powers as well as under s 242 (3) and (5) of the Companies Act by Greenwood Holdings Limited (the applicant) for an order to set aside an *ex parte* order made in this matter on 9.10.1997. The grounds upon which the application is made are stated in the body of the Notice of Motion to be:-

- (a) That the *ex parte* order was obtained by non-disclosure or misrepresentation of material facts.
- (b) That the said *ex-parte* order was made (in breach of the applicable rule) without serving the application on the applicant, a person known to be affected by it or a person against whom the order was sought in essence.
- (c) That the said *ex-parte* order could only be made after giving notification of the application to the applicant.
- (d) That the said *ex-parte* order is a nullity.
- (e) That the Court would not have made the said *ex-parte* order if there was no misrepresentation of material facts.
- (f) That under section 241 (1) (c) of the Companies Act the Court has no jurisdiction to grant a blanket or general sanction and the jurisdiction of the court can only be exercised in relation to a particular exercise of the liquidator's powers.
- (g) That the said application was not a *bona fide* one.

The circumstances leading to this application as disclosed in the affidavit in support of the applicant sworn on 9.6.1999 and filed in Court on same day, are that on 5.11.1996 Pan African Credit & Finance Limited in liquidation (PACF) filed a suit (HCCC No 2740/96) against the applicant for, *inter alia*, the recovery of Shs 31 million plus interest thereon. Upon being served with Summons to Enter Appearance, the applicant filed its defence to the suit on 4.12.1996 pleading several matters, including failure by PACF to obtain the sanction of the court or of a committee of inspection, to appoint Messrs Kaplan & Stratton Advocates as its advocates prior to the institution of the suit, a matter which as the applicant alleges, meant that the liquidator of PACF had acted *ultra vires* its powers. By reason of the liquidator's

alleged *ultra vires* actions, it was the applicant's contention in its defence, that Messrs Kaplan & Stratton Advocates had not been duly appointed to act in the suit as required by order 3 rule 1 of the Civil Procedure Rules and accordingly, the plaint by which the suit was instituted had not been signed by a duly appointed advocate of PACF.

By an application dated 8.10.1997 and filed in this matter on the same day, M/S Kaplan & Stratton Advocates sought and duly obtained an order of this Court in the following terms:-

"1. That the liquidator be and is hereby authorised and given sanction to appoint Kaplan & Stratton, Advocates and such other advocates as it may deem fit from time to time to assist it in the performance of its duties as liquidator of the company.

2. That the authority and sanction hereby granted to the liquidator being for the benefit of the company and urgently required in respect of any such assistance rendered to the liquidator shall be retrospective and with effect from the appointment of the liquidator on 18th August 1994 or such other date as it may have been appointed."

The application giving rise to the orders sought to be set aside was heard *ex parte* and, as is clear, sought retrospective sanction from the date of appointment of the liquidator for PACF on 18.8.1994.

One of the major complaints upon which this application is based is that the order was obtained without serving the applicant. According to the applicant, the liquidator of PACF knew that the applicant would be affected by the orders that were being sought in the *ex parte* application; the applicant further contends that the order was in effect against it and accordingly, it ought to have been served. Connected to this complaint is the allegation by the applicant of misrepresentation and non disclosure of material facts during the application for the *ex parte* order. In support of the contentions, learned counsel for the applicant Mr Esmail, submitted that the liquidator obtained the orders in secrecy; that it ought to have disclosed to the Court that there was a suit pending between PACF and the applicant; that in that suit an application had been made to strike out the plaint because it was filed by advocates who had not been sanctioned by the Court to act for the liquidators and that there was no urgency in obtaining the orders now sought to be set aside; nor was it necessary it was further argued to proceed on the basis of urgency.

For all those reasons, the applicant contends that the *ex parte* order is a nullity and ought to be set aside, that the order would not have been made if there was no misrepresentation (and non disclosure) of material facts and that the Court has no jurisdiction under s 241 (1) (c) of Companies Act, to grant a blanket or general sanction. In that regard, Mr Esmail argued that the jurisdiction could only be granted in relation to a particular exercise of the liquidator's powers. In the course of his submissions, Mr Esmail also referred to a number of authorities to which were not on the point in issue.

