



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 363 OF 2008

JOHN KIPKEMBOI KILELPLAINTIFF

VERSUS

WILFRED RIITHO NJERU

INTERIM LIQUIDATOR OF LAKESTAR

INSURANCE COMPANY LIMITED (IN LIQUIDATION).....DEFENDANT

RULING

1. Pursuant to the provisions of Section 238 (3) of the Companies Act, Rules 7 (i) and 203 of the Companies (Winding Up) Rules, Section 3A of the Civil Procedure Act and Section 159 (2) of the Constitution of Kenya 2010, the Plaintiff (hereinafter “the Applicant”), has sought Orders from this Court to appoint Mr. Hezlon Kamau Waithaka as an Auditor and Interim Liquidator of the Defendant Company, now in liquidation. That further, the said Hezlon Kamau Waithaka carries out an Audit and prepares an Report on his findings of all the activities of the statutory manager appointed between 1st July, 2002 to 27th June, 2003 and all the activities of the defendant between 30th June, 2003 and March, 2012 in respect of all the moveable and immovable properties whether existing or formerly subsisting, sold, leased and/or charged, bank deposits, withdrawals and all payments made out of all existing accounts and other accounts opened in various banks during HIS terms in office in respect of all properties, assets and liabilities of LAKESTAR INSURANCE COMPANY LIMITED (“the Company in liquidation”). He sought that such a report, once prepared should be filed in this Court within 90 days from the date of the Order. The Applicant further sought to have this court give an Order compelling the Defendant to surrender and supply to the said Hezlon Kamau Waithaka all inventories of the moveable and immovable assets prior and after disposal, bank account numbers and their respective banks, deposit slips, withdrawals made, bank cheque Books in use and cheque counter folios, bank statements, books of account, Auction bids, Payment Vouchers, rent expenditure, payroll and/or pay slips of creditors and liabilities, statements of all investments made (treasury Bills and all such relevant documents) as may be asked and/ or required for the purposes of auditing and compiling the said report in respect of the Company. In his Motion dated 9th March, 2012, the Applicant relied on the grounds on the body of the motion and his Supporting Affidavit sworn on 9th March, 2012.
2. The applicant depones that the Court made a winding up Order against the Company vide a Judgment dated 27th June, 2001 and thereafter the Defendant was appointed as the interim

liquidator of the Company with effect from 30th June, 2003. It was averred that the Defendant has been the interim liquidator for a period of 8 years. That at the time the Defendant assumed office, the Company in liquidation had both moveable and immovable assets as evidenced by the Report of the statutory manager duly appointed to run the affairs of the Company from 1st July, 2002 to 30th June, 2003. It is also contended that on 14th February, 2012, this Court restrained the Respondent from running the affairs of the Company and therefore, there is a vacancy in the office of the Interim Liquidator. Further, the Applicant contends that the Defendant during the period in which he acted as the Interim Liquidator, has never called for a single meeting of the creditors and contributors of the Company in Liquidation and this is contrary to the requirements of the Companies Act. The Plaintiff also contended that the Defendant never filed any audited report of accounts with the official receiver as required by Law and additionally did not supply the Plaintiff with a statement of affairs of the company in liquidation despite the fact that the Plaintiff was both a shareholder and a contributory. Moreover, it is the contention of the Applicant that the Defendant misappropriated the assets of the company in liquidation without due regard to the interest of the creditors and contributories.

3. The Plaintiff further states that on 21st October, 2009, the respondent was ordered to file final accounts within three months of the order of the court but allegedly failed to do so even after an Order of stay was vacated on 12th March, 2011. It is thus contended that the Defendant has since 12th March, 2010 failed, refused and neglected to extend time to file his final accounts before the order for injunction was issued on 14th February, 2012. The Plaintiff further contends that in light of the fact that the Official Receiver has failed to enforce the provisions of the Companies Act for the last eight years and remove the Defendant from office, it is fair and just for the Court to appoint Mr. Hezlon Kamau Waithaka as an auditor and interim liquidator for the purposes of auditing and compiling a report to enable the Court to make the appropriate orders. He therefore prays that the application be allowed in the interest of justice.
4. In opposition, the Defendant filed a Replying Affidavit sworn on 22nd March, 2012. The Defendant stated that he was appointed as the interim liquidator of the Company in liquidation by an Order of the Court dated 27th June, 2003 which appointment took effect on 30th June, 2003. That following such appointment, the Defendant took over the office of the interim liquidator and exercised his mandate according to both the Companies Act and Insurance Act to realize the Company's assets. The Defendant contended that on 27th May, 2003, the Company in liquidation suing through the Receiver Manager, obtained a Judgment in the sum of Kshs. 34,774,865/- against the Plaintiff in Nairobi HCC no. 1016 of 2002. That on 29th May, 2011, the Company in liquidation suing through the Receiver Manager extracted a decree in the sum of Kshs. 47,645,015/- against the Plaintiff. No appeal, he contended, has been preferred against the said judgment and therefore the said decree remains unpaid and duly continues to accrue interest. In view of these facts, the Defendant contends that the Applicant is a debtor to the Company in liquidation and it is therefore improper for him to purport to bring the instant application as a contributory. As such it is contended that the Applicant has approached this Court with unclean hands and requesting this court to appoint a liquidator of his choice is a veiled attempt by the Applicant to conceal his indebtedness. Further to this, the Defendant contends that since he took office as the interim liquidator, his efforts to bring the liquidation to a close has been persistently hampered by the Plaintiff who has filed numerous suits and lodged numerous applications to stifle the process of liquidation. In illustrating this point, the defendant contended that, after the institution of this suit on 1st July, 2008, the Plaintiff obtained interim orders freezing all company accounts effective 2nd July, 2008. That further, the company accounts remained frozen until 21st October, 2009 a period of sixteen (16) months. The Defendant contended that during the said period and while the company in liquidation accounts remained frozen, the Defendant could not even pay for the running expenses including the office rent where he operated from and that accordingly due to this status at the time, the liquidation process was halted. That thereafter when the Orders freezing the Company in liquidation accounts were vacated on 21st October, 2009, and before communicating to the bank about that development, the plaintiff purportedly rushed to court on 26th October, 2009 and obtained a stay of execution of the orders granted and the said accounts once again remained inaccessible. That the said orders remained in force until they were

vacated in March, 2010 whereafter the court issued on Order on 21st October, 2009 requiring the defendant to file the final accounts within three months. It is contended that the defendant could not comply with such an order due to the freezing of the Company in Liquidation accounts which lasted for more than two years. The Defendant also contends that the Plaintiff once again moved to the Court of Appeal to appeal the ruling of the Court made on 25th March, 2010 after the accounts court allowed the Defendant to access the accounts following the order vacating the interim injunction. The Court of Appeal however dismissed the said appeal on 16th July, 2010.

5. It was the defendant's further contention that due to restrictions placed on accessing the Company in liquidation bank accounts he could not pay the rent to the offices he used for more than 22 months and this forced the Landlord to destrain for rent by seizing property belonging to the Company including pertinent documents with regard to the Company in liquidation and thereafter locking the offices, thereby delaying the liquidation process. The Defendant contended that due to such disruptions, no work could be done and the required reports could not be prepared. The defendant therefore maintained that he should not be blamed for failing to conclude the process of liquidation as his attempts were on numerous occasions halted by ongoing court proceedings which would yield court orders that had the direct effect of suspending the liquidation process. It was therefore the Defendant's contention that the Plaintiff is not entitled to seek the appointment of liquidators of the Company as he only seeks to protect himself from execution of the sum of over Kshs. 47,000,000 which he owes the Company in liquidation as a Judgment Debtor. For the foregoing reasons it is prayed that the Applicants application should be dismissed as the same is misconceived and is an abuse of the Court process.
6. I have carefully considered the application, affidavits on record, the written submissions and their oral hi-lights by counsel. The issue for determination is whether in view of the vacancy in the office of the interim liquidator, should the Plaintiff's choice of such liquidator be appointed. It was the contention of the Plaintiff that the Defendant was restrained from running the affairs of the Company in liquidation with effect from 12th February, 2012. In the foregoing, it is his contention that the office of the Liquidator of the Company is vacant and as such the Company in liquidation does not have an officer in charge of running its affairs. The Defendant however submitted that though the Defendant was removed by this Court as the interim liquidator of the Company, Section 236 (e) of the Companies Act Cap. 486 Laws of Kenya is clear that during the period of such a vacancy, the Official Receiver is entitled to take over and act as the interim liquidator. It was further submitted by counsel for the Defendant that the conduct of the Plaintiff in this matter alludes to the fact that he has come with unclean hands and that the fact that he is a judgment debtor of the Company in liquidation disentitles him to come to this court to and seek the appointment of a liquidator of his choice who would also double up as both a liquidator and an auditor.
7. I have looked at the Order dated 6th March, 2012 by the Honourable Justice Musinga. Order number 2 thereof reads as follows:-

“THAT the Defendant's activities as liquidator of Lakestar Insurance Company be and is hereby permanently restrained and also from having access and/or withdraw monies held in the account number 0112061694500 and TB A/C 0118561694500 with Co-operative Bank of Kenya Limited pending hearing and determination of this suit”

From the foregoing it is clear that the Defendant was “permanently restrained” from carrying out any activities as the liquidator of the Company or even accessing the Company in liquidation's bank account during the pendency of this suit. The net effect of such an order is that the Defendant can no longer act as the interim liquidator of the company in liquidation until this case is determined. As such, there is indeed a vacancy in the office of a liquidator for the company. It is on this basis that the Plaintiff supposedly wants this Court to appoint a Mr. Hezlon Waitthaka Kamau as the Interim Liquidator of the company in liquidation. Section 234 of the Companies Act generally gives power to the court to appoint a liquidator or liquidators. Section 236 (e) provides that the official receiver shall be the liquidator by virtue of his office during vacancy in a company under liquidation.

Therefore, the defendant was correct in his submission that under section 236 (e), in the event of a

vacancy of a liquidator, the Official Receiver of the Company under liquidation automatically becomes the liquidator.

8. Although the Official Receiver becomes the liquidator of the company in the event of a vacancy, the Plaintiff has raised various complaints against him to show that the official Receiver may not be the appropriate person to be the liquidator. The Plaintiff alleged that the official Receiver had failed to act and have the Defendant removed from office after the latter had failed to file security under Section 237(a) of the Companies Act, that he had failed to cause the auditing of the liquidation account contrary to Section 245(3) of the Act, that the Official Receiver had failed under Section 246(1) of the Act to take cognizance of the Defendant's conduct of failure to perform his duties. That the Official Receiver as the custodian of public interest had failed to act properly to correct the misdeeds of the Defendant. For this reason, the Plaintiff urged that the Official Receiver is not the right person to fill the void. The Respondent submitted that the court should exercise judicial authority in a manner not prejudicial to other contributories, shareholders and policyholders.
9. It is true that under the Companies Act, there are various obligations that are bestowed upon the Official Receiver as far as companies under liquidation or receivership are concerned. There was no denial that the official Receiver had negated on his duties as variously enumerated by Mr. Oyugi for the Plaintiff. The answer to the Plaintiff's complaints against the Official Receiver was the challenge to the Plaintiffs integrity only. Whilst the Official Receiver is a neutral and always best placed person to fill any vacancy in a liquidation, when serious issues have been raised against his office such as the ones in this case, I think the court has to be slow in endorsing that office for liquidation purpose.
10. I appreciate the fact that the applicant has been found to be in bad light by this court previously, but the application he has made, in my view, is not self serving when there are allegations that for over eight (8) years, a court appointed interim liquidator has not acted as per the law, that he has even disobeyed a court order requiring him to furnish a report of accounts, it is a cause for concern. What has such interim liquidator been doing for that entire period? Is he not required to report to court of what he has done? I think that when a liquidator is appointed for a company in liquidation, his primary role is not to **"kill"** the company but to **"kill"** it **"softly"** or in a manner that would benefit the creditors and contributors of such company. From the matters deponed to in Affidavits on record, I do not think that the interim liquidator herein did a good job as would be expected of him. I think that is why this court decided to injunct or remove him from liquidation in March, 2012. If the Official Receiver has all along turned a blind eye to the **"irregularities"** of the interim liquidator for a period exceeding eight (8) years, of what use will he be if he is now given the mandate to run the liquidation? I doubt.
11. While I appreciate that the Plaintiff cannot be heard to complain or make accusations against others to his exclusion on the running of the company in liquidation, I note that in the application before me, he is not seeking to be appointed to the running of the company. He seeks the appointment of a 3rd party, a professional for that matter! I have seen the resume of the proposed liquidator. The same looks exceptionally admirable. Since once appointed, the liquidator ceases to be an agent of the Plaintiff or any other party but the court, I see no harm in having him so appointed. He shall be answerable to court. He shall be subject to the directions of no other party but the court. To my mind, for the reason of the prolonged interim liquidation (2003 to 2012) the Official Receiver is not best suited. From the resume of Hezlon Kamau Waithaka, the court has no doubt that he may be capable of the task. There was nothing that was presented to cast any aspersions on him as a professional.
12. The other issue is of whether the Interim Liquidator has been fulfilling his mandate in accordance with the Companies Act Chapter 486 Laws of Kenya. It was contended by the Plaintiff that the status of the company in liquidation is unknown. That further, the whereabouts of the proceeds of sale of both the moveable and immovable assets belonging to the company in liquidation have not been disclosed. The Plaintiff further contended that since the Defendant took office on 30th June, 2003, no single meeting of creditors and contributories has ever been held and that further no single creditor has ever been paid. He alleged that the Defendant has never filed a single report with the official receiver. There are also allegations that the respondent has misappropriated the assets and monies of the company in liquidation. The Defendant countered this argument by

stating that he has been frustrated by the Plaintiff and his fellow directors in his efforts to recover and liquidate assets of the company. He demonstrated this frustration by contending that the Plaintiff hampered his effort by filing suit upon suit and application after application, even obtaining interim injunctions freezing all company accounts time and again. The Defendant narrates his woes in paragraph 11 of his Replying Affidavit giving a history of the applications and counter- applications and orders given by various Courts.

13. It is not in dispute that the litigious nature of the Plaintiff has had an impact on the liquidation process of the Company under liquidation. The Defendant has not denied the fact that he did not meet his statutory obligations as a liquidator in terms of the Companies Act Cap 486 Laws of Kenya but wholly blames it on court proceedings instituted by the Plaintiff. I empathize with his situation, but in the same breadth, I hasten to add that nothing stopped the Defendant from seeking the directions of this Court with regard to the various hurdles he was facing. As the Plaintiff correctly put it, a liquidator is an Officer of the court. Should there have been any matters with regard to the liquidation process, the Defendant should have sought the protection of the Court. Indeed I agree with Justice Mutungi in his ruling dated 29th April, 2004 that there has been an abuse of the court process for far too long in view of the multiple proceedings taken in this matter. However, the Defendant's justification of non-compliance of the Companies Act Chapter 486 Laws of Kenya may now be water under the bridge given the Orders issued by this court on 6th March, 2012 permanently restraining his activities as the liquidator. As such, this Court has to deal with the matter to the effect that the Defendant is no longer the liquidator of the Company in liquidation but that does not absorb him from whatever he did before his removal or restraint.
14. The upshot of this is that the application dated 9th March, 2012 is allowed as prayed. This matter be mentioned on 7th June, 2013 to consider the report of the said interim liquidator.

DATED and DELIVERED at Nairobi this 1st day of March, 2013.

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A. MABEYA

JUDGE