REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Winding Up Cause 26 of 2012

IN THE MATTER OF: MAGUTA INVESTMENTS LTD

AND

IN THE MATTER OF: THE COMPANIES ACT, CAP 486

AND

GEORGE MORARA T/A BIANCAS ……..…. 1ST INTERESTED PARTY

KENYA SHELL LTD. ……..….. 2ND INTERESTED PARTY

R U L I N G

1. By a Notice of Motion dated 19th December, 2012 filed in relation to the winding-up of Maguta Investments Ltd (hereinafter "the Company"), the proposed 2nd interested party, **Kenya Shell Ltd** (now **Vivo Energy (K) Ltd** and hereinafter "the Applicant") seeks *inter alia* for stay of the Order issued by the Court on 13th December, 2012. The stay requested is pending the hearing and determination of the instant application and intended appeal by the Applicant as against that Order. The application is brought pursuant to the Court's inherent jurisdiction and predicated upon the grounds that the applicant stands to suffer irreparable loss and damage and that if the stay is not granted the intended appeal would be rendered a mere academic exercise. The application is based on the following grounds:

"a. The proposed Interested Party, Kenya Shell Limited, had a licensor/licensee relationship with the Company in respect of a service station situate along Mbagathi Way in Nairobi on LR. No. 209/8258. This relationship was terminated by Kenya Shell Limited's letter dated 5th November 2012.

b. The termination was accepted by the company who handed over the service station to Kenya Shell Limited on or about 13th November 2012.

c. By his ruling, Mutava J ordered Kenya Shell Limited to return the fuel pumps it removed from the service station. The pumps in question belonged to Kenya Shell Limited.

d. Mutava J also ordered that Kenya Shell Limited grant access to the premises to including other entities Insignia Limited and Bianca's Restaurant. Both are unknown to Kenya Shell Limited who has no contractual or other relationship with them.

e. The effect of the judge's order directing that third parties be granted access to the service

station was that Kenya Shell Limited was being asked to allow trespassers onto its property.

f. There is no jurisdiction to make the orders made by Mutava J in a Winding-up petition.

g. The proposed Interested Party who is the applicant intends to appeal against the ruling of 13th December, 2012 and unless the orders sought are granted, the appeal will be rendered a mere academic exercise.

h. The proposed Interested Party will not have any way of supervising the activities of the third parties Insignia Limited and Bianca's Restaurant if the orders sought are not granted and it is compelled to allow the third parties access to the property.

i. Unless the orders sought are granted, the proposed Interested Party stands to suffer irreparable loss and damage, particularly loss of reputation and risk of damage to its property.

j. It is in the interest of justice and achieving the overriding objectives thereof that this application be heard and the order sought granted.

k. There is sufficient cause to review the order of 13th December, 2012 in the circumstances of the case".

2. In the affidavit of **Naomi Assumani** in support of the application sworn on 19th December, 2012, it was deponed that the said Ruling and resulting Orders therefrom by the Honourable Judge, deprived it of its property and would put the Applicant at risk of misuse and wastage by third parties over whom it had no relationship or control. Further, that if Orders sought were not granted, the intended appeal would be rendered an academic exercise. It was also contended that the proposed grounds of appeal, as outlined in paragraph 12 of the said Affidavit, were valid and with reasonable prospects of success.

3. In objecting to the application, the 1st interested party filed its Grounds of Opposition dated 6th February, 2013. It contended that the requirements for a grant of stay orders and review had not been satisfied by the Applicant. It noted that the prayers sought in the application were omnibus and that the application was defective and lacked merit. Further, it contended that the application was an abuse of the process of the court as no provisions of the law had been cited in relation to the same.

4. As I see it, after careful perusal and consideration of the application and the antecedent proceedings in this matter, the principal issue that arises for determination by the court is whether the Court has power to grant the stay of the Orders issued by Mutava, J on 13th December, 2012. The other issue for determination is whether the applicant has satisfied the court on the alternative prayer for review of the said Orders.

5. When the application initially came for hearing on 23 January 2013, the same could not be reached and Mr. Mugambi for Insignia Ltd proposed that the Applicant should give an undertaking in damages as consideration for the extension of the interim orders of the Court made on 13 December 2012. Indeed this suggestion did not seem to be unreasonable and the Applicant has now supplied to court the appropriate undertaking. In fact, the Application did not come for hearing until 19 February 2013.

