



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJA.)

CIVIL APPEAL NO.81 OF 2015

BETWEEN

KWANZA ESTATES LIMITED.....APPELLANT

AND

DUBAI BANK OF KENYA LIMITED

(in Liquidation).....1ST RESPONDENT

KENYA DEPOSIT INSURANCE CORPORATION

(The Liquidator of Dubai Bank Kenya Limited).....2ND RESPONDENT

(Being an appeal from the orders of the High Court of Kenya at Mombasa (Otieno J.) dated 3rd September, 2015

In

Civil Case .NO.44 of 2013)

JUDGMENT OF THE COURT

The appellant brought an action in the High Court at Mombasa being Civil Case No.44 of 2013 against the respondent for certain declaratory orders in respect of eleven (11) properties known as Watamu Beach Hotel and Kalulu Island in Watamu, Kilifi County (the suit properties), permanent injunction and general damages.

Specifically the appellant pleaded that it was a customer of the respondent operating a bank account and that it obtained from the 1st respondent an overdraft facility in the sum of Kshs.160,000,000 to purchase the suit properties. A dispute arose with regard to the appellant's account whereupon the appellant instituted the aforesaid suit. Simultaneously with the plaint the appellant took out a motion on 25th April, 2013 for temporary orders. Muya, J considered the application on 2nd August 2013 and ordered that, pending the hearing and determination of the suit, there be an interlocutory injunction to restrain the 1st respondent from advertising for sale, selling, entering into, alienating or transferring the suit properties;

that an order of a mandatory injunction be issued against the 1st respondent compelling it to deposit in court a sum of Kshs.167,000,000 together with interest thereon, in total amounting to Kshs.197,801,205.48 as at 31st March, 2013, and a further order of mandatory injunction directing the 1st respondent to furnish security and/or provide the applicant with accurate statement of account in respect of some 3 accounts in the name of the appellant. Subsequently by another motion brought on 27th November, 2013 the appellant sought, among other things, that the Chairman and Managing Director (Hassan Zubeidi and Binay Dutta) of the respondent, respectively be committed to prison for disobedience of the aforesaid orders of 2nd August, 2013.

It was ordered by Kasango, J that the application be canvassed through written submissions which were to be exchanged and highlighted on 3rd September, 2015. When the application came up for this purpose, it was placed before Otieno J. It is the proceedings of that day and the order issued following arguments that are the subject of this appeal. On that day Mr. Buti, learned counsel for the appellant confirmed that while he had filed and served submissions as ordered, the respondent had not done so. Mr. Mwenesi learned counsel for the respondent explained that there were new developments; that the appellant had filed an application dated 2nd September, 2015, seeking, *inter alia*, that the Kenya Deposit Insurance Corporation, the 2nd respondent, as the liquidator of the respondent, be joined in the proceedings as a defendant for continuity of the suit; that from that application it was clear that respondent had been placed under liquidation; that Mr. Mwenesi who had all along acted for the 1st respondent had not been retained by the liquidator; that the order said to have been disobeyed was directed at the 1st respondent, as an institution and not the two officials in their individual capacity; and that in those circumstances and pursuant to section 56 of the Kenya Deposit Insurance Act, the pending application for contempt of court be suspended.

What Mr. Mwenesi was telling the court was that he could not have taken any action, including filing submissions on behalf of the 1st respondent having been placed under liquidation, without instructions. Mr. Buti, however did not see any problem in the prevailing circumstances and insisted that the appointment of a liquidator did not affect the application to commit the Chairman and Managing Director of the 1st respondent as the cause of action against them had arisen before the liquidation; and that the committal orders were sought against the two officials and did not relate to the liquidator. Mr. Buti cited **section 56 (1) and (2)** of the Kenya Deposit Insurance Act insisting that they had, as a matter of fact applied to court for leave to proceed against the respondent from the stage the proceedings had reached.

