**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL DIVISON**

**WINDING UP CAUSE NO 23 OF 2009**

**IN THE MATTER OF LES BELLES SAVAGES LIMITED**

**AND**

**IN THE MATTER OF THE COMPANIES ACT, CHAPTER 486, LAWS OF KENYA**

**RULING**

**Appointment of a receiver after judgment**

[1] The application before me is the one dated 2nd of March, 2011 which seeks for the following orders:

1. ***THAT pursuant to the judgment delivered on 21st October, 2010, Orlando costa Luis be appointed Receiver of the Company.***
2. ***THAT this Honorable Court deem fit to approve such appointment.***
3. ***THAT this Honorable Court deem fit to make provision for the remuneration of the said Receiver.***
4. ***THAT the costs of this application be provided for.***

[2] The application is premised upon the judgment that was delivered by M.G. Mugo J on 21st October, 2010. The major reason for applying is that; whereas the learned judge ordered that the company be wound up under the provisions of the Companies Act, Chapter 486 of the Laws of Kenya, she also directed the parties to consider their position and appoint a suitable person as the Receiver for the court's approval. Pursuant to that order, the Applicant proposed to the Respondent that Orlando Costa Luis, Certified Public Accountant to be appointed as a Receiver. Despite these efforts by the Applicant, the Respondent has remained mum on the issue hence this application. What does the Applicant say about the probity and prospects of her application?

**Submissions by the Applicant**

[3] The Applicant contends that under section 231 of the Companies Act, the court has the option of appointing other person other than the official receiver to be the official receiver for purposes of winding up a company by the court. According to the Applicant, by directing the parties to consider their position and appoint a suitable person as the Receiver for the court's approval, the court leaned towards the provisions of section 231 of the Companies Act. Therefore, the application herein is merely giving effect to the said order of the court and the law.

[4] Mr Hira, counsel for the Applicant, took issue with the judicial authorities cited by the Respondent especially the first two, and submitted that those decisions related to appointment of a liquidator before winding up order had been made under section 235 of the Companies Act. The authorities do not, therefore, apply in this case where a winding up order has already been made.

[5] He did not stop there. He argued that, in spite of the appeal filed by the Respondent, the winding up order herein is still effective unless and until it is discharged on appeal. He also lamented that the delay in the appointment of the official receiver has caused and continues to cause injustice and prejudice to the Applicant. He referred the court to Halsbury's Laws of England, 5th Edition, paragraph 108, and 4th Edition Volume 7 paragraphs 1044 and 1045.

[6] He pressed on; that the court is not functus officio as claimed by the Respondent and the case of HCC CIVIL APPEAL NO 12 OF 2013 quoted by the Respondent does not apply. For those reasons he beseeched the court to allow the application.

**Respondent submitted**

[7] That it relies on the Company's Notice of Preliminary Objection dated 11th May, 2011 and the replying affidavit of Paul James Savage sworn on 11th May, 2011. In brief, the Respondent Company's case is that:

**Court is functus officio and lacks jurisdiction**

[8] That after delivering its judgment in this Winding Up petition, which judgment has been appealed against by the respondent, this Honorable Court became functus officio. The Companies Act does not provide for the appointment of receivers after a winding up order has been made, thus; the Petitioner's application herein dated 2nd March, 2011 lacks merit. In any case, the Applicant has not discharged the burden of proving that she is entitled to the relief she is seeking. Further, the application is brought under rules 7 (i), 202 and 203 of the Winding up Rules and section 403 of the Companies Act.