The basic contention of the applicant springs from the presupposition that it was an interested party in the application giving rise to the *ex parte* order and therefore it ought to have been served and involved in the application right from the start. That is clearly the reason why the inherent powers of this court are being invoked; on the basis that the applicant was wronged by its exclusion from the proceedings. The allegation of secrecy, non disclosure and misrepresentation also arise from that contention. The question that naturally arises for consideration is whether the applicant's contention is tenable.

The answer put forward by PACF to the above complaint is that the applicant has no *locus standi* in this matter and consequently it is not entitled to bring this application. For that reason it is said that the applicant was not entitled to be served with any notice or to make representation to Court in the application. Accordingly, the liquidator was entitled to proceed *ex parte*, the PACF further contends.

I think to logical point at which consideration of this matter should begin is sections 241 and 242(3) of the Companies Act under which the application for the orders now sought to be set aside was made. Section 241(1) (a) and (c) states what the powers of the liquidator are. The paragraph provides:-

"The liquidator in a winding up by the Court shall have power, with the sanction either of the Court or of

the committee of inspection:-

(a) to bring or defend any action or other legal proceedings in the name and on behalf of the company;

(b) to appoint an advocate to assist him in the performance of his duties.”

And s 242(3) makes provision for the liquidator to apply to Court in the manner prescribed for directions in relation to any particular matter arising under the winding up. It enacts:-

“The liquidator may apply to the Court in manner prescribed for directions in relation to any particular matter arising under the winding up.”

Finally on these provisions, sub-section 3 of section 241 enacts:-

“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 the Court with respect to any exercise or proposed exercise of any of those powers.”

It will be clear from the above provisions that the law very carefully prescribes how the powers of the liquidator are to be exercised; it expressly points out as to who, apart from the general control by the Court, may apply to Court with respect to any exercise or proposed exercise of any of those powers.

Now the applicant relying on the court’s inherent powers as well as the provisions of the Civil Procedure Rules, but without making any reference to any particular rule or any decision on the point, says that it is entitled to be served because having regard to the fact that there was a suit pending between the applicant and PACF, the applicant was an interested party. In my view however, the language of the sections of the Companies Act quoted above and the general tenor of the law on the matter do not support the applicant’s views. There is also nothing amongst the numerous authorities cited by the applicant’s learned counsel which gives credence to any of the views expressed by him. In my opinion, section 241 (3) of the Companies Act restricts an application with respect to any exercise or proposed exercise of any of the powers under the section to a creditor and contributory. In the instant case, the applicant is none of those persons. Indeed if Parliament intended to extend the matter to persons falling under the applicant’s category, surely it would have included in sub-section (3) of the section a suitable provision to cover such persons as debtors or intended defendants. In my judgment, the omission of such persons from the section suggests that they were not envisaged as interested parties in the exercise of the liquidator’s powers under section 241. The reasons for that omission are obvious and was explained in two authorities cited by learned counsel for PACF, Mr Ochieng, which I now turn to consider.

In *Re a debtor* (No 26A of 1975) [1984] 3 All ER 995, the plaintiff instructed solicitors to act for him in an action in negligence against the defendants. After he had obtained legal aid and a writ had been issued, the solicitors discovered that he was bankrupt. They were advised by counsel that his trustee in bankruptcy should be added as joint plaintiff in the action and that the trustee should obtain permission from the committee of inspection, under s 56 of the Bankruptcy Act 1914. The trustee agreed to be joined as second plaintiff and instructed the solicitors to act for him but declined to apply for permission under s 56 on the ground that the costs of the action would be met by the legal aid fund. The action was ultimately settled by a consent order in favour of the plaintiffs and the defendants were ordered to pay the plaintiffs’ costs which were however taxed at nil, because the taxing master was not satisfied that the solicitors had been duly sanctioned. On an application by the solicitors for retrospective sanction, it was held:-

“(1) The purpose of s 56 of the 1914 Act was to protect the bankrupt’s estate by requiring the trustee to obtain the permission of the committee of inspection to do any of the things specified in that section before casting on the estate his costs incurred in so doing, and s 83(3) of that Act and r 107 of the 1952 Rules only applied where the trustee sought to recover such costs from the estate. Since H’s costs of the litigation were going to be met either by the defendants or by the legal aid fund, he did not need the protection of permission under s 56 enabling him to charge the costs against the bankrupt’s estate. It

followed that the taxing master had been wrong to conclude that, because of the absence of permission under s 56, the solicitors could not claim their costs from H and accordingly he had been wrong to tax H's costs at nil .

