



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

MISC. APP. NO. 82 OF 2019

(Appeal Originating from Nyahururu CM's Court Cr.No.119 of 2013 by Hon. A. Mukenga (R.M.))

CYRUS WAIHENYA MURANGO.....1ST APPLICANT

WACHIRA NDIRANGU.....2ND APPLICANT

-VERSUS-

MUHOTETU FARMERS COMPANY (IN LIQUIDATION).....1ST RESPONDENT

THE OFFICIAL RECIEVER OF MUHOTETU

FARMERS COMPANY LIMITED.....2ND RESPONDENT

RULING

The Notice of Motion dated 08/10/2019 was filed by the applicants, Cyrus Waihenya Murango and Wachira Ndirangu – (1st and 2nd applicants) against Muhotetu Farmers Company Ltd (in liquidation/receivership) (1st Respondent) and the official receiver of Muhotetu Farmers Company Limited in Receivership Liquidation. The applicants seek orders that they be granted leave to initiate a suit against the defendants and costs to be in the cause.

The grounds upon which the application is premised are that the applicants have a valid claim against the respondents which they intend to file and the law requires that leave be sought as the 1st defendant is under liquidation. The 1st applicant swore an affidavit dated 08/10/2019 in support of the application where he deponed that they are members of the 1st Respondent and that membership was ratified by the court in **NYA CMCC 119/2013 Cyrus Waihenya Murango Vs Muhotetu Farmers Co. Ltd** and **NYA CMCC 160/2013 Wachira Ndirangu V Muhotetu Farmers Co. Ltd**; that despite the court's findings, the 1st Respondent has refused, ignored or neglected to register the applicants as members; that the applicants are aware that the 1st Respondent has been disposing of its assets and obtaining benefits which do not accrue to the applicants due to the fact that they are not registered as members; that that is why they want to pursue the Respondents through the court so as to be registered in order that they may benefit from the company assets.

Beatrice Osicho, counsel for the official Receiver, the 2nd Respondent opposed the application and deponed that on 5.10.2018, the 1st Respondent passed a special resolution to voluntarily liquidate and appointed the Official Receiver as liquidator,(B O – 1 – Special Resolution); that in accordance with section 397(b) of the Insolvency Act, 2015 and the Resolution , the 2nd Respondent published a notice of the resolution to liquidate the 2nd Respondent in the Standard Newspaper on 10.10.2018 and the Kenya Gazette on 19.10.2018(BO-2); that the voluntary Liquidation commenced when the Resolution was passed and its effect was that the directors' powers are terminated and the company ceased to carry on its business except in so far as may be necessary for its beneficial liquidation; that through the applicant's advocate, the 2nd Respondent's advocate received a demand that they register the applicants as members pursuant to the courts orders in CMCC 119/20013 and 160/2013(BO – 3); that the 2nd Respondent requested the advocate to provide the certified copy of the judgment and court order(BO-4) but the same were never forwarded to the 2nd Respondent for consideration, whether or not to admit the claim; that it is due to the inordinate delay and neglect by the applicants that the applicants' claim has not been considered and the applicants should move the Registrar of Companies to add their names to the Register of members of the 1st Respondent since the Registrar has the powers to do so. Counsel also deponed that the applicants have no claim against the 2nd Respondent, the application is misguided, an abuse of court process and should be dismissed.

The applicants filed their submissions on 16.06.2020, in which it is not denied that the 1st Respondent is under liquidation and that is why they have come to court under section 432(2) of the Insolvency Act 2015 which provides that once a liquidator is appointed, a party can only institute a suit or continue with one with the approval of the court; that the applicants have demonstrated through the annexed plaint that they have some legal rights against the company and that the issue raised by the 2nd Respondent's counsel can only be canvassed after the suit is filed. He relied on the decision of **MBA HCMISC App 147 of 2018/Michael Kadowe Karisa v African Safari Club(In liquidation through**

its liquidator official Receiver and UAP Insurance Co. Ltd)