[9] That the Respondent, being aggrieved by the judgment, filed a Notice of Appeal on 27th October, 2010 and has now applied in the Court of Appeal for a stay of further proceedings herein. Both the appeal and the application for a stay of further proceedings are still pending in the Court of Appeal. The Petitioner/Applicant who was also apparently aggrieved by the judgment delivered herein did not file any notice of appeal against the same. Instead, she has applied for the court to appoint a receiver of the company following the winding-up order. It is the submission by the Respondent that the court lacks jurisdiction to grant the reliefs sought in the circumstances of this case. It is settled law that where a court has no jurisdiction to grant the reliefs sought, it downs the tools by striking out the application. The Respondent cited the famous authority to support the said preposition; the **Owners of Motor Vessel S v Caltex Oil (K) Ltd [1989] KLR** 1 at page 14; Nyarangi JA stated the law as follows,

> ***Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there will be no basis for a continuation for a continuation or proceedings pending further evidence.***

According to the Respondent, the Applicant is seeking to mislead the court into appointing a receiver yet the court ordered that parties consider their position and appoint a suitable person as the Receiver for the court's approval.

[10] The Respondent further submitted that it has never been served with the Winding-Up Order in contravention with section 90 of the Civil Procedure Act which provides;

> ***90. All orders or notices served on or given to any person under this Act***

***shall be in writing.***

[11] In support of the claim of ***Functus Officio,*** the Respondent cited and submitted that any party who is aggrieved by any of the orders should, therefore, appeal to the Court of Appeal. Section 66 of the Civil Procedure Act provides as follows;

> ***66. Except where otherwise expressly provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal.***

The Respondent also relied on Section 270 of the Companies Act which gives a party who is aggrieved by the decision of the Companies Court a right of appeal to the Court of Appeal. The section reads;

> ***270. Subject to such conditions and limitations as may be prescribed by rules, an appeal shall lie to the Court of Appeal from any decision or order given or made by the High Court in the exercise of the jurisdiction conferred upon it by section 218.***

[12] The Respondent quoted judicial decisions also in support of their stand-point on the matter. In **AHMET ALI GURE V DAUD SETHE DIFF [2009] EKLR,** the Appellant/Applicant sought to move the court to stay the execution of court orders and further to set aside the orders of the court together with a decree. The court held;

> ***'The right position in my view is that, any party aggrieved by an order on appeal by the High court should pursue the same in the Court of Appeal which then has the appellate jurisdiction to correct any adverse situation that may be complained of by any party … the court has therefore become functus officio and it would be against the norms and principles of law to revisit what it has concluded. In fact this will lead to prejudice against the respondent. I am persuaded therefore that, I have no jurisdiction to entertain an application of this nature but, this is not to say the appellant's doors are closed. There is definitely room for him to pursue the matter in the Court of Appeal where all the matters related to the proceedings herein may be addressed. Accordingly this application is dismissed with costs to the Respondent.'***

[13] According to the Respondent the Court of Appeal in **COURT OF APPEAL AT NYERI, CIVIL APPLICATION NO. 21 OF 2013: DICKSON MURICHO MURIUKI V TIMOTHY KAGONDU MURIUKI AND 6 OTHERS** refused to entertain an application for stay of execution pending the intended appeal to the Supreme Court on the basis that the court was functus officio. In that case, the court had this to say of the issue of functus officio,

> ***20. On the issue of whether this Court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery of tis judgment and pending the hearing and determination of an intended appeal to the Supreme court, we are of the view that once this court has pronounced the final judgment, it is functus officio and must down its tools. In the absence of statutory authority, the principle of functus officio prevents this court from re-opening a case where a final decision and judgment has been made. We bear in mind that in the new constitutional dispensation, most cases will end at the Court of Appeal and it is inadvisable for this Court to be able to issue stay orders after delivery of its judgment. We remind ourselves that the principle of functus officio is grounded on public policy which favours finality of proceedings. If a court is permitted to continually revisit or reconsider final orders simply because a party intends to appeal to the Supreme Court or the Court may change its mind or wishes to continue exercising jurisdiction over a matter, there would never be***

***finality to a proceeding. The structure of the Kenyan Courts of Appeal in those cases where certification to the Supreme Court has not been granted. Allowing this Court to issue stay orders after judgment would be detrimental to the concept of finality in litigation within hierarchy and structure of the Kenyan courts.***