(3) The Court had power retrospectively to validate the employment of solicitors by a trustee in bankruptcy, but normally such an order would be made only where it was necessary to enable the trustee to charge costs against the bankrupt's estate.”

And in *Re Branson Ex parte The Trustee* [1914] KB 701 Horridge J when faced with a similar situation stated:-

“The first objection taken to the motion is that at the time it was launched there had been no consent obtained from the committee of inspection. The section which deals with that is s 57. It says “The trustee may, with the permission of the committee of inspection, . . . bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt. It is quite clear that no such consent had been obtained in this case. Mr Ward further relied upon s 15, sub-s 3, of the Bankruptcy Act of 1890, which provides that the sanction required under s 73 of the Bankruptcy Act, 1883, for the employment of a solicitor, must be a sanction obtained before the employment, except in cases of urgency, and in such cases it must be shown that no undue delay took place in obtaining the sanction. The question is whether the obtaining of that sanction is a matter for the protection of the estate so that the trustee may not incur solicitors' costs without getting the sanction of the committee, or whether the sanction creates a condition precedent to the right of the trustee to take proceedings against any third parties. The case of *Lee v Sangster* (1) says that the absence of such sanction could not be pleaded as a defence to an action in the High Court. The case of *Re Angerstein* (2) shows that an application by motion in the Court of Bankruptcy is in substitution for an action at law. I think, therefore, on the authority of those two cases that the preliminary objection cannot be sustained. In addition to those cases, s 73 of the Bankruptcy Act, 1883, and r 117 of the Bankruptcy Rules tend to show that the provision is one for the protection of the estate, because they both provide for the production of the necessary evidence before the taxing master of the sanction having been obtained. The point may occur again, and therefore I think it as well to give a distinct ruling upon it. My ruling is that the obtaining of the consent of the committee of inspection to the taking of proceedings is merely a provision for the protection of the estate and is not one which the respondent or the defendant in any proceedings by the trustee is entitled to avail himself of in answer to those proceedings.” (The emphasis is mine)

The same principle is stated in *Halsburys Laws of England*, 4th edition, Vol 7 (2) paragraph 1578 as follows:-

“.....Litigation by Liquidator: The sanction to bring legal proceedings should be obtained before they are begun, although there is power to give the sanction subsequently. However, a third party has no right to object to the proceedings brought by a liquidator in the company's name without the sanction of the court.”

It is of course noted that Mr Esmail's view is that neither of the two cases is of any assistance to PACF allegedly because in neither of the cases was the inherent power of the court invoked. Mr Esmail also submitted that the two cases are not applicable because the question of the liquidator misleading the Court was not raised in either of them. In my view, those submissions are misleading. I say so because it is trite law that the inherent powers of this court can be invoked only for the purposes of doing justice; they cannot surely be exercised for the purpose of assisting a party who intends to avoid a legal liability. The second point is that the issue of misrepresentation and the related question of non-disclosure of material facts can only arise, if the applicant is an interested party in the matter of the application. Obviously, if he is not an interested party, the applicant has no business bringing an application to set aside the *ex parte* order. For those reasons, PACF is right to say that the applicant has no *locus standi* in the matter. It follows from this that the applicant's complaint about not being served etc etc is wholly misconceived. In that respect, the two cases cited by the respondent's learned counsel become useful in that they demonstrate how an English statute with similar provisions to s 241(1) of the Companies Act was interpreted.

To summarise therefore, the law as established in the two cases and as reaffirmed in *Halsbury's Laws of England*, (4th Edition) volume 7(2) paragraph 1578 is that a third party such as the applicant has no right whatsoever to object to proceedings brought by in a liquidator's name. And since this application falls squarely under the category of an objection brought by a third party, it cannot succeed.

For all those reasons, I find that the applicant has no *locus standi* and that its application not only lacks merit but is also wholly misconceived. It is for the same reasons dismissed with costs.

Dated and Delivered at Nairobi this 28th day of January 2000.

T.MBALUTO

JUDGE