



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 294 OF 2013

KIMANI GECAU..... PLAINTIFF

VERSUS

RURAL URBAN CREDIT.....1ST DEFENDANT

WIMADEN ENTERPRISES AUCTIONEERS.....2ND DEFENDANT

RULING

1. The ruling herein is in respect of the Defendants' Notice of Preliminary Objection on 7th March 2014 filed a Notice of Preliminary Objection dated 6th March 2014 and the Plaintiff's Notice of Motion dated 18th March 2014 and filed on 20th March 2014 as parties agreed that the Plaintiff's application be heard together with the said Notice of Preliminary Objection.
2. The Defendants' Notice of Preliminary Objection sought to have the Plaintiff's suit dismissed for the reason that the same having been filed in contravention of Section 228 of the Companies Act, it was void *ab initio*, incompetent, a non-starter, incurably defective and an abuse of the process of the Court.
3. In response to the aforementioned Preliminary Objection, the Plaintiff filed Grounds of Opposition dated 17th June 2014. He contended that his application was aimed at curing the defect in the Plaintiff's application dated 11th July 1995 and prayed that, in the interest of justice and fairness, the suit be heard and determined on its merits and not dismissed upon mere technicalities.
4. His application was brought under the aegis of Order 8 Rule 3 and Order 2 Rule 14 of the Civil Procedure Rules, Section 1A of the Civil Procedure Act, Section 228 of the Companies Act and Section 159(1)(d) (sic) of the Constitution of Kenya. He sought the following orders:-

1. **THAT leave be granted to amend the 1st Defendant's name to read RURAL URBAN CREDIT FINANCE LIMITED (IN LIQUIDATION).**
2. **THAT leave be granted to the Plaintiff under Section 228 of the Companies Act (Cap 486) to proceed with his claim herein against the 1st Defendant which is in liquidation.**
3. **THAT the costs of this application be provided for.**

5. The application was premised on the grounds that neither the Plaintiff nor his advocates on record had the knowledge that the 1st Defendant was under liquidation at the time of filing the suit sometime in 1995 and that in the urgency in filing of the instant matter, the legal status and 1st Defendant's name was not cross checked.
6. He averred that there would be no prejudice occasioned upon the Defendants if the application

- was allowed. He was emphatic that the court was under an obligation under the provisions of Section 1A of the Civil Procedure Act and Article 159(2) (d) of the Constitution of Kenya to allow his application in the interest of justice and fair trial.
7. In support of the application herein, he swore an affidavit on 16th March 2014 that was filed on 20th March 2014. He deposed, *in extenso*, the grounds he had adduced in his application. He pointed out that the Defendants filed their Statement of Defence on 4th March 2014, a period of almost twenty (20) years since the Plaintiff was filed.
 8. The Plaintiff referred the court to several cases amongst them **HCCC No 1675 of 2002 Nelliwa Builders and Civil Engineers v Kenyatta National Hospital, Civil Appeal No 163 of 2012 Heads U Win Salon v Ram Development Ltd** and **Civil Application No NAI 41 of 2014 (U/R 31/2014) Samiyan Kaur Devinder Singh v Speedway Investment Ltd & Another** which dealt with the issue of the wide and unlimited discretion of the court in allowing amendment to pleadings.
 9. Under Order 8 Rule 3 of the Civil Procedure Rules, 2010, the court has the discretion to allow amendment of pleadings if it deems it to have been a genuine mistake that was not misleading as to the identity of the party. The proviso reads inter alia:-

“An amendment to correct the name of a party may be allowed under sub-rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.”

10. The onus is on an applicant who seeks to amend his pleadings to prove that no prejudice shall be occasioned upon the Defendants, that its commission or omission thereof leading to the error or omission was inadvertent, that after due diligence had he had exercised before the institution of the suit, he would not have been able to justifiably have knowledge of the particular part he wishes to amend.
11. The Plaintiff was not seeking to introduce a new party, but to further give clarity as to the status of the party. What the Plaintiff sought in his application was the name of the 1st Defendant to include “(IN LIQUIDATION)” to its name. Ordinarily, it would be a travesty of justice and a departure from the principles of fair trial, expedient and fair determination of issues as enunciated under Sections 1A and 1B of the Civil Procedure Act for the court to dismiss an application to describe the 1st Defendant in the correct manner.
12. However, the court’s discretion should and will not be exercised without due caution and with regard to the circumstances of the matter. They shall neither be capriciously nor willfully be employed to deny either of the parties an avenue of recourse through the court processes or used it the aiding and abetting of a willfully indolent and imprudent litigant.
13. The Defendants were categorical that the Plaintiff was at all times aware that the 1st Defendant was under receivership but had proceeded to institute the suit against it contrary to the provisions of Section 288 of the Companies Act. In the Defendants’ List of Documents dated 3rd March 2014 and filed on 4th March 2014, the Defendant provided several documents to support its claim.
14. In the letters dated 1st March 1991, 22nd September 1992, 3rd September 1993, 26th October 1993, 22nd May 1995 and 12th July 1995 all addressed to one Njeri Gecau appointed under the Power of Attorney on 6th June 1984 by the Plaintiff, are signed off by the Official Receiver & Interim Liquidator. Further, two (2) payments made to the Registrar General on 11th October 1990 and 26th May 1995 bore testimony of the fact that the Plaintiff and or his appointee were aware that the 1st Defendant was under receivership with the payments being received by the Interim Liquidator and Official Receiver on its behalf.
15. In the Return of Service sworn by one Samuel Njoroge Muchai on 18th July 1995 and filed on 21st July 1995 at Paragraph 3, the process server swore that the state counsel who was personally known to him.
16. Under the provisions of the Companies Act Cap 486 (laws of Kenya), no proceedings shall be instituted as against a company under receivership unless the leave of the court has been sought

and obtained. Section 288 of the Companies Act reads as follows:-

288. When a winding up order has been made or an interim liquidator has been appointed under Section 235, no action or proceeding shall(emphasis court) be proceeded with or commenced against the Company except by leave of the court and subject to such terms as the courts may impose.

17. While the court could have allowed the Plaintiff to amend his Complaint under the provisions of Order 8 Rule 3 (2) of the Civil Procedure Rules, 2010 which allows the court to allow an amendment after the period of limitation had expired if it would have thought it just to do so, the mandatory provision of Section 228 of the Companies Act dissuaded this court from allowing the application herein.
18. It is evident from the above documentation that the Plaintiff would find it very difficult to deny that it was not aware of the 1st Defendant's legal status at the time he filed the suit herein. As Section 228 of the Companies Act is couched in mandatory terms, the Plaintiff was required to first seek leave from the court before instituting the suit.
19. Having failed to seek and obtain the said leave, the proceedings herein were a nullity- **See Hartford v Amicable Mutual Life Insurance(1871) IR 5 CL 368 In Re National Employers Mutual General Insurance Association Limited (In Liquidation) [1995]BBC 774; 1 BCLC 232, Hall v Old Talargoch Lead Mining Company [1876] Ch. D 1796** and citation from the **Halsbury's Laws of England 4th Edition, Volume, 7(3)** at paragraphs 2250 and 2652.
20. Section 228 of the Companies Act cannot come to the aid of the Plaintiff to continue with the proceedings as he had proposed for the reason that the institution of his suit was null and void. Indeed, no useful purpose can be served in allowing Prayer No (1) of the Plaintiff's application when the suit herein was null and void *ab initio*. In other words, leave cannot apply retrospectively.
21. The negligence of his advocate in complying with the mandatory provisions of the law cannot therefore be dismissed as having a mere technicality. It does appear to this court that the Plaintiff became aware of the fatality of his suit when the Defendants filed their Notice of Preliminary Objection.
22. The provisions of Article 159(2) (d) of the Constitution of Kenya, 2010 should not be used as a panacea for inconsistencies and inadequacies committed in the pursuit of justice. Rules of procedure are the handmaidens of justice, and should be regarded and construed as such by litigants. They ought to be interpreted with a purposeful approach and not to the extent that any obligation imposed by law with regard to procedure becomes a mere insignificant technicality.
23. Accordingly, having considered the pleadings filed by the parties, oral and written submissions and the authorities cited, the court finds that this is not a proper case in which it should exercise its discretion in favour of the Plaintiff.

DIPOSITION

24. Accordingly, the upshot of this court's ruling is that Plaintiff's Notice of Motion application dated 18th March 2014 and filed on 20th March 2014 was without merit and the same is hereby dismissed. On the other hand, the court hereby upholds the Defendants' Notice of Preliminary Objection dated 6th March 2014 and filed on 7th March 2014 is hereby upheld. The Plaintiff's Complaint dated 11th July 1995 and filed on the same date is hereby dismissed with costs to the Defendants.
25. It is so ordered.

DATED and DELIVERED at NAIROBI this 15th day of October 2014

J. KAMAU

JUDGE