



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA
Winding Up Cause 3 of 2008

IN THE MATTER OF: TSAVO SECURITIES LIMITED

AND

IN THE MATTER OF: COMPANIES ACT

1. FRANCIS MUHINDI
2. GODWIN WANGONGU
3. GRACE NGALA
4. BOKOLE MWENI MASHA
5. POLYCARP NGOJE
6. GEOFFREY WANJOHI
7. GRACE WAMBUI GICHOOBI
8. JOSEPH MAWEDI
9. FARAJI MWATETE
10. STEVE MUSYOKA
11. BETT KIPROP
12. VAATI MUNYWOKI
13. IMAGE TRUSTEE LIMITED
14. MOTSO LIMITED
15. DETAIL MASTERS LIMITED
16. SIC DONEC LIMITED
17. AMBITIOUS INVESTMENTS LIMITED
18. GAWAI INVESTMENT LIMITED
19. MERRAN INVESTMENT LIMITED
20. FLAME AFRICA LIMITED
21. FRED MWENI.....APPLICANTS/CONTRIBUTORIES

VERSUS

JAMES DANIEL DENAORIGINAL PETITIONER/RESPONDENT

R U L I N G/DIRECTIONS

On the 5th December 2008, the Applicants who are 21 legal persons including limited liability companies and who claim to be shareholders and/or contributories in the subject company, Tsavo Securities Limited filed Two applications under Certificates of Urgency.

In one application which I will refer to Application No. "A 1" the Applicants under various provisions of the Companies Act and the Civil Procedure Rules sought inter alia, Orders to:

- (1) Be granted leave to commence and bring up this application and any other action in this Winding Up Cause and for the said advocate to represent them.
- (2) Strike out the Winding Up Petition herein dated 18th July 2008 and the Chamber Summons Applications dated 18th July 2008 and subsequently dispense with, discharge, and/or set aside the Orders of this Honourable Court dated 7th October 2008 appointing an Interim Liquidator to take over the Management and control of Tsavo Securities Limited.

The other application dated and filed on the same date, 5th December 2010 and which I shall refer to as Application No. "A 2" sought inter alia, Orders to:-

1. Stay the orders of the court issued on 7th October 2008 pending inter partes hearing of the application and which orders effectively placed the company under Interim Liquidation with the appointment of one James O. Omela Senior Partner in the firm of Henry & Associates as Interim Liquidator of M/s Tsavo Securities Limited.
2. Restraining the Petitioner in any way whatsoever from publishing or advertising this cause or orders hereof pending hearing and determination of this application.

On 2nd July 2009, the applicant's and the Petitioner's Counsel fixed Chamber Summons dated 5.12.2008 for hearing. The minute reads:-

"By Consent Chamber Summons dated 5.12.2008 is hereby listed for hearing on 2.9.2009."

It was not clear from the record which application had been set down for hearing as both Applications "A1" and "A2" are by Chamber Summons and are both dated and filed 5/12/2008.

On 2nd September 2009, Mr. G. Kithi appeared for the Applicant while Mr. Waithera held brief for Mr. Steve Kithi for the Respondent.

Mr. Waithera applied for adjournment on Mr. Steve Kithi's behalf while Mr. G. Kithi opposed the adjournment. On the basis of the submissions made I rejected the application for adjournment and ordered the hearing of the application to proceed. The ruling is on record.

As the record will show Mr. G. Kithi prosecuted the application No."A1". It is the application to strike

out the petition. The matter was heard between 4 p.m. and 5 p.m. when Mr. G. Kithi concluded his submissions. As the time was up for the day, the application was adjourned and a new date was to be fixed. The matter was fixed before the Honourable Justice Ojwang on 17/09/2009. Naturally the matter was referred to me as the application was partly heard. In the process of re-allocation Counsel addressed Hon. Justice Ojwang on various procedural issues. Hon. Justice Ojwang made some interesting observations and raised some pertinent questions which he left to be decided by myself.

The matter came before me finally on 19/11/09. On the said date Mr. Steve Kithi raised questions regarding procedure and the question of priorities of the applications. Mr. Steve Kithi raised questioned of abuse of the court process. He took the court through the Chronology of events in the proceedings. He said that:-

- The Petitioner obtained the orders of appointment of Interim Liquidator on 7.10.2008.
- The company filed an application dated 14.10.2008 and obtained ex parte orders of stay on 16.10.2008.
- That in more than a year now since the application was filed but it has never been heard inter partes.
- Two applications both dated 5.12.09 have been filed by the Applicants.
- Hon. Justice Njagi had given directions. He was subsequently transferred.
- That the application to strike out is contrary to Justice Njagi's Orders.
- Mr. S. Kithi was not in court when the matter proceeded before Justice Ibrahim. That he had been involved in an accident.
- The contributories have not been enjoined yet they want to strike out the Petition.
- The application for stay and to set aside the orders has never been heard.
- That this is diversionary.
- Petitioner's filed their reply and raised a Preliminary Objection.
- Petitioner is a shareholder.
- The Company is using a smoke screen to try and defeat the Petition through side applications.
- Improper procedure being used.

Mr. G. Kithi responded and stated inter alia, that:

- His firm has duly been appointed
- The contributories have filed Notices to appear at the Petition.
- Application to be enjoined is superfluous.
- Contributories have a right to appoint an advocate.
- Issue of jurisdiction – Can be dealt with through the Preliminary Objection.

I have considered this matter at length and the submissions by Counsel. It is clear from the foregoing that Mr. Waithera who was holding brief for Mr. S. Kithi did not have sufficient knowledge of the background and the matters/events which had taken place and also the record. His brief was only to apply for adjournment on behalf of Mr. S. Kithi. I disallowed the adjournment at the time and the matter proceeded. The Applicants closed their submissions and it is the Petitioner/Respondent's turn now. Mr. S. Kithi now having the opportunity has pointed out various issues and suggested that the court is being made to proceed in a manner that is inconsistent with the Justice Njagi's directions and the record and the order of

proceedings and priorities. He had the view that the application to strike out ought not be heard before the other applications for joinder or that to stay and set aside.

I have carefully perused the record now. Justice Njagi on 11.12.08 made the following orders:-

“Given the conflicting interest of the various parties; I think it will be more prudent ... jurisdiction is very central to any court proceedings without jurisdiction, this court cannot proceed with any matter and if it is found that it has no jurisdiction it has to down its tools.

At the same time it is important to ensure that all interested parties are on board when that issue is raised. I therefore direct that the application for the contributories to participate in this matter be determined including the issue as to whether that participation is limited in any way. Thereafter the issue of jurisdiction may be determined.”

The said court order is valid and still in force. It has not been varied or set aside.

With hindsight therefore the application to strike out cannot take precedence and the application which seeks joinder of the contributories as parties. Hon. Justice Njagi's orders must be complied with.

I was not made aware of Hon. Njagi's directions/orders. Mr. Waithera could not have known of these as his instructions were limited. I agree and hold that the proceedings on 2.09.09 was inconsistent with the orders of my brother Hon. Justice Njagi. I proceeded out of ignorance of the existence of the said directions. Mr. G. Kithi may have acted in the interest of his client and in the manner he thought it best. He may have had a different interpretation as can be seen from his last arguments. It is hoped that he did not take advantage of the absence of the Counsel for the Petitioner to take this court to a different direction.

I think that it would be improper to proceed with this application to strike out the Petition. I think that the application for joinder of the contributories be considered first.

I am also in agreement that the Applicant must be certain and elect what application to pursue. It would appear that it would be questionable for the Applicant to pursue an application to strike out the entire petition when its application for stay and setting aside is still pending and it is enjoying the orders of stay granted.

I wish to rectify and regularize the record and proceedings. As a result, I hereby set aside the proceedings that took place on 2.09.09. The application to strike out shall be heard afresh but subject to Hon. Justice Njagi's directions/orders. The costs shall be in the cause.

Orders accordingly.

Dated and delivered at Mombasa this 19th day of March 2010.

**M. K. IBRAHIM
JUDGE**

Further Order by consent:

Mention on 23.4.2010 for directions.

IBRAHIM, J