



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E 356 OF 2020

LATOYA MGHOI KAKA (Suing on her own

behalf and on behalf of The Estate of the

late James Karanja Maina) PLAINTIFF

VERSUS

PETER KAHI (As the Administrator, Nakumatt

Holdings Limited 1ST DEFENDANT

ATULKUMAR MAGANLAL SHAH 2ND DEFENDANT

RULING

1. Before Court is the Plaintiffs Motion dated 11/9/2020 which was amended on 17/9/2020. It was brought under **Article 10 (1) and (2) (b) of the Constitution of Kenya, section 432 (2) of the Companies Act, No. 17 of 2015 and sections 1A, 1B, 3A and 63 of the Civil Procedure Rules 2010.**

2. The Motion sought several orders including; leave to commence legal proceedings against the 1st defendant, injunctive orders restraining the 1st defendant from proceeding to distribute assets of Nakumatt Holdings Limited pending the determination of the application and suit, orders compelling the 1st defendant to provide statements for the account in which the claim amount was paid and orders compelling the 1st defendant to pay the claimed amount.

3. The plaintiff's case was that she was the wife of the late **James Karanja Maina**, and she had brought this suit on behalf of his estate. That the deceased was an employee of the 1st defendant until his demise. That during his employment, the deceased was placed under an insurance policy with Kenindia Assurance Limited which covered the deceased's pension, last expense and work injury as benefits.

4. That upon the insured's demise, Kenindia Assurance Company Limited transferred the deceased's death benefits amounting to Kshs. 30,000,000/= to an account held by Nakumatt Holdings Limited in trust for the beneficiaries of the deceased.

5. That despite obtaining a Certificate of Confirmation of Grant, the 1st defendant failed to pay the said death benefits to the beneficiaries of the deceased. That the Kshs. 30,000,000/= did not form part of Nakumatt's assets. The plaintiff was thus apprehensive that the defendants may exhaust Nakumatt's assets before remitting the benefits to the beneficiaries.

6. The 1st defendant opposed the application vide his affidavit of 10/3/2021. He averred that he was an appointed administrator of Nakumatt Holdings Ltd. That upon advertising a notice calling for all creditors of Nakumatt, the plaintiff lodged her claim for Kshs. 30,000,000/=.

7. That the administrative process was ongoing and that he had compiled a report to Court on the status quo along with recommendations on the way forward. A copy of the report was annexed. That on this basis, the application was thus premature and speculative. He urged that the application be dismissed.

8. It was submitted for the plaintiff that **section 432 (2) of the Insolvency Act** provided that Court's approval be sought once a provisional

liquidator has been appointed for any proceedings against the company. The plaintiff had therefore invoked the jurisdiction of the Court under **Articles 10(1) and (2) (b) and 159 of the Constitution**.

9. On the injunction sought, it was submitted that a Quist close trust arose immediately Kenindia Assurance Limited disbursed the claim amount to Nakumatt's account specifically for remission to the deceased's beneficiaries. That the plaintiff had tendered sufficient proof that the claim amount was indeed remitted to Nakumatt's account.

10. That if the injunction is not granted, the plaintiff would suffer irreparable harm which would not be adequately compensated by an award of damages. That since the death benefit did not form part of Nakumatt's assets, payment of creditor's debts before hearing of this case would render the suit nugatory as Nakumatt's assets would be dissipated. That there would be no property left for the plaintiff to pursue if the 1st defendant continued to distribute Nakumatt's assets hence any consequential decree herein would not be settled.

11. That the plaintiff had sufficiently identified a trust property and the same ought to be traced. That the 1st defendant ought to have accounted for the funds and explain why the claim amount was not transferred to the beneficiaries.

12. I have considered the pleadings and the submissions. There are three issues for determination. The first is ***whether the plaintiff should be allowed to continue legal proceedings against the 1st defendant***. The application was brought under **section 432 (2) of the Insolvency Act 2015**. The section provides: -

“(1) Within seven days after a liquidation order is made in respect of a company, the company shall lodge a copy of the order with the Registrar for registration and also lodge a copy of it with the Official Receiver.

(2) When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the Court and subject to such conditions as the Court considers appropriate.

(3) An order for liquidating a company operates in favour of all the creditors and of all contributories of the company as if made on the joint application of all of them”.

