REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: OMOLO, TUNOI & SHAH, JJ.A.)
CIVIL APPEAL NO. 10 OF 1997

BETWEEN

LEISURELODGES LIMITED ..... APPELLANT

AND

YASHVIN A. SHRETTA ..... RESPONDENT

(Appeal from the ruling (order) delivered on 27th day of
November, 1996 by Mr. Justice Ole Keiwua
in
WINDING UP CAUSE NO. 28 OF 1996)
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JUDGMENT OF TUNOI, J.A.

On October 15, 1996, the respondent herein, Yashvin A. Shretta, an advocate of the High Court of Kenya, presented to the superior court at Nairobi a petition for the winding-up of the appellant, Leisurelodges Limited, a company which owns a five star beach hotel called Leisurelodge Club, a four star hotel called Leisurelodge Hotel and an 18 hole golf course. In his petition the respondent alleges among other things, that the appellant company is being managed corruptly, illegally, and not for the benefit of all the shareholders and that the minority shareholders have, since October, 1995, been excluded from its effective management and are being oppressed. It is further alleged that the majority shareholders have devised a scheme through which they are converting to their use the appellant company's money. These illicit operations are said to range from:

> a)manipulating foreign exchange rates, whereby the income of the appellant Company is deliberately credited at a markedly lower rate than the market one, and the difference kept in a secret account in a bank which is owned by the families of the majority shareholders,
>
> b)arranging for a part of the revenue of the appellant Company to be paid by tour operators in foreign bank accounts controlled by the members of the majority shareholders' family,
>
> c)collecting from foreign debtors of the appellant Company money and failing to account it to the appellant Company,
>
> d)collecting domestically monies belonging to the appellant Company and failing to account it to the appellant company, and

e)supplying to the hotel and club such items as TV sets and safes without disclosing their interests.

The respondent has further alleged that the appellant company which, on January 2, 1995, acknowledged its indebtedness to the respondent in the sum of Shs.43,772,588/= and had agreed on the mode of payment of the same has repudiated that acknowledgment. At the dictation by the majority shareholders, the appellant company has purported to amend the Articles of Association, permitted new people to become shareholders in disregard of the Articles of the Association, reconstituted the Board of Directors and purported to increase the share capital with the sole object of undermining the position of the minority shareholders. On the same day, i.e. November 15, 1996, the respondent also filed an ex-parte application by way of Notice of Motion under a certificate of urgency. The application was expressed to be brought under sections 231, 235, 237 and 241 of the Companies Act (the Act) and Rules 7, 27 and 36 of the Companies (Winding Up) Rules and was supported by the respondent's affidavit. Three orders were sought. These were:-

1.That service of the application upon the appellant be dispensed with in the first place due to the urgency and the circumstances of this matter.

2.That Mr. Hezekiah Wangombe Gichohi of H. W. Gichohi & Company, Certified Public Accountants, P. O. 34694, Nairobi and Mr. George Kimeu of Waithaka Kiarie & Mbaya Associates, Certified Public Accountants, P. O. Box 55107, Nairobi, be appointed the interim liquidators of the above mentioned company, Leisurelodges Ltd. and

3.That the powers of the said Mr. Hezekiah Wangombe Gichohi and Mr. George Kimeu be limited and restricted to the powers set out in Section 241 of the Act, except Section 241 (2).

The respondent deponed in the affidavit in support of the application that unless an interim liquidator was appointed immediately, the current management which is entirely drawn from the majority shareholders, will take away, waste or steal the assets of the appellant company to the detriment of the minority shareholders and creditors. On the next day, October 16, 1996, the learned judge of the superior court (Ole Keiwua, J.) in a terse order granted ex parte the application as sought, and further ordered that inter-partes hearing of the application be held on October 30, 1996. But on October 18, 1996, the appellant company through its counsel, Mr. Gautama, filed an application by way of chamber summons urging the court to set aside or suspend its orders made on October 16, 1996, pending the inter-partes hearing on the grounds that the court lacked jurisdiction to appoint any person other than The Official Receiver to be an interim liquidator and that such orders cannot be made ex-parte without giving prior notice to the appellant company. A further ground relied upon in support of the application was that no undertaking as to damages had been given by the respondent as a condition of the grant of the said reliefs.

