



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 242 OF 2018

ETHICS AND ANTI-CORRUPTION COMMISSION..... PLAINTIFF

VERSUS

SALEH CHEPKOLE..... 1ST DEFENDANT

TITUS KIPKEMBOI 2ND DEFENDANT

PEMBENI LIMITED..... 3RD DEFENDANT

LIBERTY ASSURANCE COMPANY LIMITED.....4TH DEFENDANT

WILSON GACANJA.....5TH DEFENDANT

RULING

1. A dispute on representation of the 4th defendant herein has subsisted between the firm of Sang & Lang'at Advocates and the Official Receiver. In an effort to resolve the dispute, the Official Receiver filed Notice of Motion dated 14th October 2020, the subject of this ruling.

2. The following orders are sought in the application:

(a) *THAT this honorable court be pleased to expunge from the record of the court the memorandum of appearance, submissions dated 24th April, 2019 and other pleadings/documents filed by the firm of Messrs Sang & Lang'at advocates purporting to have been filed on behalf of the 4th defendant.*

(b) *THAT this honorable court be pleased to strike off the firm of M/S Sang & Lang'at advocates purporting to act for the 4th defendant from the record in this matter.*

(c) *THAT the costs of this application be provided for.*

3. The application is supported by an affidavit sworn by Beatrice Osicho, a Deputy Official Receiver in the office of the Official Receiver in Insolvency. She deposed that the 4th defendant was established under the Insurance Act Cap 487 to undertake insurance business as prescribed under the said Act and that the Commissioner of Insurance decided to have the company liquidated for failure to comply with the requirements of the Insurance Act. That **Winding Up Cause No. 29 of 2004 - In the matter of Liberty Assurance Company Limited** was filed to petition the court to liquidate the company.

4. She further deposed that the winding up court issued an order dated 21st January 2005 which appointed the official receiver as the provisional liquidator of the 4th defendant and accordingly the official receiver collected and preserved the company's known assets. That the official receiver entered appearance in this matter on behalf of the 4th defendant and that the firm of M/s Sang & Lang'at Advocates have entered appearance for the 4th defendant without having been instructed by the official receiver.

5. In response to the application, a replying affidavit sworn by Noreen Sharrif Choge was filed. She deposed that she is a shareholder/director of the 4th defendant alongside her late husband Jim Choge and also a joint administrator together with Byron Kipngetch Gawon Choge of the Estate of the said Jim Choge pursuant to Succession Cause No. 934 of 2008. That the Late Jim Choge faced bankruptcy proceedings in **Bankruptcy Cause No. 6 of 2000** when the 4th defendant had a lot of liabilities and that during the proceedings, all title documents were surrendered to the official receiver pending resolution of the cause which was concluded in 2005 and the receiving orders and actions taken were discharged pursuant to Gazette Notice No. 13867 & 13870 dated 4th November, 2011. She added that vide a letter dated 12th February

2015 the official receiver indicated that she did not have any objection to the facilitation of settlement with regard to land parcel No. Nakuru Municipality Block 5/221 (the suit property herein) and requested the Land Registrar, Nakuru to withdraw any caution placed on the parcel by the official receiver.

6. She deposed further that some of the 4th defendant's assets were sold and debtor's liabilities were paid off and that the company has never been wound up and the winding up file has been dormant for over fifteen years. That since the 4th defendant has no debtors, the official receiver should cease being the receiver. That her advocates on record had made an application dated 28th October 2019 in **Winding Up Cause No. 29 of 2004** seeking orders that the official receiver be discharged and that the application is still pending. She urged the court to stay these proceedings pending the hearing and determination of that particular application.

7. The official receiver filed a further affidavit in which she deposed that there are two separate insolvency matters which are **Bankruptcy Cause No. 6 of 2000- Jim Choge (debtor)** and **Winding Up Cause No. 29 of 2004 - In the Matter of Liberty Assurance Company Limited**. That a receiving order was made in **Bankruptcy Cause No. 6 of 2000** and that on 17th March, 2000 the official receiver was appointed a receiver of the estate which order was discharged on 15th October 2002 and the property of the estate was returned back to the late Jim Choge. That the Attorney General filed a petition on 24th October, 2004 for the winding up of Liberty Assurance Company Limited as it had an insolvency deficit. That at the time of liquidation, the 4th defendant had two properties in its name which were Nakuru Municipality Block 5/221 and Eldoret Municipality Block 4/60. That the letter dated 12th February 2015 was issued erroneously under the presumption that Nakuru Municipality Block 5/221 was owned by the late Jim Choge which is not true since the estate of the late Jim Choge and the 4th defendant are two separate entities.

