



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

MISCELLANEOUS CIVIL APPLICATION NUMBER 25 OF 2016

BENSON GICHERU MUCHOMBA.....APPLICANT/RESPONDENT

VERSES

TAHIR SHEIKH SAID GRAIN MILLERS LTD....RESPONDENT /APPLICANTS

RULING

1. The notice of motion dated 20th July, 2018 by the Respondent prays inter alia for orders that this court be pleased to set aside the ex parte orders issued on the 12th July, 2016 granting leave to commence legal proceedings against the Respondent /Applicant who is already on administration. The other prayer for interim orders staying the matter at the lower court namely **Kitale CMCC No. 228 of 2016** had already been issued albeit to await the outcome of this application.
2. The supporting affidavit P.V.R RAO sworn on 20th July, 2018 essentially deponed that the ex parte orders issued were in error as the court ought to have considered the special circumstances of the matter and should have given the Respondent /Applicant the chance to respond.
3. That in the nature of the suit there ought to have been the need to hear the Applicant as well before granting leave to the Respondent as the Administrator was already in place and had already published notices in the Daily Nation Newspapers.
4. He further stated that the Respondent did not attend the Creditors meeting or submit any claim of indebtedness to the Applicant on 25th July, 2016 in line with Section 568 of the Insolvency Act.
5. The Respondent replied vide the grounds of opposition dated 25th September, 2018 as well as the replying affidavit sworn on the 19th November, 2018 where he said inter alia that the application was frivolous and an abuse of the court process as the proceedings were concluded and or closed. He said that the same was an abuse of the process as it is an indirect appeal on the orders of Hon. Githinji J.
6. The parties have filed written submissions which I have perused and see no reason to reproduce them here. They have equally cited various authorities which I have gladly perused.
7. The issue for determination is well captured by the parties very well namely whether the ex parte orders of leave granted to the Respondent should be set aside and that the same ought to have been granted at an inter parties stage.
8. The orders granted on 12th July, 2016 according to my brother were granted as he said meritoriously. There was no suggestion that the applicant was served or was ordered to be served.
9. The application comes against the background that the issue falls under the Insolvency Act and that in essence the Applicant is under some protection by operation of the law. Section 560 of the said Act presupposes that the party who is indebted can only bring an action by seeking the leave of the court or the consent of the Administrator. In this case the Respondent sought the consent of the court.
10. Although in the ordinary litigation leave to institute suits for instance where there is limitation of time is usually made ex parte, I find that under the Insolvency Act, the approach is somewhat different. The Respondent and in this case the Administrator ought to be involved for the simple reason that he now litigate on behalf of the Debtor who has been placed under administration. The Administrator thus who is essentially a third party so to speak, must be notified as he may not be privy of the debts or liabilities due to the organisation.
11. What then would be the impact of not granting the Applicant its wishes? Although in my view I do not find much reason to fault the leave granted I find the provisions of Section 560 of the Act aforesaid necessary, namely that the same leave cannot be granted ex parte without the consent of the Administrator.
12. There was an argument that the suit had proceeded very far at the lower court and infact it was awaiting judgement and that the Applicant

had been a willing participant all the way. This could be the case, but hypothetically what would the Respondent for instance do with a judgement against the Administrator who is legally insulated? Can he for example execute against the Applicant?

13. The above questions are best answered if the Applicant would be allowed to participate from day one. I do not think that allowing the application would be running contrary to the spirit and the letter of the discretion given to the courts. There would not be prejudice suffered by the Respondent as he would still be involved in the matter.

14. For the above reasons and specifically that the matter at hand is *Sui generis* I find the application meritorious. The same is allowed and the orders granted by this court on 12th July, 2016 are set aside.

15. The Applicant is hereby granted 14 days from the date herein to file his response if any. There be stay in the meantime of the proceedings in **Kitale CMCC No. 228 of 2016** pending the determination of this application.

16. The Respondent shall have the costs of this application.

Dated signed and delivered in open Court at Kitale this 11th day of June, 2019.

H. K. CHEMITEI

JUDGE

11/6/19

In the presence of:-

Mr. Bungei holding brief for Angoya for the Defendant/Applicant

Khisa holding brief for the Plaintiff/Respondent.

Court Assistant – Kirong

Ruling read in open court.