



**REPUBLIC OF KENYA**

**IN THE COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**MISC. APPLICATION NO. 59 OF 2003**

**SHALIMAR LIMITED.....1<sup>ST</sup> PLAINTIFF**

**SAZ CATERER LIMITED .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SADRUDIN KURJI .....1<sup>ST</sup> DEFENDANT**

**AKBAR KURJI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This Ruling relates to a Notice of Motion Application, dated 11<sup>th</sup> September 2017, filed by the Defendants (herein “the Applicants”) seeking for orders as here below reproduced:

- a) *That pending the hearing and determination of this Application, this Honourable Court, do lift and/or vary the stay of proceedings order, to the limited extent of granting the Defendants leave to canvass this Application.*
- b) *This honourable Court do issue and order for release to the Defendants their passports deposited with the Deputy Registrar pursuant to the order issued on 21<sup>st</sup> November 2016.*
- c) *The costs of this application be in cause.*

2. The Application is brought under the provisions of; Sections 1A, 1B, 1C, 3 and 3A of the Civil Procedure Act, Order 50 of the Civil Procedure Rules, Article 159 of the Constitution of Kenya, Rule 3 of the High Court (Practice and Procedure) Rules, made pursuant to Section 10 of the Judicature Act, (Chapter 8) of the Laws of Kenya, Section 48 of the Insolvency Act, 2015 and all enabling provisions of the law. The Application is based on the grounds on the face of it and supported by Affidavits sworn by the Applicants.

3. The 1<sup>st</sup> Defendant (herein “the 1<sup>st</sup> Applicants”) avers that, the Deputy Registrar of the High Court, Hon. E. Tanui, on 26<sup>th</sup> November 2016, ordered him to deposit his passport with the Court, as a measure to ensure that, he and the 2<sup>nd</sup> Defendant (herein “the 2<sup>nd</sup> Applicant”) do not leave the jurisdiction of the Court during the pendency of the Court proceedings against them. The Applicants complied accordingly on the same date.

4. That by the time the order was made he had filed Bankruptcy proceedings, vide Bankruptcy Cause No. 23 of 2015 and applied for Bankruptcy orders to be issued against him and on 16<sup>th</sup> December 2016, the Receiving order was duly granted against him, whereupon all proceedings against him for recovery of any debt he owed, were stayed in accordance with law.

5. That there being no eminent execution against him to make him a flight risk against the proceedings of the Court, it is in the interest of justice that the passport he deposited in Court be released to him. However, despite the demand for release of the same vide a letter dated 12<sup>th</sup> June 2017, and subsequent visits to the Court Registry, the Passport has not been released, hence the current Application.

6. The Applicant argues that he will suffer great prejudice if the passport is not released, as it is a vital identity documents which he is entitled to have. That the overriding objectives of the Court require that, civil disputes be facilitated in a just, expeditious and proportionate and affordable resolution. Thus there being no proceedings and or eminent execution against him to make him a flight risk, it is only fair that

the passport be released. That the Plaintiff will not suffer any prejudice, if the orders sought are granted.

7. The 2<sup>nd</sup> Applicant too deposed to the same facts as averred by the 1<sup>st</sup> Applicant, save that he too filed a Bankruptcy Petition vide Insolvency Cause No. 12 of 2016, seeking for Bankruptcy orders to be made against him. The orders were granted on 17<sup>th</sup> March 2017, whereupon all proceedings against him were stayed.