***21. We take cognizance that when this Court has delivered judgment; all pertinent issues and points of law have been fully canvassed and considered. Upon delivery of judgment, the rights of the parties have been determined and it is a legal requirement that the decree emanating from the judgment should be executed. The submissions by counsel, evidence on record, points of law and relevant authorities all have been raised, re-examined, weighted, deliberated upon and judgment made. What new point of law can subsequently be raised in an interlocutory application for stay of execution that will make this Court change its mind after delivery of judgment and order stay of execution? If there are new points of law or circumstances that arise after judgment, this Court is functus officio and the justiciable forum to consider the merits or otherwise of these new circumstances must shift from this Court to the Supreme Court.***

**Res Judicata**

[13] The Respondent also believes that the Applicant's application is barred by the *res judicata* rule. Section 7 of the Civil Procedure Act provides as follows,

***7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***

***Explanation. (1) – The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.***

***Explanation (2) – For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.***

***Explanation. (3) – The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or implied, by the other.***

***Explanation. (4) – Any matter which might and ought to have been made ground of defense or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.***

***Explanation. (5) – Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.***

***Explanation. (6) – Where person litigate bona fide in respect of a public right or of private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.***

The Petitioner is now seeking before this court a relief which is barred by explanation (5) above, namely,

***Any relief claimed in a suit, which is not expressly granted by the decree shall,***

***for the purposes of this section, be deemed to have been refused.***

The Respondent therefore submits that the relief which she is seeking is deemed to have been refused.

[14] The Respondent further submits that on 21st October, 2010, in delivering its judgment, the court stated that it would not grant prayer c) of the Winding-Up Petition which provided as follows,

> ***c) Alternatively, an officer other than the Official Receiver be appointed under Section 231 of the Companies Act for the purposes of winding up the company.***

The court, at pages 13 – 14 of its judgment, stated this of prayer c),

> ***As prayer c) is made in the alternative I am unable to grant the same at the moment. The parties are however directed to consider their position and appoint a suitable person as the Receiver for the court's approval.***

The court did not make any order but merely directed them to consider their position. It is submitted that the order made is too vague to be capable of enforcement. In **OLE NGANI V ARAP BOR [1983] KLR 233,** the Court of Appeal held that a judge ought to make a decision or order on every claim and that in that case, the judge's order was nebulous, uncertain and indefinite as no reasonable decree could be drawn from it. At page 235, Justice Madan, whose judgment was concurred with by Honorable Justice Miller and Kneller stated as follows;

> ***The effect of the judge's order was nebulous, indefinite and uncertain. It would not enable a sensible decree to be drawn up. It may be for this reason that the decree included in the Record of Appeal merely states the Plaintiff's suit be dismissed with costs. I am of the opinion that both the proceedings and the result reached by the judge are a nullity, his order being meaningless. The preliminary issue decided by the judge does not amount to a settlement at all and I would allow the appeal.***

[15] The Respondent, therefore, submitted that if the applicant was aggrieved by that order, she should have appealed against it. The Respondent was aggrieved by the judgment which was delivered herein and filed its Notice of Appeal on 27th October, 2010 and has even applied for a stay of further proceedings in the Court of Appeal. The issue which the Petitioner/Applicant wants to be determined by this court is the very issue which the Respondent will be taking up in its appeal. In its Notice of Appeal herein dated 28th October, 2010, the Company is appealing against the whole of that decision.

