



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISC. CAUSE NO. 393 OF 2008

IN THE MATTER OF THE ADVOCATES ACT, CAP 16 OF THE LAWS OF KENYA

AND

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT

KAGWIMI KANGETHE & CO. ADVS.....PLAINTIFF/RESPONDENT

-VERSUS-

OLERAI NURSERIES LIMITED.....DEFENDANT/APPLICANT

RULING

By a Notice of Motion Application dated 15th January 2019, brought under the provisions of **Order 22 Rule 35 of the Civil Procedure Rules and Section 1A, 1B, 3A, 38 and 63(e) of the Civil Procedure Act Cap 21** of the Laws of Kenya; the Applicant/Decree holder/Plaintiff sought the following orders;

- a) That the directors of the Respondent/Judgment Debtor namely, **Anthony George Combos and Penelope Combos** do personally appear in court for oral examination of the assets and liabilities of the Respondent Company and/or whether the said directors should be held personally liable for payment of the outstanding decretal sum of Ksh 1,364,623/- together with accrued interest thereon due and owing to the Decree holder under the Decree given on 22nd May 2018 in this suit.
- b) That the said directors do produce for inspection by the court and the Applicant all books of accounts, bank statements, annual returns, Tax payment records/declarations, list of past and present assets, cheques, audited accounts and any other information relating to the past and present status of the Judgment Debtor company from 1998 to date.
- c) That the said directors of the Judgment Debtor company as at the time of filing the suit herein namely, **Anthony George Combos and Penelope Combos** be held personally liable for the amount due to the Applicant under the Decree given on 22nd May 2018 against the Respondent/Judgment Debtor company herein.
- d) That the Applicant/Decree holder be at liberty to execute the Decree given on 22nd May 2018 against the said directors of the Respondent/Judgment Debtor namely **Anthony George Combos and Penelope Combos** jointly and severally.
- e) That the costs of this application be paid by the directors of the Judgment Debtor

The Application was based on grounds that;

- a) The Applicant holds a Decree given in this suit on 22nd May 2018 against the Respondent for the sum of Ksh 1,364,623/- together with interest thereon at court rates.
- b) The said is in respect of taxed costs for legal services rendered to the Respondent/Judgment Debtor on the instructions given by the directors of the Respondent/Judgment Debtor.
- c) The current physical address of the Respondent/Judgment Debtor is not known to the Applicant hence frustrating the Applicant's efforts to execute the Decree.

- d) The Judgment Debtor has already ceased operations and/or assets of the Respondent/Judgment Debtor have not been found despite diligent efforts by the Applicant hence frustrating the execution of the Decree.
- e) Efforts to search the records of the Respondent/Judgment Debtors at the Companies registry have been frustrated by lack of availability of the physical file.
- f) The Judgment Debtor's assets, monies and properties have been willfully and fraudulently transferred and/or concealed or utilized by its directors with a view to defeating its creditors.
- g) The directors of the Respondent/Judgment Debtor have dealt with the advanced loans, assets and resources of the company as their personal property and for their own purposes and benefit hence leading to the collapse of the company.
- h) During the pendency of the suit and/or after passing the Decree the directors of the Judgment Debtor have dishonestly and fraudulently diverted the assets of the company with a view to defeating their creditors.
- i) The directors of the Judgment Debtor personally instructed the Advocate Applicant to render legal services in this suit and they should therefore be held personally liable to settle the outstanding decretal sum. The directors have all along personally paid legal fees to the Applicant.

NOTICE OF MOTION DATED 28TH JUNE 2019

By a Notice of Motion application dated 28th June 2019 and filed in court on 1st July 2019, brought under the provisions of **section 1A, 1B, 3A and 63(e) of the Civil Procedure Act, and Order 51 Rule 1 of the Civil Procedure Rules 2010 and sections 428, 430 & 431 of the Insolvency Act** and all other enabling provisions of law, the Respondent/Applicant sought the following orders;

- a) That the execution proceedings currently before this Court in this matter be stayed pending hearing and determination of the application and/or of the **Insolvency Cause E008 of 2019**.
- b) that the costs of this application be provided for.

The Application was based on grounds;

- a) That the Applicant passed a resolution on 18th June 2019 to have the company wound up, as it was unable to pay off its debts.
- b) That the Applicant is entitled to have proceedings in this matter stayed as provided for under section 428,430 and 431 of the Insolvency Act.**
- c) That this application would be rendered nugatory and the Applicant would suffer irreparable harm, if not heard and determined on priority basis.
- d) That the ongoing execution proceedings will be rendered a nullity and contrary to the provisions of **section 430 of the Insolvency Act**.

