



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 538 OF 2016

MATHEW WANDERA AKWIRI.....CLAIMANT/DECREE HOLDER

VERSUS

HABO GROUP OF COMPANIES LTD....RESPONDENT/JUDGMENT DEBTOR

RULING

1. By a ruling dated 24th September 2020, I directed Augustine Omondi Awiti, Hezrone Awiti Bolo and Monica Anyango Awiti, being Directors of the Respondent/ Judgment Debtor to appear before me on 15th October 2020, for examination on oath, as to the Respondent's means and assets and to produce an account and all other relevant documents, including an undertaking for settlement of the decretal sum herein.
2. On 15th October 2020, Counsel for the Directors, Mr. Wameyo told the Court that one of the Directors, Hezrone Awiti Bolo was not able to attend court because he was appearing in the criminal court as an accused person. The other two Directors, Augustine Omondi Awiti and Monica Anyango Awiti were present.
3. Counsel further told the Court that subsequent to issuance of the court order summoning the Directors, a notice had been published in the Kenya Gazette by way of Notice No. 7676 of 2nd October 2020 announcing that the Respondent would be dissolved within a period of three (3) months.
4. Counsel submitted from the Bar that this new development had stripped the Court of jurisdiction to summon the Directors. The Court directed Counsel to raise the issue in a formal application.
5. The application was filed on 27th November 2020, seeking an order of stay of proceedings, particularly the order demanding that the Directors provide an undertaking on the payment of the decretal sum herein, pending determination of the intended dissolution of the Respondent, Habo Group of Companies Ltd.
6. The application is based on the following grounds:
 - a) That vide Gazette Notice No. 7676 dated 2nd October 2020, the public had been notified of the intended dissolution of the Respondent;
 - b) That before issuing the notice, the Registrar is required by law to consider the financial statements of the Respondent, the list of creditors and the Respondent's ability to settle its debts;
 - c) That issuance of the Gazette Notice was evidence of the fact that the Registrar, had from the documents presented by the Respondent, established that there was *prima facie* evidence of the fact that the Respondent was insolvent;
 - d) That the Claimant will not be prejudiced by issuance of the orders sought herein;
 - e) That in view of the new developments, the Directors of the Respondent cannot in their capacity, give an undertaking for the settlement of the decretal sum as ordered by the Court.
7. The Claimant's response is contained in his replying affidavit sworn on 25th February 2021.
8. The Claimant depones that the present application is made in bad faith, with the sole intention of scuttling the proceedings, in order to allow the Respondent and its Directors to continue with their disobedience of court orders.

9. The Claimant further depones that the affidavit in support of the application is sworn by Counsel, who cannot ascertain the facts he claims to have knowledge of, and if indeed the Respondent is insolvent or facing insolvency proceedings.

10. The Claimant adds that the Gazette Notice attached only shows the intention of the Registrar to dissolve the Respondent.

11. The Claimant points out that the Directors have not shown what action they have taken regarding the intended dissolution.

12. By a further affidavit sworn on 3rd March 2021, Counsel for the Respondent filed Gazette Notice No. 666 dated 29th January 2021, showing that the Respondent had been dissolved.

13. The question before the Court therefore, is whether in the wake of these developments, the Court can proceed to summon the Respondent's Directors, for purposes of examination as to the settlement of the decretal sum herein.

14. In the written submissions filed on behalf of the Respondent and its Directors on 3rd March 2021, reference was made to Section 897(4) and (5) of the Companies Act, 2015 which provides as follows:

(4) As soon as practicable after striking out the name of the company off the Register, the Registrar shall publish in the Gazette a notice that the company's name has been struck off the Register and the date of the striking off.

(5) On publication of the notice, the company is dissolved.

(6) Despite subsection 5-

a) The liability (if any) of each director, managing officer and member of the company continues and may be enforced as if the company had not been dissolved;

15. The Court was referred to the decision in ***Kenya Power & Lighting Company Limited v Benzene Holdings Limited T/A Wyco Paints [2016] eKLR*** where the Court of Appeal restated that no action can be brought against a company that has been dissolved, because such a company does not exist in the eyes of the law.

16. This is however not the issue before the Court. It is not in contest that judgment was entered against the Respondent Company on 8th March 2018 and a ruling on taxation was issued on 9th August 2018. The liability in issue therefore arose long before commencement of the dissolution proceedings alluded to by the Respondent's Directors.

17. Moreover, at the time the Court summoned the Respondent's Directors for examination, there was evidence that the Respondent had failed to settle the decretal sum and attempts at execution had not borne fruit.

18. In summoning the Respondent's Directors for examination, the Court invoked Order 22 Rule 35 of the Civil Procedure Rules. In exercising these powers, the Court is interested in finding out if the Directors have in any way contributed to the Respondent's failure to meet its obligations.

19. In pursuing their application for stay of proceedings, the Directors rely on two Gazette Notices; one on intended dissolution and the other on actual dissolution of the Respondent. It was not lost on the Court that none of the Directors swore an affidavit to explain the circumstances surrounding the dissolution of the Respondent Company. Instead, Counsel for the Directors arrogated himself the role of deponing to issues of fact, not within his knowledge.

20. This leaves the Court with many questions, top on the list being what led to the dissolution of the Respondent and what role the Directors played in it.

21. These questions only serve to fortify the need for examination of the Directors, with a view to determining first, the circumstances leading to the dissolution and second, whether the Directors played their proper role in the affairs of the Respondent Company.

22. I therefore direct that Augustine Omondi Awiti, Hezrone Awiti Bolo and Monica Anyango Awiti shall personally appear before this Court on **Tuesday, 13th April 2021 at 11.00 am** for purposes of examination under Order 22 Rule 35 of the Civil Procedure Rules.

23. The costs of this application will be met by the three Directors.

24. These are the orders of the Court.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OF MARCH 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Anaya for the Claimant

Mr. Wameyo for the Directors