**Preservation of assets**

[16] The jurisdiction to preserve the asset of the company which is the subject matter of a suit is to be viewed against the 2009 Civil Procedure amendment which states that the overriding objective of the Act and the Rules made is to facilitate the just, expeditious, proportionate and affordable resolution of the civil dispute governed by the Act. In the case before the court, the asset sought to be preserved, which is the subject matter of this petition, is the house situated at Kwale/Diani Beach/783/2. This provision has been interpreted by the Court of Appeal in the **African Safari Club v Safe Rentals Ltd, Court of Appeal at Nairobi, Civil Application No. 53 of 2010** as requiring the courts to have regard to substantive justice and to promote fairness and equally in the conduct of the litigation. The court stated the law as follows,

> ***This being an application under rule 5(2)(b) of the Court's rules the two conditions to be satisfied by an applicant are first, that it has an arguable appeal, in other words, the appeal is not frivolous and second, if a stay is not granted, the appeal, if successful***

***would be rendered nugatory. It is beyond question that these two requirements have served the cause of justice in this field of law for a long time and will continue to do so. However, after the enactment of the overriding objective, we believe that the Court is now required to take a much broader view of justice and therefore, the two requirements can no longer be regarded as exhaustive. Rule 5(2) is subject to the overriding objective and therefore this Court in exercising its power under the rule, must give effect to the overriding objective – the reason for this is that the court derives the power to prescribe the two requirements from rule 5(2)(b) and also from the Appellate Jurisdiction Act.***

***We think that the balancing act as described in the analysis of the positions of the parties before us, is in keeping with one of the principal aims of the o2 principle of treating both parties with equality or in other words placing them on equal footing as far as it is practicable, pending the determination of the intended appeal on merit. This we think is what the special circumstances of the situation before us and justice demand. We believe that rules of procedure including rule 5(2)(b) have considerable value in terms of administration of justice but the new challenge brought about by the enactment of the o2 principle brings into focus the fundamental purpose of civil procedure which is to enable the courts to deal with cases justly and fairly.***

In that case, the court was considering an application for a stay of execution made under rule 5 (2) (b) of the Court of Appeal Rules. However, what it is stated about the overriding objective of the Act applies even to the court dismissing the application before the court. It is worthy of note that the 2009 amendment refers to the overriding objective of the Civil Procedure Act and Rules made under it. The Respondent, therefore, submits that the applicant has not proved any hardship she would suffer if the order sought is not granted and therefore, a new interpretation of the Rules that gives effect to the overriding objective is called for in this case. The Respondent, however, stands to lose its sole asset, a cottage on L.R. No. Kwale/Diani Beach/783/2. This investment is worth over Kshs.9Million now.

[17] In reply to the Applicant's Submissions dated 26th April, 2013 the Respondent submitted that in **COURT OF APPEAL, CIVIL APPEAL NO. 10 OF 1997: LEISURE LODGES LTD V YASHVIN A. SHRETTA**, the court, in deciding whether it would appoint an interim liquidator to conserve the assets of a company, stated that it would have to be fully satisfied of the fears of the applicant, that such an order was necessary. The applicant in this application has not proved that she is entitled to the relief she is seeking. The Respondent further submits that if this application is granted, it stands to render his application nugatory in the **COURT OF APPEAL, CIVIL APPLICATION NO. 61 OF 2011 (UR 40/2011): PAUL JAMES SAVAGE AND LES BELLES SAUVAGES LTD V MONA HUSSEIN ALI DUALE** in which he is seeking a stay of the order made on 21st October, 2010 and a stay of further proceedings in this suit pending the hearing and determination of the intended appeal.

[18] For the foregoing reasons, the Respondent prays that the Applicant's application dated 2nd March, 2011 be dismissed with costs.

## COURT'S RENDITION

[19] This application is hotly contested, and perhaps it is because of its peculiar circumstances; the parties involved were once spouses. That notwithstanding, I see one issue which the Court should determine at this stage of the proceedings, namely;

***a) Whether the court can grant the orders sought.***

However, I reckon that, for me to reach the final decision on the broad issue I have framed, I will invariably have to determine all matters which have been raised herein, and relating to; 1) the basis of the application; 2) res judicata; 3) jurisdiction of the court; 4) functus officio; and 5) the true process of winding-up a company by the court.