6. The Applicant in oral submissions made on its behalf by learned counsel Mr. Kiragu Kimani, submitted that the application did not cite any provisions of the *Civil Procedure Rules* as this was a winding up matter and the Companies (Winding-Up) rules applied. In his further submissions, Mr. Kiragu Kimani for the Applicant pointed out the 7 grounds which will be taken up by the Applicant on appeal. He noted that under a Winding-up Petition, orders for injunction which were sought could not be granted to anyone else but the Company. Insignia Ltd which had made the application before court under the Winding-up Petition procedure had sought a prohibitory injunction not a mandatory one. However, Insignia Ltd had detailed that it was a shareholder of the Company. Counsel maintained that it was only the Company, not its shareholders, who have any rights as regards the contracts that it had entered into

with third parties including the first Interested Party (Bianca's Restaurant) and Insignia Ltd. The question which arose out of the learned Judge's status quo Order was as to who exactly was going to run the service station? Would it be the Company which is involved in the dispute between its shareholders or would it be Insignia Ltd, even though a minority shareholder or, indeed, Bianca's Restaurant or possibly even the Applicant? In the Grounds of Opposition, the first Interested Party had maintained that Mutava J's Order merely put the parties back into the position that they had been in when the Company was in possession of the service station. It was noted that the station had been handed back to the Applicant by the husband shareholder of the Company, who had been running the service station all along. Such action had been disputed by the wife shareholder, who had admitted that she and her husband were going through an acrimonious divorce. Secondly, Mr. Kimani detailed that the Court had granted a mandatory injunction which had not been sought and ought not to have been granted unless there were exceptional circumstances. Thirdly, the Company was in the throes of a (matrimonial) dispute between its majority shareholders but it was the only entity that could detail what the Company owned in relation to the service station premises or otherwise. Fourthly, whether the Company, Insignia Ltd or Biancas' Restaurant were making profits or otherwise, was immaterial. Fifthly, counsel noted that the learned Judge on 13 December 2012 had only granted a stay of 7 days to allow the Applicant to move to the Court of Appeal for a stay application to be brought there. However, it was commonplace that the Court of Appeal always prefers to see what the High Court makes of a stay application before it gets involved itself in such matters. Counsel referred to **Madhupaper International Ltd v. Kerr (1985) KLR 840** in this connection. Finally, counsel maintained that this Court has an inherent power to grant a stay of its own orders and referred to the cases of **Butt v. Rent Restriction Tribunal (1982) KLR 417** as well as **Ujagar Singh v. Runda Coffee Estates Ltd (1966) EA 263**. Counsel closed his submissions by stating that he had made no reference to the Civil Procedure Rules as the matter before court was a Winding-up Petition to which the Winding-up Rules applied.

7. Mr. Mugambi for Insignia Ltd., as well as for the wife, who was a director and shareholder of the Company, responded to the effect that he considered the Application before court to be very strange. As drawn, the Application did not rely upon any rule of Court, although it did seem to be an application for stay pending appeal, which ought to be governed by **Order 42**, *Civil Procedure Rules*. He noted that those Rules applied unless in conflict with the Companies Winding-up Rules. Counsel maintained that the only matter that the court should take into account is that of stay pending appeal. Other matters laid before the court with regard to safety of petroleum products, which entity should operate the service station etcetera were immaterial. It was a question of what loss the Applicant would suffer if the stay was not granted. Counsel noted that Mutava J. had granted an interim injunction during the hearing of an application to dismiss the Petition in this matter. The injunction given covered the maintaining of the business of the Company. Such was an intangible asset and the Judge had been persuaded that the business ought to be protected. The business would have been completely paralysed by the carting away of the fuel pumps which had been carried out minutes before the service of the Court Order upon the Applicant. Mr. Mugambi made the comment that all parties involved were losing money including the Applicant as well as Insignia Ltd and Bianca's Restaurant. He pointed out that there had been no concrete argument put forward by the Applicant as to what would happen to the petrol station should the stay not be granted. He maintained that the grounds for the granting of a stay had not been met. Further, an application for review of Mutava J's said Order did not lie where an appeal has been proffered. Counsel maintained that the facts as disclosed in the Affidavits of 21 January 2013 and 22 January 2013 sworn by Kevin Owera and Joyce Waiyaki respectively commend themselves to the Order of 13 December 2012 to be maintained. If the court was inclined to grant the stay then the petrol station would be empty for a long time pending the Appeal.

8. In her turn, Miss Kivuta for Bianca's Restaurant submitted that she relied entirely upon the Grounds of Opposition that had been filed in that connection. Counsel was mainly concerned that the restaurant was not in operation and there was a loss of business. As there were major losses being suffered, an order for stay would prolong the situation and, in her opinion, it would depend upon where the greater damage lies. Mr. Kiragu Kimani for the Applicant in response, pointed out that there was no affidavit filed herein to detail what was happening as far as Bianca's Restaurant was concerned. From the submissions of counsel for the first Interested Party as well as for Bianca's Restaurant, nobody had said as to who was going to put his head on the chopping block and take responsibility for what may occur at the service

station. The matter of losses being made was a matter of conjecture. It was the Applicant's position that the interested parties including Insignia Ltd., as well as Bianca's Restaurant, had no right to be at the service station. The Applicant could not terminate any agreement with those parties as it did not have any such agreement with them. In his opinion, **section 80** of the *Civil Procedure Act* superseded **Order 45** and all that the Applicant needed to show was sufficient cause for a stay to be granted. In counsel's opinion sufficient cause was that the Applicant had no relationship with the third parties, no way of controlling them and no way of obeying the mandatory injunction. He maintained that the filing of a Notice of Appeal is not the same as filing an Appeal and consequently there is no bar to a review of the Order of 13 December 2012. He stated that the inherent power of the Court was just that, it is not contained in any statutory authority and was even outside the provisions of **section 3A** of the *Civil Procedure Act*. There was no need for the Applicant to cite the rule under which an Application may be brought before court where it came under the inherent jurisdiction of the Court. Finally, counsel maintained that there was no rule of law that stated that because the matter was not raised before the Judge at the initial hearing, the parties could not put forward facts that are relevant to the fresh Application sought.

9. From the onset, the applicant has purported to invoke the Court's inherent powers and authority to determine this matter. The Court's inherent power is provided for under **Section 3A** of the *Civil Procedure Act*, which reads:

"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court."

The inherent powers of the court are not vested in it either by law or statute, but arise by virtue of it exercising its role and mandate as a Court. In **Connelly v Director of Public Prosecutions (1964) AC 1254**, Morris, J reiterated:

"There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuse of its process and to defeat any attempted thwarting of its process."

In exercising its jurisdiction in determining matters therefore, the Court is endowed with such powers as would enable it to effectively and efficiently conduct its mandate and obligation, without undue regard to any abuse in conformity with the powers vested in it under the Constitution, hence inherent.

10. In **Cocker v Tempess (1841) 151 E.R 864**, **Anderson, J.** held on inherent jurisdiction as follows:

"The power of each court over its own process is unlimited; it is a power incident of all courts, inferior as well as superior; were it not so, the court would be obliged to sit still and (to) see its own process abused for the purpose of injustice. The exercise of the power is certainly a matter of the most careful discretion."

The Court in exercising its inherent power is mandated to exercise its unfettered authority with careful discretion. The *Civil Procedure Act* provides for both substantive and procedural rules that govern the operation of the Court in exercising such mandate. **Sections 1A** and **1B** of the Act provide for the Court's exercise of its inherent power to facilitate for the just, expeditious, proportionate and affordable resolution of civil disputes. However, this overriding objective is not to be misused and any party invoking the overriding objectives and the inherent power of the Court will not be allowed to abuse it. This was the position as held by the Court of Appeal in **Hunker Trading Co. Ltd v Elf Oil Kenya Ltd Civil Application No. Nai. 6 of 2010** in which the learned Judges held *inter alia*;

"…the applicant cannot be allowed to invoke the "O_2 principle" and at the same time abuse it at will…if improperly invoked, the "O_2 principle" could easily become an unruly horse and therefor while the enactment of the "double O" principle as a reflection of the central importance the court

must attach to case management in the administration of justice, in exercising power to give effect to the principle it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation of its application must be properly laid and the benefits of its application judicially ascertained."

11. Under **Rule 203** of the *Companies (Winding-Up) Rules,* the procedure on how to deal with an application of the nature of the instant matter is provided for. The Rule reads:

"In all proceedings in or before the Court, or any judge or officer thereof, or over which the Court has jurisdiction under the Act or these rules, where no provision is made by the Act or these rules, the practice procedure and regulation in such proceedings, shall unless the Court otherwise directs, *be in accordance with the rules and practice of the Court."*

The Companies' Winding Up rules do not make express provisions for stay Orders in its Rules. As a result therefore, the rules that govern civil proceedings are applicable i.e. the *Civil Procedure Rules, 2010*. Under those Rules, **Order 42 Rule 6** covers the point. Further, **Order 42 Rule 6 (2)** provides that the Court will not grant orders, such as those of the nature that the applicant seeks, if the requirements and pre-requisites set out therein are not satisfied. It reads:

"(2) No order for stay of execution shall be made under sub-rule (1) unless-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or orders as may ultimately be binding on him has been given by the applicant."