SUPPORTING AFFIDAVIT

The application is supported by an affidavit dated 28th June 2018, was sworn by Austin Ayisi, Advocate for the Applicant/Defendant. He asserts that summons were issued to the Directors of the Applicant, dated 23rd May 2019, to appear before Court on 25th June 2019 for purposes of giving evidence.

That this matter was scheduled for mention on 18th July 2019 and the Applicant however, had filed **Insolvency Cause E008 of 2019** as it was unable to pay off its debts.

He averred that the resolution to wind up the company was passed on 18th June 2019 and subsequently on 24th June 2019, the said liquidation petition was filed.

That in the interest of justice and in adherence to the law, the Applicant is entitled to have the proceedings in this instant matter stayed as per **sections 428, 430 and 431 of the Insolvency Act**, pending the determination of **Insolvency Cause E008 of 2019**.

He stated that any execution proceedings against the Company such as the one currently before this court, will be a nullity by virtue of **section 430 of the Insolvency Act** if they were to commence.

That the Company will suffer immense prejudice as the liquidation petition will have been undermined by the ongoing execution proceedings and the Plaintiff/Respondent herein will have the full benefit of participating in the liquidation petition as one of the creditors.

He contended that the Plaintiff will suffer no prejudice if the proceedings herein are stayed pending hearing and determination of the Liquidation Petition.

That the Liquidation Petition would be rendered nugatory and the Applicant would suffer irreparable harm and prejudice, if not heard and determined on priority basis.

JUDGMENT DEBTOR'S ORAL SUBMISSIONS

On 11th December 2019, Mr. Kiragu for the Judgment Debtor orally submitted that a liquidation petition had been filed in **E008 of 2019** and sought that these proceedings are stayed pending the hearing and determination of the Insolvency Cause, In the matter of Olerai Limited and urged this Court to stay the proceedings in this matter pending the hearing and determination of the winding up petition. The Grounds for the application are in the affidavit sworn by A. Ayisi on 28th June 2019 to the effect that on 18th June 2019 the company passed a resolution to winding up the Company, marked **AGCI**.

Under the Insolvency Act, once a resolution is passed then there cannot be any execution or distress on the Company Assets.

The Applicant relied on the Case digest citing cases that once Winding up. Counsel argued that once a winding up Petition is filed, the assets are subject to winding up and nothing should be done to disturb the equality of Creditors.

In **Re Kenya Bus Services Ltd [2019]eKLR**, the Court held that attachment for execution pending winding up was void;

“...section 225 of the Act provides in no uncertain terms that any attachment after commencement of the winding up ‘shall be void’

The court concluded as follows;

“Our conclusion is that the attachment of the appellant’s goods was void and that the warrants of attachment were issued in error and should be set aside and that the respondents must bear the costs of attachment (execution.”

Woods Auto & Allied Supplies vs Kenya Bus Services Limited 7 Another [2015] eKLR;

“Section 225 of the Companies Act provides as follows;

“Where any company is being wound up by the court, any attachment, distress or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void.

In **Ndane Construction Company Limited vs Spencon Kenya Limited[2016]eKLR**, the court held;

“At any time after the presentation of a winding up petition, and before a winding up order has been made, the company, or any creditor or contributory, may-

a) Where any suit of proceeding against the company is pending in the High Court or the Court of Appeal, apply to the Court in which the suit or proceedings is pending for a stay of proceedings therein; and

b) Where any other suit or proceedings is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the suit or proceeding;

And the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.”

Not dissimilar provisions are found in **Section 428 of the Insolvency Act:-**

“1) At any time the making of a liquidation application, and before a liquidation order has been made, the company, or any creditor or contributory, may-

a) If legal proceedings against the Company are pending in the court- apply to the court for the proceedings to be stayed; and

b) If proceedings relating to a matter are pending against the company in another court-apply to the court to restrain further proceedings in respect of that matter in the other court.

2) on the hearing of an application under subsection (IXa) or (b), the court may an order staying or restraining the proceedings on such terms as it considers appropriate.

3) if, in relatioOn to a company registered (but not formed) under the Companies Act, 2015, the application is made by a creditor, this section extends to any contributory of the company.”

22) A rationale of the provisions of Section 225 of the Companies Act (and Section 430 of The Insolvency Act) is that once a

Winding up Petition is presented, the assets of the Company need to be protected as they are now subject to the winding up cause and secondly no action that destabilizes the equality among Creditors of the same class is to be permitted. This court cannot therefore, not make orders that are voided by the provisions of section 225.”

