



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 7 OF 2019

MIDLAND ENERGY LIMITED.....PLAINTIFF

VERSUS

AFRICAN BANKING CORPORATION LTD1ST DEFENDANT

ERNST & YOUNG LLP.....2ND DEFENDANT

RULING

BACKGROUND

1. The plaintiff herein, **MIDLAND ENERGY LIMITED** (under Administration) sued the defendants through the plaint dated 14th January 2019, seeking the following orders:-

i. An urgent permanent injunction to restrain the defendants herein jointly and severally by themselves, their servants and/or agents from acting as administrators and/or from proceeding to act as administrators of the plaintiff company and/or from selling, alienating, transferring or in any manner whatsoever disposing of any of the plaintiff's properties/Assets and/or such other Third Party properties in the custody of the plaintiff company.

ii. An urgent temporary injunction to restrain the defendants herein jointly and severally by themselves, their servants and/or agents including the joint administrators (namely Julius Mumo Ngonga and Anthony Makenzi Muthusi) from acting as administrators and/or from proceeding to act as administrators of the plaintiff company and/or from selling, a alienating , transferring or in any manner whatsoever disposing of any of the plaintiff's properties/Assets and/or such other Third Party properties in the custody of the plaintiff company.

iii. A declaration judgment to the effect that the defendants are in breach of contract and that their purported appointment and operation of administrators is illegal and contrary to the mandatory Statutory Provisions of Law and hence null and void.

iv. An order directing the defendants, jointly and severally to return all the plaintiff's properties and assets to the plaintiff's offices and to open the plaintiff's offices at the defendants' costs.

v. An order directing the defendants jointly and severally to pay the plaintiff company compensation for loss of business occasioned by the defendants' purported appointment of administrators and their operation thereof, the quantum thereof to be determined by this honourable court.

vi. Cost of this suit and interest at court rates.

2. Concurrently with the plaint, the plaintiff also filed an application for injunction and also a further application on 29th January 2019 seeking injunctive orders.

3. The defendants filed their respective defences, under protest, to the application in which they denied the plaintiffs claim. The 1st defendant also filed a Notice of Preliminary Objection dated 4th February 2019 in opposition to the application dated 29th January 2019 in which it listed the following grounds:-

1. During administration, the directors of a company subject to administration are suspended and consequently have no legal ability, status and or locus standi to commence any action or court case on behalf of the company, in this case Midland Energy Limited (under administration).

2. A fortiori, the said directors have no locus to defend any suit on behalf of the company and in this case Midland Energy Limited (under administration).

3. Consequently, the suit herein, having been authorized by suspended directors and the applications there under, are hopelessly incompetent, fatally defective and inadmissible and ought to be dismissed forthwith.

4. In view of the provisions of Section 576 and 583 of the Insolvency Act No. 18 of 2015 and the Fourth Schedule thereof, providing for the powers administrators, including:

a. The power to appoint an advocate solicitor or accountant or other professionally qualified person to assist the administrator in the performance of the administrator's functions.

b. The power to bring or defend any action or other legal proceedings in the name and on behalf of the company.

c. The power to do all acts and to exercise in the name and on behalf of the company any deed, receipt or other document.

The suit and the applications herein having been authorized by the administrators are hopelessly incompetent, fatally defective, and inadmissible and ought to be dismissed forthwith.

5. In addition to the foregoing, pursuant to the notice of withdrawal of suit dated 17th January, 2019 and filed on 17th January 2019 by the administrators, this suit was withdrawn and consequently the application filed on 29th January, 2019 has no legs to stand on and is an abuse of the court process.

6. This honourable court has no jurisdiction to entertain the plaintiff's application as presently instituted.

7. There is no competent suit or application before this honourable court.

4. The 1st defendant also opposed the application dated 4th January 2019 through a Notice of Preliminary Objection dated 21st January 2019 wherein it raised the following grounds:

i. That upon the company being placed under administration, a person may begin or continue legal proceedings against the company only with the consent of the Administrators or with approval of the court pursuant to Section 560(1) (b).

ii. That prior to instituting this suit, no court approval was sought and neither did the Administrators issue any consent to commence this suit as required by Insolvency Act No. 18 of 2015.

iii. That following the company being placed under administration, all the affairs and business of the company were placed under the administrators, including all the assets and undertaking of the company and consequently the powers of the directors in terms of dealing with plaintiff's assets ceased.

iv. That the companies directors have no locus to sue and defend any suit on behalf of Midland Energy Limited (Under Administration).

v. The application and the entire suit is hopelessly incompetent, fatally defective and inadmissible and the same ought to be dismissed forthwith.

vi. This honourable court has no jurisdiction to entertain this matter as presently instituted.

vii. There is no competent suit before this honourable court.

5. After hearing the submissions of both parties in respect to the two notices of preliminary objection, this court, in its ruling delivered on 13th June 2019 found that the objections are merited and allowed them with a rider that the applicant was at liberty to file a fresh application for leave to file suit or obtain consent of the administrators to institute the suit.