In its application and affidavit in support, the Applicant contends that it stands to suffer loss and damage, especially loss of reputation as well as to its property. However, has the Applicant shown what substantial loss it stands to suffer should the stay order not be granted? **Order 42 rule 6** is clear that the Applicant has to show what *"substantial loss"* may result should the orders prayed for not be granted. The *"substantial loss"* in the instant application as per the Supporting Affidavit is that the Applicant is being deprived of its property and has no control over the activities of the third parties which the Company would seem to have come to some independent arrangement (contrary to the provisions of the Licence which the Company held from the Applicant) as per the use of premises being the service station by the 1st Interested Party on the one hand and the investment by Insignia Ltd on the other. The learned Judge's Order restoring the status quo at the petrol station includes the reinstatement of the Applicant's equipment thereat including the petrol pumps and allowing the sub-lessees to access and conduct business within the service station premises.

12. The Applicant has also prayed in the alternative for an order for review of the Orders issued. **Section 80** of the *Civil Procedure Act* as read with **Order 45**, *Civil Procedure Rules* provides for such review. **Section 80** reads:

"Any person who considers himself aggrieved-

(a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal is preferred; or

(b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such orders as it thinks fit."

The procedural rules are provided under **Order 45**. The Court in reviewing the decision of the judge is guided by the principles set out in that Order. **Order 45 Rule 1** reads:

"(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

Order 45 Rule 2(1) further provides that:

"(1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed."

13. The only ground upon which the application for review is predicated in the Applicant's application is at paragraph k which reads as set out above.

The Applicant does not elucidate what such *"sufficient cause"* is save to contend that it would be in the interest of justice and overriding objective that the application be allowed. As reiterated in **Hunker Trading Co Ltd v Elf Oil Kenya Ltd** (supra), the overriding objective principle as provided under Sections 1A and 1B of the Civil Procedure Act are not going to be a ***"panacea for all ills and in every situation."*** The upshot is that the applicant has not shown any other reason as to why this court should determine the issue of review as provided for under **Order 45 Rule 2 (1)** and for that reason the court would not be able to determine this matter on the issue of review. Further, orders for review emanate where no appeal has been preferred. In this connection, **Order 42 rule 6 (4)** is applicable as such reads:

"For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given."

Consequently, under **Order 45 Rule 1 sub-rule (2)**, the Applicant is barred from filing for review, as it has proffered an appeal against the orders made by Mutava, J on 13th December, 2012 by filing its Notice of Appeal. The proviso reads:

"(1) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party *except* where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

14. In **John Gakure & 148 Others v Dawa Pharmaceuticals Co. Ltd Civil Application No. 299 of 2007**, Waki, JA held *inter alia*;

"…jurisdiction of the court has been enhanced and its latitude expanded in order for the court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and its principle aims. In the court's view, dealing with a case justly includes inter alia, reducing delay and costs and expenses at the same time as acting expeditiously and fairly. To operationalize or implement the overriding objective calls for a new thinking and innovation and actively managing the cases before the court including granting of appropriate interim relief in deserving cases."

From the foregoing and in following the ruling of Waki, JA, I am of the opinion that the Applicant has done enough to persuade this Court in its prayers for a stay of the Order made by Mutava, J. Such is in accordance with the principles of the overriding objective propounded in **Sections 1A and 1B** of the *Civil Procedure Act* and not necessarily the inherent jurisdiction of the Court pursuant to **Section 3A** that the matter herein is determined. However, a stay should not be granted as per **Order 42 Rule 6 (2) (b)** without the provision of security therefore by the Applicant. To this end, the Court is satisfied that the Undertaking as to damages already lodged on the Court file by the Applicant is sufficient security for the Court to grant the stay. The upshot is that I find that the Applicant has done enough to satisfy the requirements of **Order 42 Rule 6** of the *Civil Procedure Rules* and would allow its application for stay with costs. It seems to me that the greater damage would lie in not allowing a stay than granting the same.

DATED and delivered at Nairobi this 9th day of May, 2013.

J. B. HAVELOCK
JUDGE