In *Re Alvik Prestige Limited (formerly Alvik Kenya Limited) [2006] eKLR*, the court observed that;

“Firstly under Section 225, any attachment, distress or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void. There is of course no question of attachment, distress or execution here, this provision is cited to emphasis the effect of a winding-up petition by the court”

Counsel relied on **Section 430 of the Insolvency Act** which provides, any process commenced after liquidation of the company is void; emphasis is on the word commencement. He further stated that if the court proceeds with execution of the company it would be void and in contravention of the **Insolvency Act**.

DECREE HOLDER’S ORAL SUBMISSIONS

Mr. Kang’ethe for the Decree holder in his oral submissions in court on 11th December 2019 opposed the application seeking stay of proceedings. Counsel stated that the application was preconceived and it purported to assume that stay of proceedings ought to automatically be granted in law the moment the liquidation petition is filed which is not the case. Various provisions of Insolvency Act empower the Court to consider the facts before the stay of proceedings is granted. There is a discretionary power and it is not automatic/absolute grant of stay of proceedings on application by a party.

The facts are that Counsel submitted that the Plaintiff and the Defendant entered into consent for payment of Legal fees on 22nd May 2019 but the Decree was issued later but at the time the Company existed.

The Respondent Company knew the status of the Company and would not have entered into a Consent if they knew they would not comply with the consent. The Respondent went to execute and found the Company had no assets it was wound up. Counsel for the Company entered Consent with instructions from the Directors of the Company, the alter ego of the Company. Therefore, the Respondent filed the application of 24th January 2019 to have the Directors held personally liable for the amount in the Consent and the Directors to be examined and to produce documents of the Company

He submitted that the Defendant appeared severally before the court and they sought to file Replying Affidavit and on 18th June 2019 the same Directors passed a resolution of voluntary winding up Petition of the company.

The Court granted on 21st May 2019, partial orders for examining the Directors. The Respondents wanted to go behind the fraud and find the assets carted away by the directors of the Company. At the same time, the Applicant filed the resolution Directors passed of Voluntary Winding up of the Company and filed Winding Up petition in Court **E008/2019**, a copy was annexed to their application that the Company sought liquidation on the basis of ceasing operations on the basis of indebtedness and inability to meet its financial obligations.

There is mischief by filing of liquidation proceedings to render the Court order of examination of Directors irrelevant and unenforceable. The order to examine Directors is not an order for execution. A court does not act in vain and the Applicant cannot circumvent compliance of a valid Court order.

The Respondent stated that in Voluntary Winding up, **Section 425, 427, 428 of Insolvency Act** are relevant.

However, **Section 430 of Insolvency Act**, the stay of proceedings is not granted where the Court has jurisdiction to consider proof of fraud or mistake. Stay of proceedings order should be granted where the Court is satisfied there is no mistake or fraud and where grant stay of proceedings is issued it is on conditions the Court deems fit in the circumstances.

The Court is empowered to look behind the intention of Winding up. From the facts the Voluntary Liquidation is to shield the Directors to move scot free from payment of the decretal sum from the Consent. The winding up petition is filed in bad faith.

By **Section 394 of the Insolvency Act** a Voluntary Winding up is valid after 14 days of passing the resolution and gazettelement and publication in 2 dailies/newspapers. There is no evidence that the same has been done in this case.

In Reply Counsel for the Applicant reiterated that the jurisdiction of the court is donated by Statute and by virtue of **Section 430 of Insolvency Act** after filing application for winding up all execution must stop against the Company.

The Directors did not owe any debt directly but through the Company and they are not liable personally for the debts of the Company which is a separate legal entity.

By the time the Court issued orders on 21st May 2019 to have Directors examined, the Insolvency application had not been filed but these orders cannot be effected in light of the new events.

DETERMINATION

On 18th July 2018, the Applicant informed Court that the orders of Court of 21st May 2019 to have the Directors of the Company examined

could not be effected as there was an application for stay of proceedings which had been filed. The Court was informed that there was a moratorium to enforcement and execution proceedings to the Company under Liquidation.

This Court gave directions that the moratorium related to appointment of Administrator/Administration. That in the absence of the alleged Winding up petition alleged to have been filed the Court orders of 21st May 2019 would be effected on 30th September 2019.

Counsel for the application sought to appeal these directions. The Court ordered that a formal application was to be filed and the parties to research and submit to the Court on the position of Winding up of a Company and examination of Directors. Both Counsel ably acquitted themselves.

The Court record confirms that on 22nd May 2018, Counsel for the Applicant and Respondent in both applications recorded Consent that the Company would settle the debt by judgment being entered against the Company for Ksh 1,364,623/- with interest and Costs in favour of the Plaintiff/Applicant. The Consent was duly executed by both Counsel, it was adopted as an order of the Court and the Company was granted 30 days stay of execution. The Consent remains a valid, regular and legal order of the Court pending execution.

