



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & KIAGE, JJ.A)

CIVIL APPEAL NO. 191 Of 2018

BETWEEN

NEW KENYA COOPERATIVE CREAMERIES LIMITED.....APPELLANT

AND

JOHN KAHIATO BARI JAMES WACIURI KANADEA

**All suing on behalf of themselves and representatives of all former
employees of the Kenya Co-operative Creameries Limited**

JACKSON WARUI WANJAU.....1ST RESPONDENTS

THE ATTORNEY GENERAL.....2ND RESPONDENT

(An appeal from the Ruling of the Employment and Labour Relations Court of Kenya

at Nairobi (Wasilwa, J), dated 21st November, 2017

in

CAUSE NO. 1299 OF 2013)

JUDGMENT OF THE COURT

The 1st respondents herein were former employees of the Kenya Co-operative Creameries Limited (KCC), which has since been wound up. Prior to the claim that is part of this appeal, the 1st respondents, through their Union had filed another claim against KCC via **Industrial Cause No. 24 of 1998**. They were seeking to be paid their terminal benefits after being summarily dismissed from employment. The court found that they were entitled to the said benefits. Pursuant to the court's order, it was alleged that the management of KCC produced a schedule of payments due to every employee in terms of their terminal benefits and gratuity totalling to Kshs. 109,640,482 plus the unremitted Maziwa Sacco dues totalling Kshs. 92,803,457.

Shortly thereafter, the 1st respondents discovered that an official receiver was appointed by a third party creditor, Kenya Commercial Bank (KCB) to take over KCC's assets in a bid to recover monies advanced to it. In a move to secure their interests, the 1st respondents moved to court to obtain a winding up order against KCC. While the case was subsisting, the Government of Kenya took over KCC and paid all its outstanding debt which rendered their winding up suit academic.

The 1st respondents claimed that they were promised that their dues would be paid once the take-over was completed and operations resumed. The company resumed its operations under the name NEW KCC LIMITED (NEW KCC), the appellant herein, which however, never paid them their dues. This necessitated the filing of the claim that is subject of this appeal. They sought for the

following orders among others;

- a. Terminal benefits Kshs. 109,640,482
- b. ALICO (K) LTD provident funds dues to be confirmed at the hearing but tentatively
Kshs. 2,027,622.2
- c. Deducted but unremitted MAZIWA SACCO dues Kshs. 92,803,451

The basis of their claim was that the word NEW was inserted to merely to hoodwink the former employees while in essence it was still the same KCC that was re-opened. The evidence of this was that; the Company operations were maintained in the same facilities; the Government remained the single shareholder; and the Company assets remained under the ownership and name of KCC Ltd.

The appellant filed a response to the memorandum of claim and retorted that it was duly incorporated on 19th November, 2004 hence was non-existent when the initial claim for terminal dues was filed. The appellant explained that KCB in exercise of its powers of sale conferred on it by debentures dated 31st October 1994, 8th May, 1995 and 13th November, 1995 issued by KCC, appointed M/s Price Waterhouse Coopers to oversee KCC's liquidation. This led to negotiations that culminated in the said assets being sold to some two entities, KCC 2000 Limited (KCC 2000) and KCC Holdings Limited (KCC Holdings), via a sale agreement dated 12th April, 2001 by KCB.

Pursuant to a consent entered into in **High Court Misc. Application No. 990 of 2003, KENYA CO-OPERATIVE CREAMERIES LIMITED AND ANOTHER VS. THE MINISTER FOR CO-OPERATIVE DEVELOPMENT AND 2 OTHERS**; both KCC 2000 and KCC Holdings agreed to sell to the Government of Kenya all their assets and liabilities at a consideration of Kshs. 547,028,870.

Further, a vesting order was issued in **High Court Misc. Application No. 846 of 2005 (O.S), THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA AND NEW KENYA CO-OPERATIVE CREAMERIES VS. KENYA CO-OPERATIVE CREAMERIES 2000 LIMITED, KENYA CO-OPERATIVE CREAMERIES HOLDINGS LIMITED AND KENYA COMMERCIAL BANK LIMITED** wherein, among other things, all moveable and immovable properties and assets formerly owned by KCC were transferred and vested to NEW KCC, the appellant.

