



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

WINDING UP CAUSE NO. 5 OF 2013

IN THE MATTER OF THE COMPANIES ACT CAP 485

AND IN THE MATTER OF JETLINK EXPRESS LIMITED

RULING

1. On 27th July 2016 the Court ordered the Winding up of the Company. Prior to the Order for Winding Up one of the Supporting Creditors, namely Mexican CRJ filed and made an application for an “alternative “ Costs Order. In this case the Application sought the following Orders:

“THAT an application be allowed that the Officers and Directors of the Company be ordered and/or compelled to pay the costs of the Supporting Creditor”

2. During the course of Hearings on the Petition and in particular on 29th June 2015, the Company through its Advocates asserted that it was not indebted to the Petitioning Creditor nor any of the Supporting Creditors. The conduct of the Company and those directing it was such that it was perceived to have lengthened the proceedings causing the other Parties to incur additional time and costs. The Company’s arguments and submissions form part of the Court record and are repeated in the Judgment where relevant.

3. As stated, the Supporting Creditor, Mexican CRJ filed its Written Submissions on 23rd July 2015. In addition to the Submissions on the Petition and in response to the Company’s Submissions they also filed further submissions and also again made an Application for the Costs of the insolvency proceedings to be paid by the Officers and/or Directors of the Company. The Court took the view (as expressed at paragraph 52 of the Judgment) that the seriousness of such an application meant it could not be dealt with summarily. The Court Ordered that the Directors be given Notice of the Application. At the time the Company objected to the Submissions being filed. Not because of the content specifically but because it was “*a second bite at the cherry*”. Others might consider that a right of reply.

4. Paragraph 61 of the Judgment states that the ‘application before the Court to consider an alternative costs order’ was adjourned. The Court also Ordered that the Judgment be served upon the Directors. For several months thereafter there was no response. Mexican CRJ then made an Application for Substituted Service, in other words that Captain Elkana Aluvale and Captain Kiran Patel be served by advertisement in a National Newspaper. That did prompt a reaction. The firm of Echessa & Bwire Company Advocates served 2 Notices of Appointment for the Directors. None was filed and/or placed on the Court File. The two Directors then filed an application under Certificate of Urgency for an Order to prevent the substituted service. The Court gave directions. The Directions were not complied with. The Application was listed for Hearing on 9th December 2016. In the event the Directors have now been served with the

Application for an alternative order for costs.

1. In response to the Application, both Directors have filed a preliminary objection. In summary the Preliminary objection asserts that the Court has no jurisdiction to make the Orders sought. The Lateness of the objection brings to mind the lament of the Court of Appeal on delay **in *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd Civ App No 9 of 1969EALR 696***.

5. It is asserted in objection that the Court in functus. It is obvious from those Submissions that the authors of the Preliminary Objection did not take the time to read the Judgment delivered on 27th July 2016. That Judgment specifically and expressly adjourned the question of costs. Further, it is said the Directors are not Parties because there is “no application” for joinder. Again,, that statement demonstrates an ignorance of the intervening events, notwithstanding that the Company was represented at the hearing on 5th September 2016, the Court heard oral argument at length. It is recorded that there was an order for joinder.

6. This is a matter that can be decided on first principles. The Court has a wide discretion to make the appropriate order for costs. That jurisdiction emanates from Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 as well as Section 27 of the same Act. The provide:

Section 27:

27. (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

Section 1A

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the Act.

Section 1B

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims –

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and....

Section 3A. *Nothing in this Act shall limit or otherwise affect the inherent power of*

the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

7. In the circumstances the Preliminary objection is misconceived and dismissed with costs.

8. Leave to Appeal Granted.

Order accordingly,

FARAH S. M. AMIN

JUDGE

Signed and Delivered on the 17th day of February 2017.

In the Presence of:

Court Assistant: Mr Keplalah

See attached attendance list.