8. However, the Application was opposed based on grounds of opposition dated 20<sup>th</sup> September 2017 as herein reproduced:

- a) *The Court has no power to reopen proceedings to recover debts owed by the debtor upon the Application of a debtor once the proceedings have been stayed.*
- b) *The presence of a debtor is required throughout the life of the Bankruptcy proceedings.*
- c) *If the debtors' passports are released, there is a danger that the debtors may leave the Court's jurisdiction and interfere with the smooth running and conclusion of the Bankruptcy proceedings instituted by the debtors.*
- d) *No sufficient cause has been shown to justify the release of the debtors' passports.*
- e) *The Application is misconceived, and lacks merit.*

9. The Parties agreed to and disposed of the Application by filing submissions thereto. The Applicants submitted that, under Section 48 of the Insolvency Act, the Court has the power to order for the current proceedings to continue on such terms as it may consider appropriate. Reliance was placed on the case of; *Jimmy Kaule & Others vs Stanbic Bank (2008) eKLR*, to argue that, the word used under the Section is "may". Thus, it is "permissive" and not "shall" which is "mandatory". Further that, the Applicants has complied with Section 48 of the Insolvency Act, which allows the proceedings to continue on such limited terms.

10. That the grounds on which the order to deposit the passports have drastically changed, in that the Applicants having been declared Bankrupt there is automatic stay of proceedings including execution to be guaranteed by holding the passports. Thus the reasons for the deposits of the passports have been overtaken by events and there is no risk of the Defendants absconding any Court attendance and proceedings. Therefore the arguments by the Respondents that, the Applicants may abscond is "unfounded and absurd" and in any event, the property of the Applicants is vested within the control of the Official Receiver.

11. The Applicants submitted that they are law abiding and have no intention to abscond any proceedings when called upon to attend and have been co-operative with the official Receiver in the process of discharging its duties.

12. However, the Respondents submitted that, the Passports were deposited following the order of the Deputy Registrar on 17<sup>th</sup> November 2016. That the Court has no power to re-open the proceedings as Section 48(2) of the Insolvency Act only allows the Court to entertain an Application brought by the Creditor or another person interested in the Bankruptcy proceedings upon the commencement of the Bankruptcy order. There is no provision allowing the Debtor to move the Court as herein.

13. It was argued that, the stay of proceedings means that, the proceedings have been merely suspended and not extinguished. Thus the Applicants presence is still material and the passports ought not to be released. The Respondents submitted that, the presence of the Applicants is required, under Sections 17 and 24 of Bankruptcy Act (in relation to the 1<sup>st</sup> Applicant) and under Sections 52(2), 140(1), 168 and 177 of the Insolvency Act (for the 2<sup>nd</sup> Applicant) for the Public examination of the debtors/Applicants and/or participation in the Bankruptcy proceedings; hence the need of their presence at all time to guarantee the smooth and orderly conduct of the proceedings.

14. The Respondents relied on the case of; *Kakamega Papers Convertors Ltd vs Mohanlal Arora & 4 others 2014 eKLR*, where the Court declined to release passports as herein unless a security for attendance was furnished. Finally the Respondents submitted that although the Applicants argues that their property vests in the Official Receiver, however, justice is a double edged sword that cuts both ways. That, the Creditors' interest and rights to the fruit of judgment should also be provided.

15. Further, it is not true that, the 2<sup>nd</sup> Applicant has never absconded. That he was brought to Court under a warrant of arrest and detained for the whole period of hearing of the Notice to Show Cause, and that is what caused the order to deposit the passports in Court.

16. At the conclusion of arguments by the parties, I have considered the Application, the affidavits in support, the grounds of opposition and the submissions alongside the same. I find that, as aforesaid, the subject passports were deposited in Court following the order made on 17<sup>th</sup> November 2017 by the Hon. Deputy Registrar. I note that the said order clearly states under paragraph (d) of thereof that:

*"that the 2<sup>nd</sup> Judgment debtor is released forthwith but both of them (1<sup>st</sup> and 2<sup>nd</sup> Judgment debtors) shall appear in Court on 21<sup>st</sup> November 2016, with their original passports which shall be deposited in Court until further orders of the Court" (emphasis mine).*

17. The question that arises is whether, these Applicants have sought audience before the Hon. Deputy Registrar, for "the further orders". I do note that the matter was to be mentioned on 25<sup>th</sup> January 2017, but then the proceedings were stayed due to a Bankruptcy order issued. That may inform the same.

18. Be that as it were, the Applicants have sought that the Court do allow the proceedings to be re-opened for limited purpose as herein stated. The provisions of Section 48 of the Insolvency Act, 2015, (herein "the Act") have been cited and relied on. That Section 48(2) states

as follows:-

*“Despite subsection (1), the Court may on the Application by a Creditor or other person interested in the bankruptcy, allow proceedings that had already began before the bankruptcy commenced to continue on such terms as the Court considers appropriate.”*

19. It is clear that, these provisions gives the right to make an application thereunder to, either the Creditor or any other person interested in the bankruptcy, who may apply for the proceedings commenced before the Bankruptcy order to proceed on the terms the court may consider appropriate.

20. The Respondent argued that, the Applicants as Debtors do not have the locus standi to bring an Application under Section 48(2) of the Act. Unfortunately the Applicants did not respond to these submissions. The question is, do the Applicants qualify as the “other persons interested?” In my considered opinion the answer is in the negative. I say so, in that, by use of the word “Creditor”, the drafters were careful enough to omit the Debtors.

21. The logic behind this in my considered opinion is that, in a case where the Debtor initiated the Bankruptcy proceedings, the Debtor understands well that, the purpose thereof is to stay the proceedings (if any). In that case, the only person who will be prejudiced with the stay order will be the Creditors or any other person, who desires to have the proceedings continue. Naturally therefore, the Debtor would be the beneficiary of the stay. In that regard, I therefore concur with the Respondents submissions that there is no provision for the Applicants under the section 48 aforesaid to move the Court.

22. Even then, I have considered the provisions under which the Application is premised, and I find that, the only Section of the Insolvency Act, cited is Section 48 thereof. The other provisions cited are the provisions that govern the inherent power of the Court, and the need to uphold substantive justice.

23. The Court does therefore find the footing in law of the prayers sought for herein. The absence of provisions of the law that allows a party to seek for certain prayers from the Court, cannot be termed as “technical” and neither can they be granted at the discretion of the Court, without the foundation of law on which they are anchored. I therefore find the Application unsupported.

24. Be that as it were even if the Court were to invoke its inherent power, I note that the Applicants have stated that the reason why they require the passports is because they are vital identification documents. That is true. They are indeed identification and/or travel documents. However, it is noteworthy that, these passports were deposited in Court as far as 21<sup>st</sup> November 2016. A period of about 1 ½ years. The Applicants must have been using other means of identification. Secondly, there is no urgent need established for the release of the passports. If for example, the Applicants were seeking for the release of the passports to enable them travel for an urgent matter (e.g medical treatment), that would make the Court consider what orders to make to meet the end of justice.

25. Be that as it were, the purpose of the order for deposit of the passport was to secure the Applicants attendance until the matter is fully heard and concluded. The proceedings herein are stayed. They are not concluded. I therefore agree with the Respondents submissions that, it is unsafe to release the passports. As rightful observed the interests of both the Creditors and the Debtors ought to be considered.

26. The upshot of all this is that, I find the Application lacks merit and I dismiss it with costs to the Respondents. I am aware that, if an Applicant is not supported by any known provisions of the law it is basically incompetent and should be struck out. However, the Applicants relied on Section 48 cited herein, which I have held does not clothes them with the locus standi, therefore the Application has been considered on merit and that is why I dismiss it as aforesaid

27. The Application is thus dismissed with costs and it is so ordered.

**Dated, delivered and signed in an open Court this 12th day of July 2018.**

**G.L. NZIOKA**

**JUDGE**

**In the presence of:**

**Mr. Ayisi for the Plaintiffs/Applicants**

**Ms. Njiru holding brief for Mr. Kimaru for Defendants/Respondents**

**Lang’at.....Court Assistant**