The appellant claimed that during the sale, consent and transfer of assets, it was not aware of, and did not assume, the 1st respondents' claim and hence cannot be held liable for what was not within its knowledge. It maintained that it was not liable to pay the 1st respondents' benefits.

The learned H. Wasilwa, J considered the matters before her and delivered a ruling on 21st November 2017 holding in favour of the 1st respondents. She found that KCC and the NEW KCC remained in principle one entity save for the change in name.

Therefore the appellant was liable to pay the dues payable to the 1st respondents.

Being aggrieved by that judgment, the appellant filed the instant appeal on 11 grounds. The condensed complaints were that the learned Judge erred in law and fact by;

- a. Holding that the NEW KCC was the one and the same as KCC save for the change of name.
- b. Ignoring the provision of Section 3 of the Business Transfer Act and the Notice of Transfer of Business which excluded NEW KCC's liability from the debts of KCC.
- c. Misapprehending the law and the evidence on record.

When the appeal came up for hearing, learned Counsel **Mr Mathenge** held brief for **Mr Mereka** who was on record for the appellant. Their learned counterparts **Mr Namada** and **Mr Biko** appeared for the 1st respondent while **Mr Kioko** appeared on behalf of the Attorney General, the 2nd respondent. All the parties filed written submissions which they highlighted before us.

Mr Mathenge affirmed that the appellant was registered on 19th November, 2004 and issued with a certificate of incorporation under number C. 113538. This automatically gave the appellant a unique and separate corporate personality as has been ancient law since **SALOMON V SALOMON & CO. LTD (1887) AC 22**. Once the appellant become a distinct person with its own legal obligations, it could not be said to be one and the same as the wound up KCC. The learned judge therefore erred by disregarding statute that governed the foregoing processes and the evidence produced in court in support of the same.

Counsel further submitted that the appellant was not liable to pay the dues owed to the 1st respondents by virtue of the legal winding up and

sale of the assets of KCC to KCC 2000 and KCC Holding. The said sale clearly demonstrated that the two Companies were not liable for any liability emanating from KCC. A notice to that effect was printed in the *Daily Nation* on 28th June, 2005 pursuant to **Section 3** of the **Transfer of Business Act (TBA)**. The Notice did not attract any objections from the 1st respondents and pursuant to **Section 8** of the **TBA**, a claim against a transferee in respect of any liability cannot be instituted upon the expiry of 6 months. Counsel submitted that based on this, the 1st respondents

were time barred and therefore ought not to have been given by the court. He urged the Court to allow this appeal with costs and set aside the impugned ruling of the High Court.

Mr Namada hinged his argument on the consent which clearly indicated that the Government of Kenya agreed to undertake the assets and liabilities of what was called “the companies”. He continued that flowing from the consent, a sale agreement was entered into between the Government, KCC 2000 and KCC Holdings. In essence the appellant, through the Government acquired the assets and liabilities of KCC. Since the same was done pursuant to a consent filed in a court of law, a mere notice under **Section 3 (1)** of the **TBA** cannot divest the appellant of its liabilities. Therefore liability for the terminal dues owed to the 1st respondents moved to the appellant. Counsel urged that the learned judge’s finding was proper and the appeal ought to be dismissed with costs.

Mr Kioko submitted in support of the issues raised by the appellant, urging the Court to determine this appeal on merit as it is a matter of great public importance.

This being a first appeal, we have taken time to lay out the evidence, re-evaluate, re-assess and reanalyse the entire record and then determine whether the conclusions reached by the learned trial Judge are to stand or fall, with reasons. See **ABOK JAMES ODERA T/A A. J. ODERA & ASSOCIATES V JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013] eKLR**. See also **SELLE -VS- ASSOCIATED MOTOR BOAT CO. [1968] EA 123**

The central issues for determination is whether or not the appellant is separate entity from KCC and whether or not it is liable to pay the terminal dues owed to the 1st respondents by KCC.

The appellant maintained that it is a separate legal entity from KCC and therefore was not party to the suit that was initially filed by the 1st respondents pursuant to their summary dismissal. They relied on the age-old case of **SALOMON V SALOMON** supra which laid down the principle that a company is a separate and distinct legal entity and thus a juristic “person” in law with its own capacity and capable of rights and obligations. This Court echoed this principle in **VICTOR MABACHI & ANOTHER V NURTUN BATES LIMITED [2013] eKLR**;

“This being the case, Mediacom, as a body corporate, is a persona juridica, with a separate independent identity in law....”

From the record, it is clear that the appellant was duly incorporated on 19th November, 2004 and issued with a certification of incorporation under number C. 113538. This is prima facie proof that the appellant and KCC are separate and distinct entities. Furthermore, the aforementioned vesting order made it clear that the appellant and KCC were separate entities. It stated, in part as follows;

“NOW THEREFORE this court DOTH HEREBY DECLARE that ALL the movable, immovable properties and assets which were owned by the Kenya Co-operative Creameries (now in liquidation) as per the schedule part A and B annexed and the title to which was issued under Government Lands At (sic) Caps. 280, 281 and 300 of Laws of Kenya be VESTED in the said NEW KENYA CO-OPERATIVE CREAMERIES LIMITED (NEW KCC) Nairobi in the Republic of Kenya free from all encumbrances.”

We find that the learned Judge erred by holding that the appellant and KCC were the same entity save for the change of name. She did not properly evaluate the evidence before her which clearly established the appellant as a duly incorporated entity that was used by the Government to bail out KCC and give it a fresh start.

On the issues of the liabilities of KCC, the appellant argued that the notice issued under **Section 3(1)** of the **TBA** absolved the appellant of the liabilities of KCC. The 1st respondent on the other hand claim that the same was inconsequential because the vesting order was clear that the rights and liabilities were taken over by the appellant through the Government.

The said notice, which was pursuant to the transfer of business from KCC 2000 and KCC Holdings to the NEW KCC, was carried in the *Daily Nation* of 28th June, 2005. The relevant part of the notice read as follows;

“The Transferee will not assume any debts or liabilities of the Transferors incurred in connection with the Business or at all up to including the date of transfer and the same shall be paid and discharged by the Transferors and likewise all debts and liabilities due to the Transferors upto and including the date of the transfer shall be received by the Transferors.”

This notice was pursuant to **Section 3(1)** of the **BTA** which provides;

“(1)Whenever any business or any portion of any business is transferred, with or without the goodwill or any portion thereof, the transferee shall, notwithstanding any agreement to the contrary, become liable for all the liabilities incurred in

the business by the transferor, unless due notice in accordance with this Act has been given and has become complete.”

(Our emphasis)

By provisions of that notice, the appellant was compliant with the foregoing section and by that was absolved from any liabilities incurred by KCC 2000 and KCC Holding that had initially taken over KCC. **Section 3 (2)** of **TBA** is very clear on this consequence as it provides;

“(2) **The liability of the transferee under subsection**

1. shall cease immediately notice given in accordance with this section has become complete:....”

The provisions of **Section 3 (1)** and **(2)** of the **TBA** effectively absolves a transferee of any liability of the transferor once the notice has been given. As a result, we hold that the learned Judge erred in the application of the law and in apprehending the evidence placed before the court. Accordingly the appellant was not liable for the liabilities of KCC which include the terminal dues belonging to the 1st respondents. This may be an unfortunate and unpalatable consequence but the Law is clear on the point and it is the duty of the Courts to declare it as it is. In the result, we allow this appeal and set aside the judgment of the High Court in its entirety.

Having said so however, and legalities aside, we hold onto the hope that the Attorney-General will find it in him to advise Government to honour its word and pay the 1st respondents who have suffered long.

Even though costs ordinarily follow the event, we would not saddle the 1st respondents with the same.

Instead we make no order thereon.

Dated and delivered at Nairobi this 10th day of July, 2020.

W. OUKO, P

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JUDGE OF APPEAL

W. KARANJA

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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