



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
WINDING UP CAUSE NO. 12 OF 2013
IN THE MATTER OF THE WINDING UP OF KARUTURI LIMITED
AND
IN THE MATTER OF THE COMPANIES ACT, CAP 486 OF THE LAWS OF KENYA
RULING

1. This ruling is in relation to only one issue; the law that is applicable to these winding-up proceedings.
2. On the one hand, the Company submitted that it is the Insolvency Act 2015 which was applicable, whilst on the other hand, the petitioner submitted that it is the Companies Act which was applicable.
3. These winding-up proceedings were commenced by a petition which was lodged in court on 7th August 2013.
4. On 30th March 2016 the Court ordered that the Company, **KARUTURI LIMITED**, be wound-up.
5. Thereafter, on 5th April 2016, the Court appointed Joint Receiver Managers, namely **MUNIU THOITHI** and **KURIA MUCHIRU**.
6. The Insolvency Act 2015 was enacted in September 2015, and it is a statute which was intended to amend and consolidate the law relating to the insolvency of natural persons, and incorporated and unincorporated bodies. The statute was to provide for and to regulate the bankruptcy of natural persons, and also to provide for the liquidation of incorporated and unincorporated bodies.
7. The purpose and intent of the new law was to provide alternative procedures to both bankruptcy of insolvent natural persons, and the liquidation of incorporated and unincorporated bodies, so as to enable the affairs of such persons or bodies to be administered for the benefit of their creditors.
8. The new law brings into play the person called an **INSOLVENCY PRACTITIONER**, who is then authorized to be the liquidator (*whether provisional or substantive*) or the administrator of a company or a supervisor of a Voluntary Arrangement which had been duly approved.
9. It is a requirement under the Insolvency Act that the Insolvency Practitioner can only act in that capacity after the Official Receiver had duly authorized him to do so.
10. It therefore follows that if the Insolvency Act was applicable to these proceedings, the

Receiver/Managers ought to have obtained the requisite authority from the Official Receiver to act as Insolvency Practitioners.

11. It is common ground that even though the Insolvency Act came into operation, there were transition provisions, which made it clear that specified provisions of the Companies Act would continue to apply, to the exclusion of the Insolvency Act.

12. Section 734 (2) of the Insolvency Act reads as follows;

“Despite the repeal of the Companies Act, or of parts VI to IX of that Act, those Parts, and any other provisions of that Act necessary for their operation, continue to apply, to the exclusion of this Act, to any past event and to any step or proceeding relating to that past event, even if it is a step or proceeding that is taken after the commencement?”.

13. By dint of section 734 (1) of the Insolvency Act the phrase “past event” is defined to include;

i) the making of an application to the court for a winding up order in respect of a company; and

ii) the appointment of a liquidator or provisional liquidator in respect of the company.

14. In the case before me, the making of the application for the winding up of the company was done prior to the enactment of the Insolvency Act.

15. However, the appointment of the Receiver/Managers was made after the Insolvency Act had taken effect.

16. Does that mean that, whilst the order for the winding up of the company was made under the Companies Act, the appointment of the Receiver/Managers was under the Insolvency Act?

17. All the parties appear to be in agreement that the pronouncement by Ogola J. in **IN THE MATTER OF THE WINDING UP of BLUE BIRD AVIATION LIMITED, W.C. No. 7 of 2016** constituted an accurate interpretation of the law.

18. Although the parties agree that the learned Judge had correctly restated the legal position, their respective interpretations of the ruling was different.

19. This is what Ogola J. said;

“If the winding up proceedings had been commenced before the commencement of the new laws, it would have been deemed to be a past event or proceeding relating to a past event. But for the reason that the event that has been commenced was after the commencement of the new laws, viz the Companies Act No. 17 of 2015 and the Insolvency Act No. 18 of 2015, then the provisions of Section 734 (1) and (2) of the Companies Act No. 17 of 2015 would be inapplicable as a salve for the defectiveness and deficiencies of the petition”.

20. In order to fully appreciate the ruling, it is important to note that it was made in relation to an application dated 15th March 2016.

21. Considering that part VI of the Insolvency Act No. 18 of 2015 was operationalised on 18th January 2016, it meant that the application was brought when the Insolvency Act was already in force.

22. However, the petition had been premised on the Companies Act (*now repealed*) as read together with the Insolvency Act 2015.

23. The court held that the;

“provisions of the Companies Act No. 17 of 2015 and the Insolvency Act No. 18 of 2015 would prevail?.

24. The court proceeded to strike out the petition, because it had been founded upon quicksand.

25. In the case before me, the petition was lodged before the commencement of the new laws. Therefore, in line with the decision in **IN THE MATTER of THE WINDING UP of BLUE BIRD AVIATION LIMITED W.C. No. 7 of 2016**, these proceedings were founded upon solid ground.

26. But as the company has pointed out, it is not questioning the petition of itself. The company is questioning the appointment of the Receiver/Managers.

27. The said appointment was made on 5th April 2016. Obviously, that was after the new laws became effective. Does that mean that the appointment of the Receiver/Managers had to be on the basis of the new laws?

28. On a *prima facie* basis, the answer would appear to be in the affirmative. However, the matter is not so straight forward.

29. In order to appreciate the situation, I will start at the beginning. The petition to wind up the company was filed in court in the year 2013.

30. However, it is not until 30th March 2016 when the court granted orders, allowing the petition. In other words, the order to wind up the company was made after the new laws had taken effect.

31. Nonetheless, the company and all creditors who participated in the court proceedings, supported the winding up of the company. That means that even though the petition to wind up the company was a past event, the order to wind up the company took place when the new laws were already operational.

32. Immediately after the court had ordered that the company be wound up, the petitioner made an application for the appointment of a receiver/manager.

33. The reason why that application was brought to court is that the order to wind up the company had created a vacuum in the said company. The directors were effectively removed, yet, as the petitioner correctly stated, the company was;

“...a going concern, as it is a flower farm and activities have to continue, including management, works by workers and the security?.

34. In effect, the need to have Receiver/Managers appointed arose directly from the winding up order.

35. Therefore, in my considered opinion the order for the appointment of the Receiver/Managers fell within the ambit of Section 734 (2) of the Insolvency Act, which provides thus;

“Despite the repeal of the Companies Act or of Parts VI to IX of that Act, those parts, and any other provisions of that Act necessary for their operation, continue to apply, to the exclusion of this Act, to any past event and to any step or proceeding, following or relating to that past event even if it is a step or proceeding that is taken after the commencement?.

36. In the light of that express provision, Parts VI to IX of the Companies Act and any other provisions of that Act, which are necessary for their operation, do continue to apply, to the exclusion of the Insolvency Act, to any past event and to any step or proceeding preceding, following or relating to that past event.

37. The appointment of the Receiver/Managers is a step following or a step relating to the past event: therefore, even though it is a step which was taken after the commencement of the Insolvency Act, the applicable law is the Companies Act, to the exclusion of the Insolvency Act.

DATED, SIGNED and DELIVERED at NAIROBI this 11th day of July 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Kakande for Mrs. Abdala for the Liquidator

Miss Mulindi for Odhiambo for the Petitioner

Omino for Ogunde for the CFC Bank

Nyaribo for the ICICI Bank

Miss Oguto for Polythene Industry

Atonga for Elson Plastics Ltd

Ahmed for Shaghai Hitech

Nyangweso for Kenya Revenue Authority

Miss Akwale for Maina for Agrichem & Tool Ltd

Miss Akwale for Maina for Lord's Health Care

Ambala for David Omega

Wandabwa & Owino for Contributors

Collins Odhiambo – Court clerk.