13. In the present case, the company was placed under liquidation in **Milimani Commercial & Tax IP 10 of 2017**. The 1st defendant was appointed by the Court as the Liquidator. The claim is trust money paid to the Account of the company which in law is trust money and not part of the company assets. The plaintiff seem to have a genuine claim against the Company. In the premises, the application meets the requirements of the law. The first issue is answered in the affirmative.

14. The second issue is ***whether the injunctive orders restraining the 1st defendant from distributing Nakumatt's assets pending hearing of this suit should be granted***. The principles applicable in the grant of injunctions were settled in the case of **Giella vs Cassman Brown & Company Limited (1973) E A 358**. These are that; the applicant must establish a prima facie case with a probability of success, secondly that the applicant will suffer loss that cannot be compensated with an award of damages and that in the event the court is in doubt it will determine the matter on a balance of convenience.

15. Under **Mrao Limited v. First American Bank of Kenya Ltd [2003] KLR**, a prima facie case is one in which on the material produced in court, a tribunal properly directing its mind will conclude that there exists a legal right of a party that has been infringed which will require a rebuttal by the other party.

16. On prima facie, the plaintiff established that Kenindia Assurance Limited did pay Kshs. 30,000,000/= to an account held by Nakumatt Holding Limited. A discharge voucher was produced as **“LMK-2b”** and a cheque dated 8/10/2015 for Kshs. 30,000,000/- produced as **“LMK-2c”** in favor of Prime Bank Limited which was alleged to have held the benefits. There was also produced a letter dated 8/10/2015 by Kenindia marked as **“LMK-2d”** and an RTGS slip marked as **“LMK-2e”**.

17. From the foregoing, I find that the plaintiff demonstrated that the claim amount was paid by Kenindia Assurance Limited into an account held by Nakumatt. This was received by Nakumatt in trust for the estate of the deceased. It never formed part of the assets of Nakumatt. The Court therefore finds that the plaintiff has met the first limb for granting of injunctive orders.

18. On whether the plaintiff would suffer irreparable harm, it was the plaintiff's case that in the event that Nakumatt's assets were distributed, it was unlikely that she would be able to execute any decree obtained herein, thus rendering the entire suit nugatory.

19. I note that there are Liquidation proceedings against the company. I also note from the report attached by the 1st defendant that should the measures taken by the administrators to cushion the company from liquidation fail, then the next option would be liquidation and selling off of the company's assets.

20. The plaintiff contended that the sum of Kshs. 30,000,000/= did not form part of the company's assets. Should the claim amount be dissipated before hearing and determining the plaintiff's contention, the plaintiff would suffer irreparable harm. This is in light of the fact that there is a risk of exhaustion of all assets when paying off the company's creditors. I am alive to the fact that the plaintiff does not contend to be a creditor of the company, but rather a beneficiary of trust funds received by the company. It would therefore be unlikely that her claim would be settled in preference to the company's creditors. Her monies were separate and distinct from the company assets.

21. In the upshot, I find that the plaintiff has met the threshold for granting of injunctive orders.

22. The final issue for determination is ***whether the 1st defendant should be compelled to provide account statements for the account in which the claim amount was paid.*** The plaintiff's claim is grounded on the fact that Kshs. 30,000,000/= was paid into Nakumatt's account for onward transmission to the estate of the late **James Karanja Maina**. The plaintiff tendered documentary evidence to support this claim. She also contended that despite obtaining a certificate for confirmation of grant, the death benefits were not transferred to the beneficiaries.

23. It is in the interest of justice that the account statements be tendered in Court by the 1st defendant, to enable this court make an informed decision. I therefore find that the plaintiff's prayer for discovery is warranted.

24. Accordingly, I allow the plaintiff's application dated 11/9/2020 in the following terms: -

a) The Plaintiff is granted leave to commence and continue proceedings against the 1st Defendant.

b) The 1st defendant be and is hereby restrained from distributing assets belonging to Nakumatt Holdings Limited pending the determination of the suit herein.

c) In the event he has so distributed, he is ordered to set aside in an interest bearing account a sum of Kshs.30,000,000/- to cater for the claim herein. This be complied within 7 days of the date of this ruling.

d) The 1st defendant be and is hereby compelled to provide account statement for; Account Number [...]; Account Holder Nakumatt Holdings Limited held in Standard Chartered Bank Limited, Kenyatta Avenue Branch for the period between 1st October 2015 to 17th June 2021 within 30 days from the date of this order.

e) The costs of the application are awarded to the plaintiff.

It is so ordered.

DATED and DELIVERED at Nairobi this 17th day of June, 2021.

A. MABEYA, FCI Arb

JUDGE