IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, MUSINGA & KIAGE, JJ.A.)

CIVIL APPLICATION NO. 344 OF 2019

BETWEEN

KENYA HOTELS AND ALLIED WORKERS UNION.....APPLICANT

AND

SOUTHERN SUN HOTEL.....RESPONDENT

(*Being an application to join the respondent's legal representatives to this matter and to the appeal against the ruling and order of the Employment and Labour Relations Court of Kenya at Nairobi delivered on 27th Day of September 2019(Onyango,J.) in cause No. 1986 of 2015)*

AND

(Being an application to order the respondent to deposit in court security of Kenya shillings 15,191,105.26 pending an intended appeal against the ruling and order of the Employment and Labour Relations Court of Kenya at Nairobi delivered on 27th Day of September 2019(by Onyango,J.) in cause No. 1986 of 2015)

IN EMPLOYMENT AND LABOUR RELATIONS COURT NAIROBI

CAUSE No. 1986 of 2015

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RULING OF THE COURT

Before us are two applications, a notice of motion dated 5th February 2020, in which the applicant prays for the Court to join the respondent's directors namely: **Solomon John Ndungu Mugure** and **Lynton Aiden Delany** as the 1st and 2nd interested parties; and the second motion dated 30th October 2019 in which the applicant seeks that the respondent deposits Kshs. 15,191,105.26 as security towards satisfaction of the decree pending the hearing and determination of the intended appeal against the ruling and order of the Employment and Labour Relations court dated 27th September 2019.

A brief overview of the origin of this dispute is that, the applicant filed a suit on behalf of its members in various Hotels before the then Industrial Court , the main complaint being that the Hotels, had been including service charge in arriving at the taxable value for purposes of charging VAT. That they had been deducting 16% from the service charge due to its unionisable employees.

The claim was denied and the matter proceeded to hearing. However the respondent was not made a party to the claim. Nonetheless, it was ordered to pay Kshs. 15,191,105.26 to the applicant. Subsequent thereto the respondent filed an application dated 16th November 2018 seeking to have the said judgment set aside which was allowed by Onyango. J, on the basis that the Respondent had not participated in the proceedings and that the court was convinced by the applicant's explanation that indeed it was not making the deductions as had been claimed by the applicant.

Aggrieved by the ruling, the applicant has initiated the appellate process by filing a notice of appeal. On the heels of the said notice the applicant has filed the instant applications.

We shall first deal with the second application. The application is brought under rule 47 of the Court of Appeal Rules. Though the

application seeks several prayers but of Key is the prayer for deposit of Kshs. 15,191,105.26. The same is supported by grounds on its face in which the applicant claims that on 27th September 2019 the superior court delivered a ruling setting aside an award granted on 26th October 2018 in favour of the respondent for Kshs. 15,191,105.26 being the amount erroneously deducted by the respondent from its employees service charge emoluments; that the applicant lodged a notice of appeal on 8th October 2019 but the respondent intents to close its business on or before 31st January 2020 and it is this intended closure that the application is intended to forestall, and that the aggrieved employees risk losing their rightful earnings. The application is further supported by the affidavits of **Clyde Atsango Mutsotso** and **Fred Nyongesa** who reiterate the grounds in the motion.

The motion is opposed by the respondent through an affidavit sworn on the 21st November, 2019 by **Solomon Mugure** in which the respondent deposes that the application is brought under the wrong provisions of the law and as such should be dismissed. Further, that the applicant had not made out a case for the grant of the order sought,; that the respondent is a hotel operated as a part of the Tsogo Sun hotel group which owns, operates and manages an international portfolio of over 100 hotels; that the intended closure of a single property is not in any manner evidence of its inability to settle any decree against it in the unlikely event that the applicant's intended appeal is allowed, that there is a similar motion before the Employment & Labour Relations court Cause No. 1081 of 2015 consolidated with Cause 1986 of 2015 which application is still pending and has not been withdrawn and that this material information had not been disclosed.

Having considered the application and the respective materials placed before us in support and in opposition thereof, we first note that the applicant does not have any decree directing the respondent to pay any money to it. The applicant has not also alleged, or provided any evidence of, intent, on the part of the respondent, to delay or obstruct the enforcement of any decree that may be issued against it. We also note that a similar application was made in the superior court and was dismissed. It is for the foregoing reasons that this application must fail and it is so ordered.

The second motion has been brought under the provisions of Rule 51(2) of the Court of Appeal Rules and the grounds on the face of the motion state that; the respondent closed shop on 31st January, 2020, before the hearing and determination of the application dated 30th October 2019; that the aggrieved employees of the respondent risk losing their rightful earnings, fraudulently deducted at 16% VAT on their service charge pay; and that in the event that the directors are not joined, the intended appeal will be rendered nugatory.

The application is supported by the affidavit of one **Fred Nyongesa,** which affidavit merely reiterates and expounds on the grounds aforesaid. The motion is not opposed by the respondent as it neither filed a replying affidavit nor written submissions.

We have considered the motion, affidavit in support and the relevant law. From the onset we wish to point out that this Court's jurisdiction has been invoked under the provisions of Rule 51(2) of the Court of Appeal Rules. We find it prudent to cite the said provisions which provides *inter lia* that:-

> ***"51 (2) a Civil Application shall not abate on the death of the applicant or the respondent but the court shall on the application of any interested person, cause the legal representative of the deceased to be made a party in place of the……??***

The applicant states that the respondent closed shop, we do not get the meaning of "closed shop" as to whether it means it has been wound-up or has ceased its operations. Does closing shop mean that the affairs of the company have completely ceased? In any event, ceasing business and winding up are not synonymous. The fact that a company ceases business does not mean that it is wound up. The procedure for winding up of limited companies like the respondent is elaborately provided for in law and any person who alleges that a company is about to wind up must demonstrate how that conclusion has been reached by submitting proof to the court of the steps that have been taken in furtherance of that intention. This has not been demonstrated. The creditors such as the applicant herein shall in any event, at an appropriate time during the winding process,if at all, have opportunity to stake its claim. Lifting the corporate veil of a company under such casual circumstances cannot be the law or procedure intended by the Companies Act.

Further, the order sought in the instant application cannot be granted for the simple reason that the rule invoked does not give this Court power to grant such an order. Rule 51 (2) of this Court's Rules is only applicable where the applicant or the respondent was a human being but he or she dies during the pendency of an appeal. The rule is very clear and does not require special interpretation for it to be invoked.

The upshot is that the two applications are dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR