REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL, TAX & ADMIRALTY DIVISION

WINDING UP CAUSE NO 23 OF 2009

In the Matter of

LES BELLES SAVAGES LTD

AND

In the Matter of

THE COMPANIES ACT CHAPTER 486 OF THE LAWS OF KENYA

RULING

Appointment of receiver

[1] Before the Court is the application by the Plaintiff dated 23rd January 2015 expressed to be brought pursuant to the provisions of Order 9 Rule 9 of the Civil Procedure Rules, Sections 1A, 113 (sic) 3A of the Civil Procedure Act and Section 231 of the Companies Act. The Applicant seeks for the following orders*inter alia;*

a. **THAT the firm of M/S Kounah& Company Advocates be granted leave to come on record for the Applicant in the suit;**
b. **THAT the Honourable Court be pleased to appoint the official receiver to wind up the company known as Les Belles Sauvages Limited pursuant to the winding up order made on 21st October 2010.**
c. **THAT cost of this application to be provided for.**

[2] The application was premised on the following grounds:-

a) That the firm of M/S Kounah& Co Advocates was instructed to come on record for the applicant and wrote to the out-going firm of M/S Rustam Hira Advocates with a view of recording consent for the coming on record, but the letter was not responded to.

b) Following the ruling of Mugo, J delivered on 21st October 2010, the appointment of an official receiver is still outstanding.

[3] The application was supported by the affidavit of Mona Hussein Ali Duale sworn on 23rd January 2015. The deponent averred that there are no outstanding obligations or pending fees payable to the firm of M/S Rustam Hira, and, therefore, failure to allow the in-coming advocate to come on record would occasion the Applicant hardship and unjust loss. He also deposed to on the appeal on the decision of Mugo, J, that the Registrar had not prepared the proceedings to enable the party to proceed to appeal, and that a uncertified copies of the proceedings were missing from the Court record, further exacerbating the Applicant's already precarious situation.

[4] The Applicant filedsubmissions dated 19th March 2015, and argued that this application and matter therein were not *res judicata*, and that in any event, the present application is different from the earlier one because the Applicant is seeking the appointment of an official receiver to wind up the Company. It was further submitted that the application was pegged on the Judgment of Mugo, J delivered on 20th October 2010, which has never come to fruition and therefore, the orders sought are necessary legal process within the winding up order which are not caught up by the principle of *functus officio*, or *res judicata* as argued by the Respondent. The Applicant relied on the cases of; **MadhusudanGordhandas& Co v Madhu Woolen IndistriesPvt Ltd 3Scc 632;Winding Up Cause No 11 of 1991 In the Matter of East African Road Services Ltd** and **Winding Up Cause No 1 of 2005 In the Matter of Chetambe Estates and In the Matter of the Companies Act Between Abdul Aziz Kanji &Chetambe Estates** on the Court's authority and power to appoint an official receiver.

Respondent opposed application

[5] The Respondent filed Notice of Preliminary Objection dated 5th February 2015. It reiterated that the application as filed is *res judicata* as it raised the same issues that had been dealt with by the Court in its ruling dated 5th May 2014following the application dated 2nd March 2011. On *res judicata*, the Respondent relied on the cases of **Lotta v Tanaki [2003] 2 EA 556**, **Kenya Hotel Properties Ltd v Willisden Investments Ltd & 4 Others [2013] eKLR** and **ET v Attorney General & Another [2012] eKLR**. The Respondent also submitted that the Applicant was seeking to introduce a new cause with her application but seeking the same remedies. It was further submitted that the issue of the appointment of the official receiver had already been dealt with by the Court in the judgment of Mugo, J delivered on 21st October 2010 and by this Court on 5th May 2014, following the application dated 2nd March 2011. In positing that the plea of *res judicata* was a pure point of law, the Respondent relied upon the decision of **Omondi v National Bank of Kenya Ltd & Others (2001) KLR 579; [2001] 1 EA 177**.

[6] The firm of M/S Rustam Hira further filed the Replying Affidavit of Rustam Hira sworn on 11thMarch 2015 opposing the appointment of the in-coming firm of advocates to represent the Applicant. They contended that they are not prepared to consent to M/S Kounah& Co Advocated taking over the conduct of the matter on the basis that he is owed substantial fees. He was, however, amenable to the present advocates depositing the sum of Kshs 2,000,000/- pending the filing of the bills of costs. Rustam Hira argued that change of advocates under Order 9 Rule 9 of the Civil Procedure Rulesshall not be effected without an order of the court. He also averred that he appreciates that the letter dated 16th December 2014 written by M/S Kounah& Co Advocates to come on record to which M/S Rustam Hira replied through two (2) letters dated 9th and 16th February 2015 denying the consent until his fees had been settled. It was his contention that the firm of M/S Kounah& CoAdvocates did not respond to this request, but proceeded to filing the instant application, pursuant to Order 9 Rule 9(a).

DETERMINATION

[7] Judgment herein was passed on 21st October 2011 by Mugo, J. The Respondent being aggrieved of the judgment filed a Notice of Appeal in **Civil Appeal No Nai 61 of 2011**, which appeal is still pending hearing and determination. The Applicant filed an application dated 2nd

March 2011 which application was dismissed by this Court on 5th May 2014. The Applicant being aggrieved of the decision filed a Notice of Appeal on 8th May 2014. Under Order 9 Rule 9 of the Civil Procedure Rules any and every change of advocate which is made after judgment has been passed will only be effected upon the order of the Court either; (1) on application by a party; or (2) by consent filed between the outgoing advocate and the incoming advocate or party intending to act in person as the case may be. This application is as a result of failure of consent between the outgoing advocate and the incoming advocate. The application is, therefore, in order and withinOrder 9 Rule 9(a) of the Civil Procedure Rules. The objection by the firm of M/S Rustam Hira is on the basis of outstanding fee which he says are substantial. This fact has been denied by the Applicant at paragraph 11 of the supporting affidavit.

[8] I have said this before and I will repeat it here. Order 9 rule 9 of the Civil Procedure Rules was enacted for good policy reasons; to avoid unscrupulous clients from running away from an advocate to another so as not to pay the legal dues of those advocates. Such clients' legal and statutory obligations are recognized in law and may give right of lien over client's property or documents. However, applications under Order 9 rule 9 of the Civil Procedure Rules should also be seen within the right to legal representation or counsel of choice. Within that constitutional and statutory framework, the following information or events are important to note. The letter asking for consent to come on record was written on 16th December 2014byM/S Kounah& Co Advocates. This application was filed on 23rd January 2015 before the replies byM/S Rustam Hira replied through two (2) letters dated 9th and 16th February 2015. Although some time passed by, it may be unfair to assign delay on Mr. Hira in replying to the letter requesting for consent. But quite apart from that, it is not explained why Mr. Hira when he was confronted by this application and a supporting affidavit in which the deponent clearly stated that she owes him not fees or obligation, did not follow up on the laid down procedures in the Advocates Act and Advocates (Remuneration) Order on recovery of fees from a client;render andtax Advocate-Client bill of costs or file recovery suit thereof. The affidavit he filed does not contain any fee note orbill of costs. The court may work on presumptions, but that may not justify denying the Applicant right of counsel of choice in the absence of evidence on the right direction on recovery of fees as provided in law. It bears repeating that, there was no fee note attached to either of the two (2) letters dated 9th and 15th February 2015 by the firm of M/S Rustam Hira. He only referred n his Replying Affidavit to a figure of Kshs 2,000,000/-. Accordingly, and without impinging on Mr. Hira's right to legal fee, I think this application should be allowed, except Mr. Hira should be able to take copies of all necessary documents in the client's file for purposes of taxation or recovery of advocate-client costs. For those reasons, I allow the request for M/S Kounah& Co Advocates to come on record for the Applicant.

[9] Let me now turn to the substantive issues of the application. There are two (2) issues for determination namely;

(1) Whether the court is mandated to appoint an official receiver; and

(2) Whether the application is *res judicata*.

Res judicata

[10] The Respondent argued that this application is similar to the one dated 2nd March 2011 and which this court dismissed for lack of merits. Therefore, the current application is a re-litigation of matters which were dealt with and determined in the earlier application. to them it offends section 7 of the Civil Procedure Act and should be dismissed. They cited ample judicial authorities on the subject. The Applicant was of the contrary view. She submitted that following the winding up order, the court will send the notice to the official liquidator, i.e. the official receiver to take charge of the company and the official liquidator shall follow through on the liquidation as provided for under the Companies Act.Therefore, to the Applicant,appointment of the official receiver was never determined in the earlier application. Their request is meritorious

and properly before the court.

[11] I wish to say the following on the subject of res judicata. *Res judicata*is provided for in Section 7 of the Civil Procedure Act. There are occasions where *res judicata* and *functus officio* are argued as if they are synonymous. There is a clear distinction between the two concepts. See **Nairobi HC Misc App No 571 of 2011; (2014) eKLR**, where the court stated as follows;

> **"Nonetheless, it is profitable to note that the concept of functus officio should not be confused with the doctrine of res judicata although both have an element of prohibition of exercise of authority over the subject of the suit. The former prohibits exercise of authority by any court in the same suit the court has determined completely, while the latter relates to a situation where there are two suits; a current suit, and another previous; the issues in the current suit must have been directly and substantially in issue in the previous suit between the same parties, or litigating under the same title, and the issues had been determined by a court of competent jurisdiction."**