That afternoon the learned Judge delivered the impugned ruling on the foregoing arguments. He considered those arguments as requiring him to resolve the rival submissions on the effect of the respondent being placed under liquidation on the pending contempt proceedings; that is to say whether the pending contempt proceedings could continue despite the 1st respondent being in liquidation; whether the notice to show cause being against individuals as opposed to the institution was severable and could proceed independent of the liquidation. Referring to various provisions of the Banking Act, the Central Bank Act and the Kenya Deposit Insurance Act, the learned Judge observed that those statutes make reference only to institutions as opposed to individual. He asked;

“.....whether a company incorporated under the Companies Act and licensed to operate under the Banking Act, when

placed under liquidation can legally be divorced from the dictates and operations of the parent Act?(sic) I am also minded to question the purpose and need to have the provisions of section 56 (1) of the KDIC Act.”

The learned Judge agreed with Mr. Mwenesi that since the order was against the respondent it could not be enforced against its officials, the Chairman and the Managing Director. In his view, to proceed against the two officials was to proceed against the 1st respondent while under liquidation which would contravene **section 56 (2)** of the Act since the arrest and detention of the two individuals was a method of enforcement of the order of 2nd August, 2013.

This determination aggrieved the appellant who has challenged it in this appeal, arguing *inter alia* that learned Judge erred in determining a matter that was not before him; that the file had been placed before him only for confirmation that written submissions had been filed and for purposes of highlighting the same; that the learned Judge, in error relied on **section 3, 4, 5, & 6** of the Banking Act as well as Regulations made under that Act while these were not cited before him; that **section 56 (3)** of the Kenya Deposit Insurance Act upon which the learned Judge based his decision, was similarly not invoked; that as a result the learned Judge made a decision without hearing the parties on the applicability of those sections; and that the placing under liquidation of the 1st respondent could not operate retroactively to terminate contempt proceedings, which were primarily taken out against the two officers for disobedience of a court order.

The suit was instituted along with a motion for temporary relief against the 1st respondent on 25th April, 2013 as we have already stated. The motion seeking to commit the two officials of the 1st respondent was specifically brought against the 1st respondent and the order issued also against it. Just as it is trite that a limited liability company, not being a physical person can only act through its directors and other officers, it also follows that an order for committal to civil jail against it can only be enforced through committal of the directors or other officers of the company. That is why **Rule 81** of the English Civil Procedure Rules, 1999 and the Civil Procedure (Amendment No.2) Rules, 2012, which applied to procedure for contempt of court proceedings in Kenya by dint of **section 5** of the Judicature Act, provide that in case of a company or other corporation, the committal order may be made against any director or other officer of that company or corporation. **See Rule 81.4(3)** aforesaid. Contempt of court proceedings generally speaking are in the nature of enforcement proceedings.

The Kenya Deposit Insurance Act, enacted in 2012 established a deposit insurance system and for the receivership and liquidation of deposit-taking institutions such as banks, other financial institutions, and mortgage finance companies, restricts enforcement of orders against any company under liquidation. **Section 56** of the Act provides for stay of proceedings involving a company under liquidation as follows;

“56 (1) No cause of action which subsisted against the directors, management or the institution prior to liquidation shall be maintained against the liquidator.

(2) No injunction may be brought or any other action or civil proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the Court.

(3) No attachment, garnishment, execution or other method of enforcement of a judgment or order against the institution or its assets may take place or continue. (our emphasis)

Plainly, no attachment, execution or other method of enforcement can take place or continue upon the company being placed under liquidation. The learned Judge, in our considered opinion properly relied on the provisions of **sub-section 3**. A Judge in determining a dispute is not restricted only to the provisions of the law cited by a party. **Subsection (2)** which the appellant relied on cannot be read in isolation from the rest of the section.

We reiterate that committal for contempt of court is an enforcement method. This is not in dispute. What is in controversy is whether the protection of the 1st respondent under **section 56 (3)** would apply to its officials in proceedings that commenced before the liquidation. There can be no debate that the suit having been brought against the 1st respondent, all the orders arising from the suit can only be enforced against it through its organs. Where the law prohibits an order of injunction, attachment or execution or garnishee against the institution in the same vein its officers are equally insulated and it is immaterial that the proceedings against the officials commenced prior to the liquidation.

We find no merit in this appeal. It is dismissed with costs.

Dated and delivered at Mombasa this 17th day of June, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

... ..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR