



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

WINDING UP CAUSE NO 5 OF 2013

IN THE MATTER OF: JETLINK EXPRESS LIMITED

AND

IN THE MATTER OF: THE COMPANIES ACT (CAP 486) LAWS OF KENYA

RULING

1. In this matter Mr. John Tito learned Advocate, for the plaintiff filed submissions dated 23rd August 2016 and repeated the same on 31/7/2018; whereas Mr. Echesa, learned Advocate for Directors of the Company, captain Kiran Patel and Elkana Aluvale filed submissions on 5th July 2018; Mr. Sifuna, learned Advocate for KCAA, supporting Creditor filed submissions, on 15th September 2016; and Mr. Wati, Learned Advocate, for Avia Technical, Services filed submissions on 31st July 2018.

2. The genesis of these submissions is founded on the judgment of the Hon. Lady Justice Farah Amin dated 27th July 2016 and more specifically at paragraphs 52 and 62 of the judgment where the Honourable learned Judge stated as follows:-

"The Supporting Creditor also makes an application for the costs of these proceedings to be paid by the two directors of the company. That amounts to piercing the corporate veil. That is an application that cannot be dealt with summarily. The Court will hear submissions on that issue in due cause and give directions."

The Honourable Court further under paragraph 62 of the judgment stated:-

"On the question of costs there is an application before the Court to consider an alternative costs order. The Court accedes to that request. The Court will hear argument on the issue of costs once the parties have had an opportunity to digest this judgment."

3. Upon perusal of the court's record of 5th September 2016, the learned Judge made an order in the following terms:-

"1. The Directors Captain Elkana Aluvale & Captain Kiran Patel are joined as parties to the proceedings in order to enable them to respond to the show cause raised on costs by Mexican CRJ;

1. The Creditor Mexican CRJ to serve upon the directors a copy of 1 the judgment, 2 the Application for costs, 3 their submissions within 14 days.

2. The Directors are hereby granted 14 days from the date of service to enter appearance.

3. The directors to file a response and written submissions within 28 days of service.

4. List for mention on 14th October 2016."

4. From the perusal of the court's judgment on the order of 5th September 2016, my understanding is that the trial court intended the Directors to be served with an application for costs to enable them make their response; which application is not to date on record. The court had further under paragraph 52 of the judgment stated that the supporting Creditor was to make application for costs of the proceedings to be paid by the two directors of the company and the same court noted the application could not be dealt with summarily. The court further stated it will hear submissions on the issue in due cause and give directions. The court under paragraph 62 stated it will hear parties arguments on issue of costs once parties have had an opportunity to digest its judgment.

5. In the instant case, Mexican CRJ Limited was required to serve the application together with submissions, in which the Mexican CRJ Limited has not done so to date in compliance with the court's order. The submissions on application for costs are not based on any application for costs on record as there is none on record.

6. In view of the above and in absence of any application for costs as ordered by court I find there is nothing for consideration by this court.

7. I have considered the parties respective submissions which are based fully on the court's judgment delivered on 27th July 2016. The court which delivered the judgment directed that it will hear argument on the issue of costs once the parties have had an opportunity to digest its judgment. My understanding is that it is the same court which wrote and delivered judgment which is required to deal with the issue of costs. I am alive to the fact that the trial Judge is on transfer but this matter is not before me for review of the court's orders; but is based on the contents of the court's judgment and its orders.

8. By Chief Justice internal memo issued on 24th September 2018 to all Judges of the High Court dated 17th September 2018 under No.3, it states, where the hearing has been completed, the trial Judge may either return to the previous station to hear the closing oral submissions, or make an order for the filing of written submissions. In either case, the trial Judge shall go with the court file and render the determination in that matter within the stipulated period.

9. In view of the above and in absence of a formal application before me; the parties having put in written submissions based on the trial court's judgment; it is my considered view that if the parties are of the view of pursuing the matter without filing a formal application this matter should be forwarded to the Hon. Lady Justice Farah Amin for hearing and final determination on the issue of costs.

10. The upshot is that the submissions as are now before this court should be urged before Hon. Lady Justice Farah Amin. The Deputy Registrar to set a date when Honourable Lady Justice Farah Amin will hear the oral submissions on costs as per judgment. Each party to bear its own costs.

It is so ordered.

Dated, signed and delivered at Nairobi this 1st day of **November, 2018**.

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J .A. MAKAU

JUDGE