REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Bankruptcy & Winding-Up Cause 26 of 1981

In the Matter of Companies Act Cap 486 Laws of Kenya and In the Matter of Buruburu Co Ltd.

RULING

In this Ruling I have to weigh the usual rule that the successful party gains the costs, against the fact that the Company meeting that was stopped ought not to have been called for the purpose that it was called for. Secondly the damages claimed are in large part too remote.

The application which has been lost was brought for the purpose of preventing the company from distributing land illegally to persons who were not members of the Company. These persons had been registered as members and had had shares allocated to them according to the applicants. It was sought to remove these persons from the register and cancel the allotment of shares. The application asked for the production of the Register. Thirdly it asked for an injunctin rest raining the Company from subdividing the land. The Court tried unsuccessfully to have the application heard inter parties. Then the injunction was granted to prevent the Company from alienating land or a meeting. This application was filed on 10th December, 1981.

In September, 1981 a bankruptcy Petition had been filed and was Gazetted. The purpose of the Petition was to wind up the Company because its purpose had been fulfilled and because it was not being run properly, so that it was just and equitable that it should be wound up. One of the cause of dissention to be gleared from the Petition is that the purpose of the Company was to buy land. A certain number of people contributed money and by 1971 the annual returns had a complete list of the 262 members as time went on shares were further allocated and the list of members grew will I imagine the consequent reduction in the sign of the plots to be allocated. Now the bankruptcy notice sought to prevent any further alienation, but the application was superimposed to clarify the list of members. The application fulfilled its purpose by stopping a handing out of land at a meeting to be presided over by the Provincial Commissioner. I failed to get the Register clarified, however, because the wrong procedure had been employed for that purpose. There had either to be a Suit or this matter had to be considered later on when the list of the contributors was compiled. After that meeting the injunction was withdrawn. Therefore, the Respondent's claim to be compensated in damages for which an undertaking was given, and they ask for costs.

The unsuccessful applicants shelter behind the commencement of the bankruptcy as defined by Sec.226(2) of the Companies Act (Cap.486). That occurs from the time of the presentation of the Petition; that was on 30th September, 1981. Therefore the terms of Sec. 224 of the Act apply, namely;-

"In a winding up by the Court, any disposition of the property of the Company, including things in action and any transfer of shares, or alteration in the status of the members of the Company, made after the commencement of the winding up, shall unless the Court otherwise orders, be void."

The truth of the matter is that the Company knew from 1981 that there was a dispute as to membership. The Company did not seek clarification itself as it perhaps should have done. The dissatisfied persons did. The Company could not alienate or dispose of property belonging to the Company after the bankruptcy had commenced, and when there was a dispute. I could say that that might be provocative, however that may be. The order of this Court pointedly told the Company that it could hold any meeting and transact any business, as long as it did not dispose of any property, and that was within the terms of Sec 224 of the Companies Act. It cannot have suffered any damages from being prevented from doing what, by law, it could not do, and still cannot do. Moreover, the damages claimed are too wide where the items relate to a feast. It is not expected that Company meetings are so provided for; although the Company in its internal

organisation can vote for such things. But if such entertainment is the accompaniment of unlawful acts, the Company must enjoy its feast without recompense.

This goes to the remainder of the expenses claimed. The company cannot claim for advertising the meeting which it should have known, was wrong and that for a very long time, on the other hand, all lawful transactions were permitted.

The claim for damages fails.

I turn then to costs. The Company should have its costs as the proceedings were wrongly brought. Though they aimed at the enforcement of the Companies Act, they were wrongly conceived, as much as I sympathises with the dilemma that Rule 7 causes of the Companies Act (High Court) Rules. It is an originating process that should be aimed at, unless the register is to be rectified later under Sec. 352 of the Act. Can this difficulty of Rule 7 help the applicants? I am afraid not because the applicants could have complied with Rule 7 and sought directions on the procedure to be applied for rectifying the Register. Secondly Rule 9 clearly does not allow the summons procedure. If the main part of the summons was wrongly instituted, can the injunction part be considered separately? The main purpose was no doubt to restrict alienation or the proposed meeting to disputed members of the Company. But this means that Sec. 224 of the Company outh not to have acted in the proposed manner in any event. Accordingly any error of procedure did not prejudice the Company. If any guidance can be led from Rule 202 of the Winding-up Rules then an error in procedure allow injustice to the party complaining, can be condoned.

The company cannot complain that it was prevented from breaking Sec. 224 of the Companies Act, and it cannot ask for costs on the injunction part of the summonses.

The disputed persons come within the same principles as apply to the Company knowing that their membership was disputed, they could have sought clarification.

Much has been said here concerning alienation of property. Mr Mburu said that all that was to happen was that plots were to be allocated according to a 1976 scheme. So long as that concerned the original members, probably the applicants might have accepted the position; but that is not now the point. Whatever was still to happen had to be stopped. If there was still some part of the allocation or transfer to be completed that would infringe the rule against disposition, therefore it does not matter whether the Company had already agreed to the alienation in 1976. That was disputed in any event, and after the commencement of the bankruptcy could not be completed.

For these reasons there, in any judgment each party has won a substantial and more or less equal part of the application. Even though the application for the injunction was withdrawn, it could have subsisted by itself on the basis of the bankruptcy proceedings. Therefore, as the summons was sufficiently instituted for this purpose, there could be no order for the costs on this part. The final result is that each party will bear its own costs i.e the Company and applicants.

The persons Mr Kirundi represented are those persons affected by the part of the summons claiming rectification. His clients are the disputed members. They will have their costs. They fall on the side of the case, where the Company was successful. It was largely Mr Kirundi's advocacy that saved the day for them.

All this sounds as if the Court is interfering in the Company's affairs. Let the Company then clarify its position. Possibly Sec.207 of the Companies Act etsec. might assist the Company to wind itself up by a Scheme without the petition and dissention which now exists. But if the Company members agree the Petition must still be heard.