The learned judge, in his ruling, dismissing the application, made three fundamental findings; first, that an ex-parte appointment of a provisional or interim liquidator can be made at any time before the making of a winding-up order if the matter is urgent and if there exists a good cause; secondly, that in a proper case such as the one before him, dispensation of service was within the jurisdiction of the court; thirdly, that there was no prohibition to appoint a person other than the Official Receiver to be a liquidator provisionally at any time after the presentation of the petition and before the making of a winding-up order. It is against these findings that the appellant company has appealed to this court.

The ruling of the learned judge was attacked at the hearing of the appeal on two principal grounds. It was submitted by Mr. Gautama, for the appellant, first that neither under section 235(1) or under any other section of the Act did the learned judge have jurisdiction to appoint any person other than The Official Receiver as an interim liquidator and, secondly, that the learned judge failed to appreciate that neither the evidence placed before him by the respondent nor the submissions of his counsel could justify an ex-parte order appointing interim liquidators with wide ranging powers under section 241 (1) of the Act, and in any case, he could not do so without first requiring an undertaking as to damages from the respondent, the petitioner in the cause.

The determination of the first ground of appeal depends on the construction of section 235 as read with other relevant sections of the Act. Section 235 of the said Act reads as follows: "Sec 235:

> 1)The court may appoint the official receiver to be the liquidator provisionally at any time after the presentation of a winding-up petition and before the making of a winding up order.
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> 2)Where a liquidator (in this Act referred to as an interim liquidator) is so appointed by the court, the court may limit and restrict his powers by the order appointing him."

Mr. Gautama submitted in this appeal, as he did before Ole Keiwua, J that the words of the above section are clear and permit of no misunderstanding. He argued that though the word "May" is used it is of no consequence as it does not permit of any other interpretation as the section was merely an enabling provision. He contended that this is the only section in the Act which provides for the Official Receiver as the provisional liquidator. He averred that section 235 of the Act was a radical departure from the English Act - section 238 - which states that the appointment of a provisional liquidator may be made at any time before the making of a winding up order, and either the official receiver or any other fit person may be appointed. Since this was the position in England he urged us not to look into the commentaries on the English Law as they are not of proper guidance as the Kenyan and English sections were distinct and fundamentally different. Mr. Gautama pointed out to us that the Act was enacted in 1959 (Act No. 50 of 1959) and its commencement date was January 1st, 1962. Under the repealed Act section 183 thereof which was in pari materia with section 238 of the English Act was replaced by section 235 of the Act. He submitted that the change enacted by the Kenyan Legislature was deliberate, motivated largely by prevailing local social conditions.

It is an established rule, in construing a statute, that the intention of the Legislature and the meaning of the law are to be ascertained by viewing the whole and every part of the Act. Further, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant; and it is a sound general principle, in the exposition of statutes, that regard is to be paid to the policy which dictated the Act as well as to the words used. See Colquhoun v Brooks 14 App. Case. 493 at p. 506.

In order to construe the proper purport of section 235 of the Act it is necessary to consider section 226(2) of the Act which provides that the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up. The date of commencement of winding up affects many matters, for example, the disposition of the company's property, transfer of shares, executions, the directors' powers of management, etc. The commencement of the winding up by the Court, also, greatly affects the position and the powers of the provisional liquidator at all stages of the winding up since he has to take possession of and protect the assets of the company at any time after the presentation of a winding-up petition and before the making of a winding-up order. Section 228 of the Act, for example, stays action where an interim liquidator has been appointed under section 235 of the Act.

In my view, the word "may" as used in section 235 of the Act read in its popular, natural, and ordinary sense confer merely a discretionary or enabling power to the judge to appoint the official receiver to be the liquidator provisionally at any time after the presentation of a windingup petition and before the making of a winding-up order.

The issue, then, for determination is: must the Official Receiver be the sole person, to the exclusion of all others, to be appointed the liquidator provisionally? I am of the opinion that it would be an absurdity to suggest that the Legislature in enacting the current Kenya Companies Act intended to deny the court its discretion to look elsewhere for the appointment of interim or provisional liquidator apart from the Official Receiver whenever the court was invited to act under section 235 of the Act. In section 231 of the Act there is a similar expression which contemplates the case of a liquidator not being appointed. The said section reads:

"Section 231:

> If, in the case of the winding up of any company by the court it appears to the court desirable, with a view to securing the more convenient and economical conduct of the winding up, that some officer other than the person who would by virtue of section 230 be the official receiver should be the official receiver for the purposes of that winding up, the court may appoint that other officer to act as official receiver in that winding up, and the person so appointed shall be deemed to be the official receiver in that winding up for all the purposes of this Act."

