IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & MURGOR, JJ.A)

CIVIL APPEAL NO. 207 OF 2009

BETWEEN

GEORGE GIKUBU MBUTHIA..... APPELLANT

AND

CONSOLIDATED BANK OF KENYA LIMITED..... 1ST RESPONDENT

PETER MUGO NJERU……...…2ND RESPONDENT

(An Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Koome, J) dated 29th July, 2009 in H.C.C.C. No. 937 of 1986)

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JUDGMENT OF THE COURT

The appellant, who was the registered owner of a property known as Nairobi Block/73/225, charged it to the 1st respondent's predecessor in title to secure a loan. Upon his default in repayment of the loan, the chargee exercised its statutory power of sale and transferred the property to the 2nd respondent after a sale in a public auction on 13th February 1986. The 2nd respondent has in turn sold and transferred it to a third party who is not a party to this appeal. It is that sale that has formed the hallmark of litigation since1986 when the appellant instituted H.C.C.C. No. 937 of 1986 to nullify the sale. He also applied for restriction of the transfer of the property to the 2nd respondent.

For a period of more than 31 years since the suit was filed, we were informed that it remains unresolved. Instead the appellant has, over this period, filed one application after another, which he has pursued to this Court, losing most of them. Nothing would stop him from pursuing what he considered unfair treatment. Not even the warnings and pleas by the courts to set down the main suit for hearing instead of filing these numerous applications.

In that resolve the appellant instituted one such application on 21st July, 2009 for orders that the 1st respondent's amended defences dated 29th January, 1992 and 28th February 1989, respectively as well as the counter-claims dated 16th March, 1990, 16th March 1990 and 10th February, 1992 be struck out pursuant to **order 6 rule 13 (1) (b), (c)** and **(d)** of the Civil Procedure Rules. The application was premised on the single ground that the identified pleadings were filed without leave of court contrary to the provisions of **section 228** of the Companies Act.

Responding to the application, the respondents pleaded *res judicata* stating that the appellant was guilty of undue delay in bringing the application; that the court granted leave to the 1st respondent when it granted the application to amend the defence; that on 25th November 2008 the appellant brought an application where similar issues had been raised and ventilated fully culminating in a ruling of 30th April 2009 dismissing the application; that the application was an abuse of the court process; and that the suit having been struck out, there was no basis for instituting the application.

Koome, J, (as she then was), in agreeing with those submissions reiterating that the action was an old one. On the substance of the application, the learned Judge found that the appellant had failed to prove that the 1st respondent had been placed under statutory management on 11th August, 1986 or at all for there to be need for the 1st respondent to obtain leave before filing the defence; that a newspaper cutting on which the appellant relied as proof of his assertion was not sufficient evidence in law that the predecessor of the 1st respondent had been placed under statutory management; and that the application was brought after inordinate delay of 25 years. With that, the learned Judge dismissed the application advising the appellant to set down the main suit for hearing on merit.

The appellant has challenged the dismissal of his application in this appeal on 20 grounds arguing, *inter alia*, that the learned Judge failed to appreciate that the delay in bringing the application was occasioned by the respondents' failure to comply with various court orders; that it was in error to sustain the amended defenses which had been filed without leave; that there was uncontroverted evidence that the predecessor of the 1st respondent was placed under statutory management on 11th August, 1986 ; that in error, the learned Judge failed to find that the charge was not endorsed as required by **section 35 (1)** and **(2)** of the Advocates Act; and that as a matter of fact the charge was not executed and attested in accordance with **section 109 (2) (b) (i)** of the Registered Land Act (now repealed). The appellant also complained that the Judge erred in failing to find that the name of the Director and Director/Secretary was not in Latin character as required by law; that the validity of the charge went to the root of the transaction and that by ignoring these issue the learned Judge extended protection to the 2nd respondent instead of the appellant as required by **section 39 (1)** of the Registered Land Act; and that the learned Judge misapplied the doctrine of *lis pendens.*

Before us, the appellant, who argued these grounds in person, concentrated his oral submissions on the validity of the charge insisting that it lacked endorsement in terms of **section 65(1)** of the Registered Land Act hence the 1st respondent could not exercise its statutory power of sale. He cited the case of **Kenya Commercial**

Finance Company Limited V Kipng'eno Arap Ngeny & Another Civil Appeal No. 100 of 2001, to support the argument. But regarding the main and relevant ground of appeal, the appellant insisted that the suit was not defended as no leave was granted to the respondents to file their defences after the predecessor of the 1st respondent was placed under statutory management.

As the application before the High Court was premised on the provisions of **order 6 rule 13 (b) (c)** and **(d)** of the Civil Procedure Rules, the question falling for

consideration is whether the learned Judge exercised her discretion judicially. The appellant had asked the learned Judge to strike out the defences and counterclaims on the ground that no leave, as required by **section 228** of the Companies Act was obtained before they were filed. We borrow this oft-cited passage from **Mbogo v Shah** [1968] EA 93 at 96 G to explain the limits on this Court in an appeal arising from the exercise of judicial discretion by a judge.

> **" … a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."**

See per Newbold, P.

Section 228 of the repealed Companies Act stipulates that;

> "**When a winding-up order has been made or an interim liquidator has been appointed under section 235, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose".**

Under **section 235**, 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. In support of the deposition that the 1st respondent had been placed under statutory management, the appellant relied on an article copied from the **Weekly Review** magazine of 15th August, 1986. According to the article, the predecessor of the 1st respondent, Jimba Credit Corporation Limited, was placed under statutory management on 11th August 1986.

The defences and counterclaims by the respondents sought to be struck out were filed respectively in 1989, 1990, and 1992.

A pleading, under **order vi rule 13** of the repealed Civil Procedure Rules would be struck out or amended at any stage of the proceedings on the ground that—

> **"a. It discloses no reasonable cause of action or defence in law; or**
>
> **b. It is scandalous, frivolous or vexatious; or**
>
> **c. It may prejudice, embarrass or delay the fair trial of the action; or**
>
> **d. It is otherwise an abuse of the process of the court"**

The appellant relied on **rule 13(1) (b), (c)** and **(d),** that the defences and counterclaims were scandalous, frivolous or vexatious; or that they would prejudice, embarrass or delay the fair trial of the action; or that they otherwise amounted to an abuse of the process of the court. The main ground in support of the application, as we noted earlier, was that they were filed without leave contrary to the provisions of **section 228** of the Companies Act in that at the time they were filed, the predecessor of the 1st respondent was under statutory management. There can be no doubt that in order to commence any action or proceedings against a company in liquidation, the party intending to do so is obliged to first obtain leave of the court. See **Mwethaga V Thabiti Finance Company Limited & Others** C.A No. 120 of 1998. The burden was upon the appellant to demonstrate that in fact Jimba Credit

Corporation Limited was placed under statutory management. All that was placed before the learned Judge as evidence was a cutting of a magazine article. Like the learned Judge, we do not think that was sufficient proof. The placing of a company under statutory management is a judicial process. The evidence that the appellant ought to have presented was a court order. The learned Judge was not expected to assume the existence of a situation without proof.

Secondly, if Jimba Credit Corporation Limited was placed under statutory management in 1986 and the first amendment complained of was filed in 1989, it took the appellant nearly 20 years to file the application that has given rise to this appeal. Although an application for striking out can be brought at any stage of the proceedings, being a discretionary relief, such an application ought to have been brought timeously.

Thirdly, the application was clearly *res judicata* an earlier application dated 25th November, 2008, which sought for amendment of the appellant's plaint and a declaration by the court that the amended defences and counterclaim were a nullity. Lesiit, J found no merit in the entire application and dismissed it prompting the appellant to file in this Court Civil Appeal No.155 of 2009. This Court, likewise, dismissed

the appeal. The application from which the impugned ruling arose was, for this reason *res judicata.*

Finally, in the circumstances of this case, we think, even in the absence of leave to continue with the proceedings, no prejudice was suffered by the appellant as the amended defences and counterclaim were approved by the court and subsequently the 1st respondent took over Jimba Credit Corporation Limited.

For all these reasons, this appeal is bereft of any substance. We accordingly dismiss it with costs.

Dated and delivered at Nairobi this 29th day of September, 2017.

ASIKE - MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR