REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 456 OF 2018

KALISA K. MOSES.....1ST APPLICANT

KEMU SALT PACKERS LIMITED.....2ND APPLICANT

VERSUS

PETER KAHI.....1ST RESPONDENT

ANTHONY MUTHUSI.....2ND RESPONDENT

RULING

Background

1. In a ruling delivered by this court 31st July 2019, the court found, *inter alia*, that the applicant's application dated 11th December, 2018 is *sub judice* and directed the applicants to refer the suit to Malindi Court for hearing and determination.

Application.

2. The above ruling provoked the instant application dated 24th October 2018(sic) and filed on 6th December 2019 wherein the applicants seeks the review/variation or setting aside of the ruling of 31st July 2019.

3. The application is supported by the 1st applicant's affidavit and is premised on the main grounds: -

> ***1. That on diverse dated in 2015 and 2016 the applicants advanced soft loans to Kemu Salt Production Limited (Debtor). This loan was in the region of Kshs 20 million.***
>
> ***2. That the debtor was placed under receivership on 6th September 2016 at a time when the loans had not been repaid. That on the said 6th September 2016, the respondents were appointed as receivers.***
>
> ***3. That for over three years since having been appointed as receivers, the respondents had not achieved any of the intended purposes of receivership.***
>
> ***4. That it is the applicants' honest and reasonable belief that the respondents are willfully and intentionally plundering the assets and the resources of the debtor company for their own financial gain by drawing hefty salaries and allowances from the company's meager assets.***
>
> ***5. That Section 591(1) of the Insolvency Act empowers any creditor of a company under administration claiming that the administrator has acted detrimentally to affect the interests of the creditor (whether done in common with the other creditors or members of the company) to apply to court for appropriate reliefs.***
>
> ***6. That fundamentally, Section 593 of the Insolvency Act which has a marginal note 'automatic end of the administration' provides that the appointment of an administrator automatically ends at the end of the twelve months from and including the date it took effect. Section 594(1) gives the court the power to extend the term while Section 594(2) (b) provides that "the court can only extend the administrators term if the application for extension is made before the expiry of the term".***

7. That against the foregoing background, the applicants as creditors of the debtor, brought an application dated 11th December 2018. The gravamen of the application was to "inter alia".

a) Have the honourable court remove the respondents from being administrators of the debtor; and

b) Have the honourable court direct the respondents to give a true and fair account to the court of all monies they had received and/or handled as administrators from 7th September 2017 to the date of the application and to disgorge all fees that they had received during time.

4. The ruling of 31st July 2019 is premised on fundamental mistakes apparent on the face of the record as follows: -

a. That the said order was made on a fallacious assumption that the 2nd applicant is a party in all the 'related cases' particularly Kemusalt Packers Production Limited vs Peter Kahi & Antony Muthusi, Mombasa Msc. Civil Suit No. 266 of 2018. The truth of the matter is that Civil Suit No.266 of 2018 has Kemusalt Packers Production Limited as the Applicant and Peter Kahi & Antony Muthusi as the Respondents. Kemusalt Packers Ltd is not a party to that suit or any other suit. (Refer to page 412 of the respondents replying affidavit dated 14th January 2019).

b. That the said order is made under a fallacious assumption that Kemusalt Packers Production Limited is the same company as Kemusalt Packers Ltd. The truth of the matter is that;

i. Kemusalt Packers Production Limited(K) is a Limited Liability Company incorporated in the Republic of Kenya under Kenyan Laws while Kemusalt Packers Ltd (U) is a Limited Liability Company incorporated in the Republic of Uganda under the Ugandan Laws.

ii. Kemusalt Packers Production Limited has different directors from Kemusalt Packers Limited. This was vividly demonstrated by annexture KKM-1 annexed to the applicants' application dated 11th December 2018.

iii. The directors of Kemusalt Packers Production Limited are Kenyans Nationals while those of Kemusalt Packers Limited are Ugandan Nationals.

iv. That Kemusalt Packers Production Limited is primarily engaged in business within the Republic of Kenya this being salt production and Real Estate while Kemusalt Packers Ltd is engaged in business primarily in the Republic of Uganda.

c. The said order was made under the fallacious assumption that there were other related cases and that another judicial officer would hear and determine them. The truth of the matter is that there are no other related matters. That even if there were, it is fallacious to assume that another judge would assume jurisdiction of the current suit.

d. The order was made under the fallacious assumption that the application of 11th December 2018 was brought by a Debtor against the receivers. The truth is that the application was brought by a Creditor of the company.

e. That the said order is ambiguous in that it declares the application as res subjudice and at the same time directs the parties to refer the matter to Malindi for hearing and determination, if they so wish.