It would be ridiculous to suggest that "may" in this section means must. I think, therefore, that the word "may" in section 235 of the Act confers a discretion on the court, to be exercised, as all judicial discretions are to be exercised, according to the judicial rule; and consequently, Ole Keiwua, J. had a discretion to appoint a provisional liquidator who need not have been the Official Receiver so long as he was a fit person. For these reasons, I think that Ole Keiwua, J. came to the correct conclusion when he held that in view of section 231 of the Act any other fit person can be appointed provisional or interim liquidator under section 235 of the Act.

I now turn to consider other circumstances and material available to determine if the learned judge erred in holding that there was sufficient basis and material placed before him to make the orders that he did. It was argued by Mr. Gautama that there was selective presentation of material to the learned judge and that a deliberate distortion of the affairs appertaining to the appellant company were given to him.

Under section 235(1) of the Act the court may appoint a provisional liquidator at any time after the presentation of a winding-up order. When he is appointed, the court may limit and restrict his powers by the order appointing him. The purpose of making the appointment is to preserve the company's assets and to prevent the directors from dissipating them before a winding up can be made - See Pennington's Company Law, 4th Edition, at page 867 where the learned author says:-

> "It has been said that a provisional liquidator will only be appointed if the company is the petitioner or if it consents to the appointment, or if the company is clearly insolvent, or if it is obvious to the court that a winding up order will be made. These dicta show the court's reluctance to pre-judge the issue between the petitioner and the company by appointing a provisional liquidator before the hearing of the petition, but it has also been held that the court's power to appoint a provisional liquidator is not limited to such cases, and may be exercised if there is an interest of the public to be protected..."

Obviously, the appointment of a provisional liquidator of a company before the winding-up, is a drastic step fraught with grave consequences to the company and any decision in this respect are not lightly made by the court due to the serious consequences that normally flow from such an order. But there is nothing to prevent the court from appointing a provisional liquidator in a fit case considering the interests of the company, its business and the wishes of the shareholders. On my perusal of the material placed before the learned judge, I am satisfied that it was necessary in the larger interests of all concerned to appoint a provisional liquidator in order to protect the assets of the appellant company.

In the particular circumstances of this case, could the learned judge make an ex parte order appointing the interim liquidator?

In winding up Cause Number 36 of 1989 - In the matter of Turtle Bay Hotels Limited (unreported), (Pall, J. as he then was) said:-

> "I agree with Mr. Gautama that if the application is ordered to be served there must be an interval between the Service and the inter partes hearing of the application. In that intervening period there can be interference with the Company's records. There can be destruction of evidence. I agree with him that it might become difficult to have a fair hearing of the application in the event. It is therefore in the interest of justice that an interim order should be made ex parte. I therefore hereby appoint the Official Receiver to be the provisional liquidator of the Company to take immediate possession, custody and control of the Company's books of account, minute book and all other related records....."

In the instant case it was alleged in the petition that the appellant company's property was in danger of dissipation, misappropriation and wasting from those in control and documentary evidence in that respect was annexed to the petition. The learned judge in the circumstances, after hearing submissions by counsel and after considering the affidavit of the respondent was correct to find that good cause existed to warrant the order that he made.

Mr. Gautama submitted in earnest that an interim liquidator ought not to have been appointed ex parte without first requiring an undertaking as to damages from the petitioner. I do not subscribe to this argument. As correctly pointed out by the learned judge, this is not a requirement under the Act but is a matter of discretion of the Court. Being entirely a matter for discretion of the learned judge, the appellate court will not reverse his discretion since it has not been shown that he acted on a wrong principle.

For the aforegoing reasons, the decision of the learned judge cannot otherwise be faulted and I would dismiss the appeal with costs.

In the cross-appeal, the respondent has urged us to vary, reverse or delete from the ruling and order, order No. 3 issued on January 20, 1997, on the grounds that it was made without jurisdiction, it not having been applied for by the appellant or the respondent. It is plainly clear that none of the parties sought the order complained of and the learned judged ought not to have made it. Moreover, neither Prime Capital & Credit Limited nor the receivers and manager appointed by it did canvass for such an order. Again, it is apparent that the Debenture registered on December 16, 1996, was effected a week after the court order and was apparently intended to defeat and negate that order. I would, therefore, allow the cross-appeal to the extent of setting aside the order allowing the receiver and manager to co-exist with the interim liquidator. No order as to the costs of the cross - appeal.

Dated and delivered at Nairobi this 18th day of April, 1997.

P. K. TUNOI

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JUDGE OF APPEAL