



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

WINDING UP CAUSE NO. 12 OF 2013

IN THE MATTER OF WINDING UP OF KARUTURI LIMITED

And

IN THE MATTER OF COMPANIES ACT, CAP 486 LAWS OF KENYA

RULING

1. ICICI Bank Limited (the Applicant) is one of the Appellants in Civil Suit Appeal No.284 of 2015 (**ICICI BANK & ANOTHER VS. KARUTURI LIMITED & 4 OTHERS**) (the Appeal) in which Karuturi Limited (in liquidation) (hereafter Karuturi) is one of the Respondents.

2. The Applicant has through a Notice of Motion dated 13th October 2016 sought the Leave of this Court to proceed with the Appeal against Karuturi which was placed under liquidation on 30th March 2016. That Appeal, the Court is told, comes up for hearing on 20th February 2016.

3. The Parties to this Application seem to agree with the Ruling of Ochieng J. made on 11th July 2016 that the law applicable to this cause is The Companies Act, cap 486 (now repealed). For that reason the Notice of Motion is properly brought under the auspices of Section 228 of The Companies Act.

4. Section 228 of The Companies Act reads:-

“When a winding-up order has been made or an interim liquidator has been appointed under section 235, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose”.

5. Under these provisions, a Party intending to proceed with an Appeal against a Company in Receivership or Liquidation must seek the sanction of The Winding Up Court (see the court of Appeal decision in **KIRTESH PREMCHAND SHAH VS. TRUST BANK LIMITED** [2007] eKLR). In that Decision the Court of Appeal states the rationale for the Provisions of Section 228,

“Without indulging in any comprehensive discourse on the subject, we think the rationale for the provisions of the section was to ensure that the court, the acknowledged neutral arbiter of disputes, takes control of the disabled commercial entitles and ensures justice and fairness to all creditors, whether secured or unsecured, and the contributories. That is why the liquidator must answer to the court for all his activities as he owes a statutory duty to the creditors and the contributories”.

Put differently, the purpose for leave is to ensure that the assets of a Company in liquidation are administered for the benefit of all creditors (**Charles and Morse on Company Law 14th Edition 1991**)

6. The requirement is also an acknowledgement that a critical role of a Liquidator is the orderly winding up of the Company and this role should not be distracted by a multiplicity of energy sapping, time consuming and expensive litigation. Not to avail that protection to the Liquidator could result in some Creditors being disadvantaged.

7. The grant of leave is not a matter of course but discretionary. Each application will be considered on its own circumstances and facts. It is suggested that some of the matters relevant to grant of leave are:-

“.....the amount and seriousness of the claims; the degree and complexity of the legal and factual issues involved; the stage to which the proceedings, if commenced, have progressed; the risk that the same issued would be relitigated if the

claims were to be the subject of a proof of debt; whether the claim has arguable merit; whether proceedings are already in motion at the time of liquidation; were to be the subject of proof of debt; whether the claim has arguable merit; whether proceedings are already in motion at the time of liquidation; whether the proceedings will result in prejudice to creditors; whether the claim is in the nature of a test case for the interest of a large class of potential claimants; whether the grant of leave will unleash an avalanche of litigation; whether the cost of the hearing will be disproportionate to the Company's resources; delay and whether pre-trial procedures such as discovery and interrogatories are likely to be required or beneficial”(https://briferrer.com.au)

8. Surya Holdings Limited (Surya) and Rhea Holdings Limited (Rhea) are opposed to the grant of Leave and have voiced their Opposition in an Affidavit sworn on 7th November 2016 by Sai Ramaterishna Karuturi who is the Chairman and Managing Director of both Companies.

9. The gist of the Opposition, in brief, is that after the Ruling of Gikonyo J. made on 14th July 2015 (and which is the subject of the Appeal) the Applicant chose to vote in a Creditors meeting held on 21st July 2016 and thereby surrendered its security in terms of Rule 129 of The Companies (Winding Up) Rulings. It was submitted by Counsel for Surya and Rhea that having done so ICICI Bank is precluded from insisting on the Appeal. Rule 129 of The Companies (Winding Up) Rules reads:-

“(1) For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof, or in a voluntary liquidation in such a statement as is hereinafter mentioned, the particulars of his security, the date when it was given and the value at which he assesses it, and shall be entitled to vote only in respect of the balance, if any, due to him after deducting the value of his security.

(2) If he votes in respect of his whole debt, he shall be deemed to have surrendered his security, unless the court, on application, is satisfied that the omission to value the security has arisen from inadvertence”.

There is however no contention that the Applicant was one of the parties in the litigation and Ruling of 14th July, 2015 that gave rise to the Appeal. Further, it is not in dispute that the Applicant is aggrieved by that Ruling and preferred the Appeal against it.

10. The simple view I take of the Objection is that Surya and Rhea have raised a substantive issue as to the effect of the Applicants vote in the Winding process of Karuturi. But whether that post-ruling conduct precludes Applicant from participating in the Appeal is an issue that is better taken up before the Court of Appeal. And this Court is not told what prejudice Rhea and Surya may suffer if the matter is left to the Court of Appeal.

11. For purposes of considering whether leave should be granted, this Court notes that the liquidators of Karuturi do not oppose the grant of Leave. In addition, ICICI Bank is not the only appellant in the Appeal and Leave to proceed has already been granted to a co-Appellant (CFC Stanbic Bank Limited) and so the Appeal would have to proceed anyway. Therefore, permitting ICICI Bank to proceed with the Appeal may not require the Liquidator to expend substantially more time, energy and/or money in the Appeal than it would have done.

12. Another factor that favours the grant of leave is that the litigation between the Parties has been ongoing for sometime and certain matters are now at an Appeal stage. It seems fair that the Applicant should be given an opportunity to test the correctness or otherwise of a decision it is challenging.

13. For the reasons given I allow the Application of 13th October 2016 and the leave sought is hereby granted. Costs in the cause.

Dated, Signed and Delivered in Court at Nairobi this 16th day of February, 2017.

F. TUIYOTT

JUDGE

PRESENT:

Nyaribo for Plaintiff

Kiruru h/b for Owino for Surya & Rhea

Alex - Court Clerk