[20] Let me first tackle the questions of jurisdiction, functus officio and res judicata. On the principle of *functus officio* this court rendered itself in **NBI HC MISC APP NO 571 OF 2011 [2014] eKLR a**s follows:

> ***[40] I am now in a position to determine the argument on whether this court is functus officio following the decision by Odunga J; the 1st Respondent is of the view the court cannot, therefore, exercise any authority on any matter arising from the said proceeding. Let us see what the law says about the subject of functus officio. According to the BLACK'S LAW DICTIONARY, 9TH EDITION functus officio in relation to an officer or official body, like the court, denotes;***
>
> ***...without authority or legal competence because the duties and functions of the original commission have been fully accomplished***
>
> ***See also the rendition by the Court of Appeal in COURT OF APPEAL AT NYERI, CIVIL APPLICATION NO. 21 OF 2013: DICKSON MURICHO MURIUKI V TIMOTHY KAGONDU MURIUKI AND 6 OTHERS that…..In the absence of statutory authority, the principle of functus officio prevents this court from re-opening a case where a final decision and judgment has been made.……***
>
> ***But the foregoing pronouncement of the court [of Appeal] on the issue of ex [sic] [read functus] officio should be seen within the jurisdiction of that court vis-à-vis finality of litigation, and the nature of the relief which was being sought. 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. Properly understood, whereas the court becomes functus officio when it has exercised its authority over a matter and has completely determined the real issues in controversy, nevertheless, care should be taken not to inadvertently or otherwise overstretch the application of the concept of functus officio; for, in all senses of the law, it does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court such as the execution proceedings including contempt of court proceedings, or any other matter on which the court could exercise supplemental jurisdiction. Therefore, in determining whether the court is functus officio one should look at the order or relief which is being sought in the case despite that judgment has already been rendered by the court.***

[21] In step with that rendition, I should state that matters which are incidental to or necessary legal processes upon a winding up order by the court are not caught up by the principle of *functus officio,* say, conferring upon and discharging of duties, powers and obligation by official receiver in a winding up of a company by the court. That scope includes appointment of official receiver; in case of the ordinary scenario under section 230; and in case of special circumstances, under section 231 of the Companies Act. The law on receivership of Companies, the way I understood it, a winding up order does not prevent appointment of receiver except where a receiver is appointed after a winding up order, he will need the leave of the court to take possession of the charged property, but such leave will be given as a matter of course. But, although not invariably, there are some attendant costs which may come with such post-winding-up order appointment. See the literally writing of **GAVIN LIGHTMAN, AND GABRIEL MOSS; THE LAW OF RECEIVERS OF COMPANIES: SWEET & MAXWELL at 124.** That explains the way section 231 of the Companies Act is worded; which bears nothing that prevents the court from appointing a person other than the official Receiver referred to in section 230 of the said Act to be

the official receiver after a winding up order has been made. The only caveat, however, under section 231 of the Companies Act is that the appointment of such other person must be underpinned by the court finding it to be desirable for such person to be appointed with a view to securing the more convenient and economical conduct of the winding up. In other words, the person applying should convince the court that peculiar circumstances exist, and the appointment under section 231 of the Companies Act will attain more convenient and economical conduct of winding up. Otherwise, in all other circumstances, the official receiver under section 230 concludes the winding up of the company.

[22] The above proposition brings me to the argument by the Respondent that the court cannot issue orders being sought because there is an appeal pending before the Court of Appeal. A re-statement of the law in that behalf offers appropriate rejoinder to that submission. The winding up order is effective unless and until discharged on appeal or stayed by the court under section 251 of the Companies Act or by the Court of Appeal under its jurisdiction. Really, there is not what I would call ‘’automatic stay’’ of the winding up of a company in the Companies Act simply because an appeal has been filed. In the absence of any legal prohibitions, i.e. stay of winding up order or discharge of the winding up order by the Court, the winding up herein is still on course and nothing would prevent the official receiver under section 230 from proceeding on this cause as by law anointed. In addition, and I have stated this earlier, I do not accede to the argument by the Respondent that the court has no jurisdiction to appoint a receiver under section 231 of the Companies Act for purposes of winding up a company by the court after a winding up order has been made. The appointing power of the court of under section 231 or of other relevant officers including special managers extends to and is part of the outer exterior of the winding up order. Equally, given the nature of the winding up process, the original mandate of the court in a winding up cause does not end with the winding up order; and matters falling under section 230 and 231 of the Companies Act, all the way to dissolution of the company are incidental and or supplemental to the winding up order; those proceedings or steps are not trapped within the principle of *functus officio*. In sum, I find and hold that the court has and should have jurisdiction under section 231 of the Companies Act when apt circumstances exist for such exercise of jurisdiction to appoint a receiver other than the official receiver envisaged under section 230 of the Act; and that will not be an act without authority or extravagant exercise of jurisdiction in any way. And without defending the judgment of the court- as that is not the business of the court to defend its judicial decisions- I should, however, in light of the kind of submissions I am confronted with, state that, it is the realization by the court of the position of the law I have re-stated, which saw the court’s use of carefully chosen words in its order recited below;

> ***As prayer (c) is made in the alternative I am unable to grant the same <u>at the moment</u> [underlining mine]. The parties are however directed to consider their position and appoint a suitable person as the Receiver for the court’s approval.***

**Is application meritorious?**

[23] I am on the way to determining the major issue of the application. But before I do that, I should also state that the issues being raised in the application are not *res judicata;* they were not determined by the court at all as claimed, but are just part of the process of winding up the company which apparently flows from the judgment of the Court. Accordingly, as I have found that the application is not *res judicata*, the court is not *functus officio* and it has jurisdiction to utilize section 231 of the Companies Act even after winding up order has been made, the big question that remains is; whether the present application is meritorious? First of all, the basis of the application is the order of the court that I have reproduced above. Looking at the nature of the said order, I do not think it renders itself to self-execution unless; 1) upon the agreement of the parties; or 2) upon an application under section 231 of the Companies Act for appointment of a person other than the official receiver referred to in section 230 of the Companies Act to be the official receiver for purposes of the winding-up herein. Doubtless, there is no agreement of the parties that an appointment be made under section 231 of the Companies Act. 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 discretion under section 231 of the Companies Act. The only reason given is that the Applicant proposed to the Respondent that one ORLANDO COSTA LUIS be appointed as the Receiver, but to which proposal the Respondent did not respond. An application under section 231 of the Companies Act ought to satisfy the court that the appointment of the person being proposed is desirable as it would derive a more convenient and economical conduct of winding up of the company. That is the responsibility of the Applicant, unless the court is already seized of enough material of exceptional circumstances of the case- which is not the case here. The Applicant did not prove those elements prescribed in section 231 of the Companies; the Applicant did not discharge its burden of proof an iota.

[24] Up to this point, it is clear the direction the court is taking on this matter, and for the reasons I have given, I find that the application before me is not meritorious, for it does not bring itself within the legal dimensions in section 231 of the Companies Act and the court is not convinced it is desirable to invoke section 231 of the Companies Act in this case. The upshot is that the application is dismissed. Except, I order each party to bear own costs granted the nature of the relief that was sought in the application. It is so ordered.

[23] I must thank counsels herein for the rich submissions they filed in court. The court was well served.

**Dated, signed and delivered in open court at Nairobi this 5th day of May, 2014**

**F. GIKONYO**

**JUDGE**

**PRESENT**

**Kinyua-Court-Clerk**

**Dr. Kamau Kuria advocate for Applicant**

**Omolo for Were advocate for the Respondent**

**Ruling read in open court.**

**F. GIKONYO**

**JUDGE**