The Respondent admitted that they tried to execute and found the Company through its Directors carted away assets. The Respondent sought to examine the Directors vide application of 15th January 2019 and this court Granted leave to examine Directors on 21st May 2019. The rest of the unfolding events are on record.

The Applicant informed Court that the Company opted for voluntary Winding up and passed a special resolution and filed petition in Court in **E008 of 2019 by virtue of Section 424 (1) of Insolvency Act**. Therefore, by the Provisions outlined by Insolvency Act the Court should grant stay of proceedings until hearing and determination of **E008 of 2019**. On the other hand the Respondent contends that the process of liquidation was instituted by the Company through Directors to circumvent payment of the decree arising out of the Consent.

The court outlines the relevant provisions as follows;

428. Power to stay or restrain proceedings against company when liquidation application has been made

(1) At any time after the making of a liquidation application, and before a liquidation order has been made, the company, or any creditor or contributory, may

(a) if legal proceedings against the company are pending in the Court—apply to the Court for the proceedings to be stayed; and

(b) if proceedings relating to a matter are pending against the company in another court—apply to the Court to restrain further proceedings in respect of that matter in the other court.

(2) On the hearing of an application under subsection (1)(a) or (b) , the Court may make an order staying or restraining the proceedings on such terms as it considers appropriate.

430. Attachments and other forms of execution against company in liquidation to be void

If a company is being liquidated by the Court, any attachment, sequestration, distress or execution instigated against the assets of the company after the of the liquidation is void.

431. When liquidation of company by the Court commences

(1) If, before the making of an application for the liquidation of a company by the Court, a resolution has been passed by the company for liquidating the company voluntarily—

(a) the liquidation commences at the time of the passing of the resolution; and

(b) unless the Court, on proof of fraud or mistake, directs otherwise, all proceedings taken in the voluntary liquidation are to be regarded as having have been validly taken.

(2) If the Court makes a liquidation order under section 534, the liquidation commences on the making of the order.

(3) In any other case, the liquidation of a company by the Court commences when the application for liquidation order is made.

The Court was presented with a copy of the Company resolution on voluntary winding up of the Company marked **AGCI** to the supporting Affidavit of the application of 28th June 2019. The Winding up petition was filed in Court **E008 of 2019** by the Company pending hearing and determination. These facts are not contested. **Section 428 (1) 430 & 431 (1) of Insolvency Act** are applicable in this case. In a nutshell that once the Liquidation process commences then the execution process against the Company ought to halt. Consequently, proceedings leading up to execution against the Company are put on hold awaiting the finding on whether the liquidation order shall be issued and liquidator appointed or not.

The Respondent submitted to court that circumstances of filing the Winding up Cause strongly suggested that winding up was employed to circumvent the Court's orders of 21st May 2019 to have Directors of the Company examined on the Company's books to confirm its financial position in order to realise the debt accrued from valid Consent and now order of the Court. The process of examination of Directors of the Company was to commence but the execution process was curtailed by filing of the liquidation application.

The import of **Section 431(1) (b) of Insolvency Act**, is that the Court upon proof of fraud or mistake, may direct otherwise. To prove fraud, the law prescribes that its particulars must be specifically pleaded and specifically proved not on a balance of probabilities as required in Civil cases but on a standard higher than balance of probabilities. In the instant case, the evidence on record is not sufficient to prove fraud to the required standard.

In the Court of Appeal case of *Nancy Kahoya Amadiva –vs- Expert Credit Limited & Another [2015]eKLR*; it was held;

*“we have previously held that in cases where fraud and/or misrepresentation is alleged, it is not enough to simply infer fraud from the facts. In *Vijay Morjaria vs- Nansingh Madhusingh Darbar & Another [2000]eKLR* Tunoi JA (as he then was) stated as follows;*

“it is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (emphasis ours)

Therefore, at this stage the court is of the view that proof of fraud has not been found at this stage based on the law and facts presented.

Therefore, due to the facts on record and the law applicable, I find that orders of 21st May 2019 orders and proceedings are hereby stayed to allow the Liquidation to proceed first and be heard and determined.

DISPOSAL

The stay of proceedings application is granted and proceedings herein stayed on condition that the Respondent is hereby joined as one of the Creditors in the Insolvency proceedings in **E008 of 2019** and the Consent of 22nd May 2018 and decree thereof is listed as one of the debts due and owing against the Company in **E008 of 2019 & Misc Cause 393 of 2008** is hereby consolidated with **E008 of 2019** and to be heard together in 1 Court.

DELIVERED SIGNED & DATED IN OPEN COURT ON 2ND JULY 2020

(VIDEO CONFERENCE)

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. KANGETHE FOR THE APPLICANT

MR. KIRAGU FOR THE RESPONDENT

COURT ASSISTANT - TUPET