[12] The two concepts, that is to say, res judicata and functus officio share a common objective; to bring finality to litigation.The doctrine of res judicata ensures that parties who have gone through litigation are not subjected to the same legal tussle again. See the cases referred to hereinabove, i.e.**Lotta v Tanaki** (supra) and **Kenya Hotel Properties Ltd v Willisden Investments Ltd & 4 Others** (supra). See also the case of **ET v Attorney General & Another**(supra) where it was held that;

> **"The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action as to seek the same remedy before the court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which had been resolved by a court of competent jurisdiction."**

For emphasis see also the case of **North West Water Ltd v Binnie & Partners [1990] 3 ALL E.R.547** at 556, Lord Drake, J held;

> **"Where an issue had been decided in a court of competent jurisdiction, the court would not allow that issue to be raised in a separate proceeding between the different parties arising out of identical facts and dependant on the same evidence since, not only was the party seeking to re-litigate the issue prevented from doing so, by virtue of issue estoppel but it would also be an abuse of process to all, the issue to be re-litigated."**

And again the case of **Civil Appeal No. 36 of 1996 Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others,** the Court of Appeal held *inter alia*;

> "**There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for a rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of a similar nature that is further, wider principles of res judicata apply to applications with the suit. If that was not the intention we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed."**

Further elucidation is fpound in the case of**Fidelitas Shipping Co Ltd v V/O Exportchleb[1965] 2 All ER 4**Lord Denning held *inter alia*;

> **"The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that**

issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances"

And the chain of judicial authorities may be endless on this subject. But what I have stated above will suffice for the sake of the decision of court.

[13] Now, the correct question to ask is this: - Is this application similar to the earlier one dated 2nd March 2011? On 5th May 2014, this court made a determination on the Applicant's application dated 2nd March 2011, which orders of appointment of a receiver other than the official receiver were sought. The application was made pursuant to section 231 of the Companies Act. The Court dismissed the said application because it did not meet the threshold of the law and stated as follows;

"Similarly, the application before me, although expressed to be under Section 231 of the Companies Act, does not satisfy the legal threshold or even pretend to show any peculiar circumstances exist which are apt for the court to exercise its discretion under Section 231 of the Companies Act."

[14] The current application is styled to have been brought under section 231 of the Companies Act. But, it seeks for appointment of official receiver to wind-up the company. Appointment of official receiver is provided for under section 230 and despite the wrong citation of the enabling provision, there is little difficulty to see it relates to section 230 of the Companies Act. I will treat it as such within the principles of justice enshrined in the Constitution. Under section 230 of the Companies Act, the law clearly designates that ''Official Receiver''for purposes of winding up a company is the ''Official Receiver'' attached to the court for bankruptcy purposes. To me, unless otherwise ordered by the court, section 230 applies as a matter of law so far as winding up a company by the court is concerned. The earlier application was under section 231 and was determined within the law applicable. On the other hand, application of Section 230 is a different matter altogether; it designates the official receiver and there is no order to the contrary which exists in these proceedings. The refusal by the court to appoint a person other than the official receiver to act as the receiver of the company was under section 231 and cannot affect the law under section 230 of the Companies Act. As the law stands, I do not think any person can successfully argue that the Applicant ought to have brought the whole of his case, including appointment of official receiver, in the earlier application. As such, this application is not *res judicata.* I should state that, once the winding up order has been made by the court, there are consequences which follow and are provided for under the Companies Act unless there is a stay by the court. I may refer for instance to sections 227, 230 and 236. I am not aware of any stay order by this Court or the Court of Appeal, or at least none was shown or referred to me. Therefore, parties shouldprogress the matter to the next level and utilize section 227 and 236 of the Companies Act. But for record purposes, I only re-state the law that for purposes of the Companies Act so far as it relates to winding up of companies by the Court, the ''Official Receiver'' by law is the ''Official Receiver'' attached to the court for bankruptcy purposes. This case is no exception from that position of the law and specifically order that in this case, the ''Official Receiver'' by law is the ''Official Receiver'' attached to the court for bankruptcy purposes. The position I have re-stated is not a new judicial act I am performing. It is a matter of law which naturally should take its course in the absence of appointment of a receiver other than the official receiver. The question of functus officio or res judicata does not arise here. I note that parties herein have engaged their respective rights of access to justice and have taken copious legal steps thereto, and that is alright, except I think the crux of the matter has been wholly overshadowed in the process. Let parties pursue the law as is and very little difficulties will be encountered. As I have resolved the issue of official receiver, I hope the matter will progress. I allow the application but, I will not give any order on costs. Each party shall bear own costs. It is so ordered.

Dated, signed and delivered in court at Nairobi this 11th day of June 2015.

F. GIKONYO

JUDGE