8. The application was canvassed through written submissions. The official receiver submitted that the firm of M/s Sang & Lang'at were not properly instructed and that their documents/pleadings ought to be expunged from the court record as the estate of the late Jim Choge does not have the power under the law to instruct it to represent Liberty Assurance Company Limited which is the 4th defendant herein.

9. The official receiver further argued that the winding-up proceedings against the 4th defendant are still pending and that the discharge of the receiving order issued against the estate of Jim Choge does not affect the liquidation proceedings. She relied on the cases of **Abdul Aziz Kanji v Chetambe Estates Limited [2005] eKLR** and **Leisure Lodges Ltd vs. Yashvin A. Shretta [1990] eKLR, Section 444 of the Insolvency Act, 2015 and Sections 239 and 486 of the Companies Act Cap 486 (repealed)** and submitted that the liquidation process in relation to the 4th defendant is ongoing and that its affairs are vested with the official receiver. That consequently, the firm of M/s Sang & Lang'at should be struck off the record together with all their filed documents.

10. The firm of M/s Sang & Langat in their submissions relied on the case of **Blue Shield Insurance Company vs. Joseph Mboya Oguttu [2009] eKLR** and submitted that the court ought to stay the proceedings herein pending the hearing of the application filed by them in **Winding Up Cause No. 29 of 2004**. They relied on the case of **Saudi Arabia Airlines Corporation v Premium Petroleum Company Limited [2014] eKLR** and submitted that the power to strike out proceedings should be exercised after the court has considered all facts and that the application be dismissed with costs for lack of merit.

11. I have carefully considered the application, the affidavits and the submissions. The record herein shows that M/s Sang & Langat filed a Memorandum of Appearance as well as Defence and Counterclaim on behalf of the 4th defendant on 24th October 2018. The said law firm has filed several other documents and even attended court on behalf of the on behalf of the 4th defendant. Subsequently, the Official Receiver also filed a Memorandum of Appearance on behalf of the 4th defendant on 28th May 2019.

12. There is no dispute that on 21st January 2005 the Official Receiver was appointed a provisional liquidator of the 4th defendant in an order made in **Winding Up Cause No. 29 of 2004**. It is equally not in dispute that the order remains in force and that the Official Receiver is still the provisional liquidator. It is for that reason that Noreen Sharrif Choge deposed that an application has been filed in the winding up cause seeking orders that the official receiver be discharged, which application is still pending.

13. As the Court of Appeal stated in **Official Receiver and Provisional Liquidator Nyayo Bus Service Corporation vs Firestone E.A. (1969) Limited [1998] eKLR**:

... the winding up of the corporation is deemed to have commenced at the time of presentment of the petition for the winding up ... The order for winding up places the company in the custody of the provisional liquidator and the company remains under winding up provisions until it is actually wound up.

14. The order of 21st January 2005 was made when the **Companies Act, Cap. 486 (repealed)** was still in force. **Section 239** of the Act provided as follows:

Where a winding-up order has been made or where an interim liquidator has been appointed, the liquidator or the interim liquidator, as the case may be, 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.

15. M/s Sang & Langat do not purport to have been instructed by the Official Receiver. On the contrary, it is apparent that they were instructed by a director of the 4th defendant.

16. It will be recalled that the litigation in this suit concerns ownership of the parcel of land known as Nakuru Municipality Block 5/221. In the Defence and Counterclaim purportedly filed by M/s Sang & Langat on behalf of the 4th defendant, the 4th defendant claimed ownership of the said property.

17. In view of the winding up order, the 4th defendant together with its claim to Nakuru Municipality Block 5/221 are in the custody or control of the Official Receiver. Having come on record without any instructions from the Official Receiver, it follows that all the actions taken M/s Sang & Langat are null and void. While I am aware that striking out is a draconian remedy that should be resorted to very sparingly, I am satisfied that this is one situation in which striking out is in fact necessary.

18. In view of the foregoing discourse, I find merit in Notice of Motion dated 14th October 2020. Consequently, I make the following orders:

a) The Memorandum of Appearance and all other pleadings/documents filed in this matter by the firm of Messrs Sang & Lang'at Advocates on behalf of the 4th defendant are hereby struck out and expunged from the record.

b) The firm of Messrs Sang & Lang'at Advocates are not on record for the 4th defendant in this matter.

c) Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 16TH DAY OF SEPTEMBER 2021.

D. O. OHUNGO

JUDGE

Delivered through Microsoft Teams video link in the presence of:

No appearance for the Official Receiver/applicant

No appearance for the respondent

Ms Maina for the plaintiff

No appearance for the 1st defendant

No appearance for the 2nd defendant

No appearance for the 3rd defendant

No appearance for the 4th defendant

No appearance for the 5th defendant

Court Assistant: E. Juma