



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

WINDING UP CAUSE NO. 23 OF 2009

IN THE MATTER OF LES BELLES SAUVAGES LIMITED

AND

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

PAUL JAMES SAVAGE.....APPLICANT

VERSUS

LESBELLES SAUVAGE LIMITED (IN LIQUIDATION).....RESPONDENT

AND

MONA DUALE.....INTERESTED PARTY

RULING

1. Expressed to be brought under the Provisions of Rule 7 of The Companies Winding Up Rules and Section 228 of The Companies Act is a Notice of Motion dated 11th July 2016 in which Paul James Savage (the Applicant) seeks the following Prayers:-

- 3) That this Honourable Court be pleased to grant Paul James Savage, the Applicant herein, leave to file a suit against the Respondent.
- 4) That the Respondent be restrained through the Official Receiver from selling LR No.. Kwale/Diani Beach Block 783/3 pending the hearing and determination of this suit.
- 5) That the costs of application be in the cause.

2. In the Affidavit sworn on 11th July 2016, the Applicant states that he is the beneficial owner of Kwale/Diani Beach Block 7831/3 (the Property) which is registered in the name of the Respondent. He explains that he is the beneficial owner thereof by virtue of the fact that he contributed the entire purchase price of the Property being Kshs.8,500,000/=. In that lengthy Affidavit the Applicant has annexed documents which he argues will prove that, indeed, the Property was bought from his share of funds from the sale of his Mother's house which he inherited.

3. This Court was asked to find that, on the strength of the holding in **Omoke Vs. Omoke, Court of**

Appeal at Kisumu, Civil Appeal No.10 of 1981 (unreported) (**LES BELLES SAUGAGES LIMITED**) (in liquidation) the Respondent holds the Property upon a resulting Trust in favour of the Applicant.

4. That Application is resisted by both the Official Receiver and the Interested Party. Together, the two, take the position that this Honourable Court lacks jurisdiction to hear and determine this matter. Secondly that the Application raises issues which have already been determined by Court. Lastly that is not explained why it has taken 6 years after the Winding Up Order was issued for the present Application to be brought.

5. The Court has considered the rival positions taken by the parties herein in their Affidavits, replies and submissions and the initial issue for my determination is whether I have jurisdiction to entertain the application in the first place.

6. It was argued by the Interested Party that in so far as the application is brought under the Provisions of Rule 7(i) of The Companies (Winding Up Rules) and Section 228 of The Repealed Companies Act, this Court has no jurisdiction to hear and determine this matter. The Interested Party seeks to rely on the decision in the Winding Petition No. 7 of 2016, **In the matter of Blue Bird Aviation Limited** in which Ogola J. stated as follows:-

“14. Perhaps what this court ought to note is that as it stands now there are no procedural rules and guidelines with regard to the question of winding up, or as provided in the Insolvency Act No 18 of 2015, for the liquidation of companies. By Legal Notice No 1 of 2016, which effectively repealed the provisions under Parts VI-IX of the Companies Act, Cap 486 and particularly Section 342 of the said Act, there wasn't in place procedures that the Court would rely on in the event of a petition for liquidation, or a winding up petition. Further, the winding up rules were repealed by dint of Section 1023(4) of the Companies Act No 17 of 2015. The provisions of Section 7(1) under the Sixth Schedule of the Constitution may, on the question of *lacunae* in the law, be used to interpret and provide a resolution to the impasse. At Section 7(2)(a) & (b) of the Sixth Schedule, it is provided that if there is a conflict with regard to any law that was in existence before the promulgation of the Constitution which assigned responsibility of a matter to a particular state organ, and which responsibility is thereafter under the constitution assigned to a different state organ, then it would be that the provisions of the Constitution would prevail in the circumstances.

15. In the present instance, and in consideration of the provisions of Sections 7(1) as read together with Section 7(2)(a) & (b) of the Sixth Schedule, the provisions of the Companies Act No 17 of 2015 and the Insolvency Act No 18 of 2015 would prevail. However, there are no procedural rules that would enable, or invoke the Court's jurisdiction to hear and determine the dispute since the regulations are yet to be enacted.

7. As a starting point it seems accepted by the parties that since the Notice of Motion is presented in proceedings that were commenced prior to the coming into force of the Insolvency Act, it is correctly brought under the auspices of the Repealed Act. This acceptance would be borne out by the Transitional and Saving provisions of the Insolvency Act (See Section 734 of The Insolvency Act).

8. The Decision in **The Matter of Blue Bird Aviation Limited** (supra) is of persuasive nature to this Court but I prefer to reach a different result. Just like Amin J. held in Winding Up Cause No. 3 of 2016 **In the matter of Uchumi Supermarkets** Ltd, I would find that even in the face of express repeal to the Winding Up Rules and lack of Insolvency Rules, it seems logic and sensible that the Court should proceed, for the time being, under the old procedure.

9. The Power of Court to grant leave for the commencement of an action against a Company in which a Winding Up Order has been made or an Interim Liquidator has been appointed was found in Section 228 of The Repealed Companies Act and provides as follows:-

“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”.

As stated earlier this would be the Law applicable to this matter by dent of the Transitional Provisions of Section 734 of The Insolvency Act.

10. It is the anticipation of the Insolvency Act, indeed a requirement, that the Rules committee would make insolvency Procedure Rules that would replace the revoked Winding Up Rules. Section 697 (1) of The Act provides:-

“(l) The Rules Committee, with the addition of the Official Receiver, may make rules providing for either or both of the following:

(a) the procedure of the Court under this Act;

(b) appeals to the Court of Appeal from decisions of the Court under this Act”.

The Rules had not been made by the time the current Motion was presented.

11. This Court is aware that in reaching its decision in The matter of **Blue Bird Aviation Limited** (supra), the Court had drawn inspiration from the Supreme Court decision in **Civil Application No. 29 of 2014 Mumo Matemu Vs. Trusted Society of Human Rights Alliance and 5 Others** [2014] eKLR, in which the Court held:-

“This is a clear lacunae in the law that fails to protect the legal interests of an NGO or its creditors upon deregistration, but one that also threatens the role of NGO’s in public interest litigation and in effect, social change and human rights defense through litigation. What is to become of public interest where an NGO in the course of litigation in a matter affecting the larger citizenry, is deregistered? Who then protects the public concern raised and defends the ongoing matter? This clearly is an issue that needs resolve either through legislative initiative and reconsideration by Parliament, through an amendment of the appropriate law or a proper challenge of constitutionality in line with the provisions of Articles 22 and 258 of the Constitution.” (Emphasis added).

12. However I prefer to read what the Supreme Court was saying somewhat differently. It may be true where there is a clear lacunae in the Law caused by lack of Legislation, a Court may not be in a position to always provide a panacea to the problem created by the lacunae. But in my view that would in respect of Primary legislation. Distinguished, in the Cause before me, there is primary legislation (Section 228 of the Repealed Companies Act) that empowers a Court to grant leave. What is lacking is the procedural framework in which the court is to exercise such power because as at the date of the Motion, the Rules Committee had not made the Rules as required by Section 697 (1) of the Act. Is the Court to concede that such a lacunae should hamstring it from acting on a power expressly granted by an Act of Parliament? I think not! Because, as it has been said before, Procedural Rules are a handmaiden of Substantive law and to surrender to the argument that this Court cannot act on a power granted to it by Primary Legislation simply because the Rules Committee has not carried out its duty is to accept that the intention of Primary legislation can be defeated because of lack of Procedural Rules. This could lead to an injustice to those who would want to seek to enforce the substantive legislation. In so far as the Respondents have not demonstrated that the procedure adopted by the Applicant prejudices them in any way, this Court will not fault that procedure. That does it for the first objection.

13. This Court has recently had occasion to restate the factors to be considered by Court in granting leave under the provisions of Section 288 of the Companies Act. In Winding Up Cause No.12 of 2013, **IN THE MATTER OF WINDING UP OF KARUTURI LIMITED**, I held as follows:-

“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)

14. It is true that in resisting the Winding Up Order, the Applicant had argued, as he still does, that he is the beneficial owner of the subject property by virtue of having contributed the entire purchase price of kshs.8,500,000/=. In an Affidavit sworn on 30th November, 2009 in opposition to the Winding Up Petition, the Applicant had deponed as follows:-

37. THAT the said purchase price came partly from my salaries which had been paid into the petitioner’s New York account and partly from my inheritance from my mother who passed on in 2006, which was also paid to the Petitioner’s New York account and subsequently brought to the petitioner’s dollar account in Nairobi.

38. THAT I am advised by the company’s advocates, Messrs. Kamau Kuria & Kiraitu, and I verily believe the same to true that –

(a) where a person contributes the purchase price of a property which is transferred to another, the latter holds that property upon trust for the person who paid the purchase price;

(b) In view of the fact that the purchase price of the cottage came from me, the company holds the same upon trust for me;

(c) even if the respondent were wound up, I would still have the right to obtain a declaration against the liquidator that the company holds the said cottage upon trust for me.

15. It is also true as pointed out by the Interested Party and the Official Receiver that the Winding Up Court made the following finding in respect to that argument by the Applicant:-

“Although the Respondent claims that he bought the subject matter as an investment for himself, the abstract of title exhibited as annexure “PSJ 6” of his Affidavit in opposition clearly shows that the lease over the same is in the name of Les Belles Sauvages Limited. Applying the Principle of distinction between a company and its members, as set out in the celebrated case of **SALOMON VS. SALOMON** [1997] A.C. 22 cited in the Respondent’s authority No.7 in his list of authorities, the asset in issue belongs to the company and not to either of the contestants. The Respondent’s claim to have purchased it singly, without the contribution of the Petitioner has not been proved, which means that the alleged trust in his favour has also not been proved”.

In view of this holding the argument by the Interested Party and Official Receiver that the Applicant seeks leave to mount an action on matters which are res judicata may therefore not be without some force.

16. On the other hand, there is an argument by the Applicant that the Winding Up Court did not determine the issue of ownership of the subject property with finality. This may not be a frivolous argument if one was to take a view that while the Winding Up Court could deal with the question of Winding Up the Company it could not make a final finding in respect to a dispute between the Applicant and the Company over the true ownership of the subject property. In this regard it would seem that the Applicant had indeed reserved his right to mount this challenge in the proper forum. Hear what he says in paragraph 38 (c) of his Affidavit of 30th November 2009;

“38. That I am advised by the Company’s advocates, Messrs. Kamau Kuris & Kiraitu, and I verily believe to be true that –

a. ,,.,.,,

b. ,,.,.,,

c. Even if the respondent were wound up, I would still have the right to obtain a declaration against the liquidator that the company holds the said cottage upon trust for me”.

17. This Court takes the position that whether or not the issue of ownership of the subject matter was determined with finality is a matter that can be exhaustively argued in the action sought to be brought and is not a matter which this Court should take into account on whether or not to grant leave.

18. The Winding Up of the Company was ordered by Court on 21st October 2010 after finding that it was no longer tenable for the objects of the Company to be realized as the relationship of the only two Directors and Shareholders of the Company had broken down irretrievably following disagreements and acrimony which eventually led to a matrimonial divorce between the two. The Winding Up was not forced on the Company by Creditors. For this reason there are no creditors who could be prejudiced by the claim sought to be mounted by the Applicant and the Applicants intended action may therefore not invite an avalanche of litigation. This Court is of the view that the Applicant should be given an opportunity to test his claim in the proper forum (ie. the Environment and Land Court).

19. Yet in reaching the decision to exercise my discretion in favour of the Applicant, it was not lost to the Court that the Application had been brought fairly late in the day, about five (5) years after the Winding Order was made. The Court nevertheless excuses that delay because it is not argued by the Interested Party or Official Receiver that the intended action is caught up by The Limitation of Actions Act.

20. There is now the question whether the Court should grant any orders restraining the sale of the subject property pending the filing of intended suit by the applicant. The Order sought is in the nature of a temporary Injunction. Therefore, the remedy sought is equitable in nature.

21. However the request by the Applicant faces an immediate difficulty because, as submitted by the Official Receiver, the Applicant has not given an explanation why it has come to Court about five years after the decision of Judge Mugo to Wind Up the Company. Even if it is accepted that a Receiver to the Company was only appointed on 11th June 2015, it is not explained by the Applicant why it took him another 12 months to present the Application. Equity aids the vigilant. Whether the delay is taken to be 60 months or 12 months, the Applicant has not been agile and does not find favour in a Court of Equity.

22. The outcome is as follows:-

a. The Leave sought in Prayer (3) of the Notice of Motion of 11th July 2016 is hereby granted. Suit shall be filed not later than 45 days hereof.

b. Prayers (3) and (4) of the said Motion are dismissed.

c. There shall be no order on costs as the Motion has partly succeeded and partly failed.

Dated, Signed and Delivered in Court at Nairobi this 7th day of March, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Karanja for Applicant

Kiplum for Kumah for Interested party

Alex - Court Clerk