5. The applicants' case is that besides the mistakes that are apparent on the face of the record, there are also sufficient reasons justifying the review including the right to fair hearing under Article 50 of the Constitution, the right of various categories of people to institute proceeding under sections 591, 592 and 593 of the Insolvency Act.

6. The applicants further state that the respondents, whose term as administrators has since expired, have over the years mismanaged the affairs of the Debtor thus making it impossible for the applicants to recover their debts.

7. The Respondents opposed the review application through the 2nd respondent's replying affidavit and Grounds of Opposition dated 13th December 2019 wherein they have listed the following grounds: -

a. The issues framed by the applicants as grounds for review are hotly contested and can only be the subject of an Appeal and not a review.

b. The applicants are seeking your Ladyship to sit on Appeal of your own decision of 31st July 2019.

c. The application for review has not been brought timeously and the applicants are guilty of laches.

d. The application for review is an Appeal couched as review.

e. This application for review is an abuse of the court process.

f. There are no errors apparent on the face of the record whether as alleged by the applicants and/or at all.

8. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the applicants have made out a case for the granting of the orders of review.

9. When advancing the argument that there is an error on the face of the record in the impugned ruling, the applicants deponent averred that the impugned order was based on a fallacious assumption that the applicant herein is a party in all the related cases and that Kemusalt Packers Production Limited is the same as Kemusalt Packers Ltd.

10. I note in the impugned ruling on 31st July 2019, this court rendered itself as follows regarding the list of similar cases that are pending before other courts: -

> ***"10. In the further replying affidavit dated 21st March 2019, the respondents provided a list of the applications before the other courts in which similar orders to oust them as receivers have been sought. The applications are listed as follows: -***
>
> ***a. Notice of Motion dated 20th July 2018 filed in HCCC 28 of 2016 (Malindi)***
>
> ***b. Notice of Motion filed on 22nd October 2018 in the High Court Miscellaneous 266 of 2018 (Mombasa)***
>
> ***c. Notice of motion filed on 14th December 2018 in High Court Miscellaneous 456 of 2018 (Nairobi)***
>
> ***d. Notice of motion filed on 4th February 2019 in Environment and Land Court Case 90 of 2018 (Malindi)***

11. I note that the respondents attached a bundle of documents containing all the applications filed by different creditors in different courts as annexure "AM2". The existence of the said applications was not disputed by the applicants herein who in response to the long list of pending applications contended that they were not aware of any other cases and that they were not party to any of the said cases.

12. The question which then arises is whether in light of the undisputed fact that there are similar, previous applications over the issue of the removal of the respondents as the 2nd respondent's receivers, this court can still go ahead and determine the instant application. **Section 6** of the **Civil Procedure Act** provides for the doctrine of res *sub judice* as hereunder:

> ***No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. [Emphasis mine]."***

11. Having regard to the above extract of the impugned ruling and considering the fact that the existence of similar cases before other courts was not disputed by the applicants herein, I find that it is misleading and indeed dishonest for the applicants to claim that the court's earlier finding on the existence of similar cases was based on a fallacious assumption.

12. Be that as it may, and even assuming that this court was wrong in its finding that there were other similar cases before other courts over the same subject matter, I find that such a finding would be an error of fact that can only be challenged and ventilated on an appeal and not an error that is apparent of the face of the record that can be cured through an application for review.

13. Turning to the claim that there is sufficient reason for review based on the right to fair hearing, I note that the impugned ruling did not have the effect of driving the applicants herein from the seat of justice. Instead, the ruling was clear that the finding on the issue of *sub judice* did not discharge the applicants right to be heard with a rider that the applicants were at liberty to refer this matter to Malindi court for hearing and determination.

14. My finding is that the impugned ruling cannot by any stretch of imagination be said to have deprived the applicants of their right to hearing as it clearly gave them a new lease of life by directing them to refer this matter to Malindi Court for consideration.

15. For the above reasons, I am not persuaded that the instant application meets the threshold set for the granting of the orders for review and I therefore dismiss it with costs to the Respondents.

Dated, signed and delivered via Microsoft Teams at Nairobi this 6th day of May 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Muchiri for the Respondent.

Mr. Arua & Associates for Applicants

Court Assistant: Sylvia