6. Following the ruling of 13th June 2019, the plaintiff filed the application dated 14th June 2019 seeking orders that:

1. Spent

2. That under its inherent jurisdiction, this honourable court be pleased to make an appropriate order for status quo to be maintained in respect of the plaintiff's Business Assets, the subject matter of this suit, while pending the hearing and determination of this suit.

3. That the plaintiff be granted leave/consent to file suit and any fresh application against the respondents to challenge the appointment of the 2nd respondent as Administrators of the plaintiff/applicant company, and to save the plaintiff's properties/ Assets from arbitrary sale by the defendants.

4. That pursuant to the leave/consent sought here above, the plaint dated and filed in court herein on 14th January, 2019 be deemed as duly filed and served.

5. That pursuant to the leave/consent sought here above, an urgent injunction order be issued restraining the defendants herein jointly and severally by themselves, their servants and/or agents (including joint administrators i.e. Julius Mumo Ngonga and Anthony Makenzi Muthusi – partners in the 2nd defendant firm) from selling, alienating, transferring of shares and/or in any manner whatsoever disposing if the plaintiff company itself and its properties/equipment of any nature whatsoever and wherever situated and within the jurisdiction of this honourable court pending hearing and determination of this suit.

7. The defendants also filed an application dated 24th June 2019 seeking the following orders:-

1. That the plaintiff suit by the plaint dated 14th January, 2019 be struck out.

2. That in the alternative to (1) above, the ruling delivered herein on 13th June, 2019 be reviewed by striking out this suit alongside the applications as sought in the preliminary objections dated 22nd January, 2019 and 4th February, 2019.

3. That the cost of this application be provided for.

Application dated 24th June 2019

8. The application is premised on the grounds that:-

1. That no leave of court was sought prior to filing of the suit dated 14th January 2019.

2. That it is a mandatory legal requirement that when a company enters administration, leave must be obtained from the High Court or permission be granted by the administrator prior to commencing any legal action against or on behalf of such a company.

3. That it is trite that during administration, the board of directors of a company is suspended and consequently has no legal ability, status and or locus standi to commence any action or court case on behalf of such company.

4. That the suit herein was irregularly filed by suspended directors hence hopeless, incompetent, fatally defective and inadmissible and ought to be dismissed.

5. That in the ruling delivered herein 13th June, 2019, the court upheld the preliminary objections dated 22nd January 2019 and 4th February 2019 on the grounds that no leave to sue was sought or granted prior to instituting the suit as required by the Insolvency Act No. 18 of 2015. The court then proceeded to strike out applications.

6. That there is however an error apparent on the face of the record as the said ruling failed to address the plaint dated 14th January, 2019.

7. That the grounds upon which the application were struck out apply similarly to the plaint. It's thus not logical to strike out only the applications but fail to strike out the suit in the circumstances of this case.

8. That it is in the interest of justice and fairness that there be review and or variation of the orders issued on 13th June, 2019 and that this court does address itself on the objection raised by the applicant as regards the plaint dated 14th January, 2019.

9. In the submissions to the application, counsel for the plaintiff argued that the application is purely intended to frustrate the hearing of the earlier application dated 14th June 2019 considering that the court had granted the plaintiff a lifeline to file fresh applications. The plaintiff's case is that it expeditiously filed the application dated 14th June 2019 seeking the courts leave to file fresh applications and to regularize the filing of the suit itself.

10. I have considered the gist of the two applications under consideration and I note that they arise out of the parties own misinterpretation of the gist of this court's ruling delivered on 13th June 2019.

11. My finding is that having found that the preliminary objections dated 29th January and 4th February 2019 were merited and having allowed the said objections, it naturally follows that the suit on which the two applications was founded would also fall on the wayside as it was not in dispute that the plaintiff did not obtain the leave of the court before filing the said suit.

12. Furthermore, this court notes that on 17th January 2019, two administrators of the plaintiff company namely; Julius Mumo Ngonga and

Anthony Makenzi Muthusi filed a Notice of withdrawal of the suit which notice has not been challenged or rescinded by the plaintiff herein.

13. In the circumstances of this case I find that it is not in order for the plaintiff to seek to resuscitate the suit through the application dated 14th June 2019 as the best approach should have been to seek the leave of the court, on a fresh/clean slate, to file a fresh suit before any other action can be taken as envisaged under Section 560(1) (d) of the Insolvency Act. Needless to say, the instant suit having been filed without leave is incompetent *ab initio*, a fact which the plaintiff ought to have noted before filing the application dated 14th June 2019.

14. For the above reasons, I strike out the application dated 14th June 2019 with no orders as to costs. Considering that I have already found that the plaintiff suit herein is incompetent *ab initio* having been filed without leave, I allow the application dated 24th June 2019 with no orders as to costs.

Dated, signed and delivered via Microsoft Teams at Nairobi this 14th day of May 2020 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:

Dachu for Defendants

Gathumbi for Madura for Plaintiffs

C/A & DR Hon Wanyama.

W. A. OKWANY

JUDGE