In reply, Ms Osicho Counsel for the 2nd Respondent urged that section 397(b) of the Insolvency Act prohibits alteration in the status of the members after the commencement of voluntary liquidation, meaning that no shareholders can transfer their shares nor can a perceived shareholder be added to the list and it is upto the applicants to justify the need to alter the membership list; that since the liquidator owes a duty to the 1st Respondent and its creditors to distribute the assets of the company properly, otherwise the creditor can sue the liquidator if he breaches the duty and therefore the liquidator cannot act outside his mandate by altering the list of members; that under section 462 of the Insolvency Act, one of the liquidator's powers is to admit or reject claims of creditors but the applicants did not submit their claims in time, that the demand letter from the applicants was made on 22.08.2019 nine months after the advertisement because the date line for creditors to forward their claims was 14.11.2018; that the purpose for the date line was to enable the liquidator establish the extent of liabilities and assets in time because the liquidation has to be completed within reasonable time; that in any event, the liquidator could only have made a decision to accept or reject a claim if sufficient information had been availed to him. However, in this case, none was provided despite the request; that the court should reject the request unless the applicants have fully complied with the request for information.

Counsel urged the court to be guided by section 3A of CPA and overriding objective of section 1A and 1B of the CPA on efficient and effective and timely disposal of court proceedings.

I have considered the application, affidavits and the oral submissions. Section 395 of the Insolvency Act provides for when liquidation is deemed to occur. The section provides as follows: section 395

“When liquidation commences; the voluntary liquidation of a company commences when the resolution for voluntary liquidation is passed”

In the instant case, the Resolution was passed on 5.10.2018 and therefore that is the date liquidation commenced.

Section 432 then provides for the

“Consequences of liquidation order.

1. Within seven days after 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 company with the official Receiver.

2. When liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the copy may be began or continued only with the approval of the court and subject to some conditions as the court considers appropriate.

3.”

Section 397(b) of the Act provides that an alteration in, even an attempt to alter, the statements of the company's members after commencement of a voluntary liquidation is void; the applicants have indeed taken the right steps to move the court to have the court grant them leave to commence legal proceedings against the liquidator.

In my view, the essence of seeking leave to commence a suit against the company in liquidation is to ascertain whether indeed the applicant has a valid claim against the company; It is also necessary to ensure that there is order and to avoid frivolous actions/suits against the company which may involve some of the matters that have been suspended by the liquidation order. It is also to ensure that the Official Receiver undertakes its mandate without unnecessary interference and hence speed up the process of liquidation.

It is the duty of the applicants to demonstrate that they are deserving of orders sought. They claim to be members of the 1st Respondent having been ratified by the court vide the orders made in NYA CMCC 119/2013 and 160/2013 respectively.

The 1st Respondent passed a special Resolution to voluntarily liquidate the company and appointed the Official Receiver in accordance with section 395 of the Insolvency Act. The 2nd Respondent published the notice to liquidate the company on 11.10.2018 and by that notice, creditors of the company were invited to send their respective claims with the full particulars. The applicants did not take advantage of that window to submit their claims and they have not given any explanation for the failure to do so.

The Respondent has deponed that when the applicants made a demand to the Respondent, the Respondent on its part requested the applicants, by the letter dated 26/08/2019(BO-4) to avail copies of the judgment and court orders in the said cases, but that to date, they have never provided the same. I have noted that the applicants annexed a copy of the court's judgments in NYA. CMCC.119/2013 and 160/2013 to their affidavit. However, the said judgement is not certified. Why would it be so hard for the applicants to avail the said documents which would establish their claim?

The applicants have not bothered to explain why they did not avail the necessary documents to the Respondents for verification so that their issue would have been considered administratively. Had the matter been dealt with administratively, maybe it would have been unnecessary to engage in these court proceedings, unnecessary expenses, and saved on the court's precious time.

Having had two opportunities to pursue their rights and failed to submit their claims, it is evident that the applicants have acted indolently and generally want to abuse the court process. However, just in the event that they have a genuine claim against the 1st Respondent it would be unjust to lock the applicants out because in the event they cannot prove their claim, they will compensate the Respondents in terms of costs. For the above reasons, and in exercise of the court's discretion, I make the following orders;

1. The applicants do present the certified court proceedings, judgement and orders made in NYA CMCC 119/2013 and 160/2013 to the 1st Respondent and 2nd Respondent for consideration of their claims. That should be done within 21 days from today's date.

2. If the parties do not agree, the court hereby grants leave to applicants to file suit within 45 days of the first Respondent's decision denying the applicants' claim.

3. Since the applicants were the indolent party, they will bear costs of this application.

Dated, Signed and Delivered at NYAHURURU this 1st day of October 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Githongo holding brief for Ms. Osicho for Respondents

Henry - Court Assistant